

Open Source Property

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About This Book

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JAMES GRIMMELMANN, PATTERNS OF INFORMATION LAW 32 (version 1.1 2017), <https://james.grimmelmann.net/ipbook/ipbook.1.1.pdf>. Note the font used in this quote, since it is drawn from an external source.

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Part I

Foundations

Chapter 1

Ownership

William Blackstone, *Commentaries on the Laws of England*

Vol. 1, pp. 131–136 (1765); vol. 2, p. 2

THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land

SO great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tri-



Figure 1.1: William Blackstone. Source: 6 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 582 (1865), <https://archive.org/stream/cassellsillustra06lond#page/582/mode/2up>.

bunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. . . .

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

1.1 The Right to Exclude

Jacque v. Steenberg Homes, Inc.
563 N.W.2d 154 (Wis. 1997)

WILLIAM A. BABLITCH, Justice.

Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke's Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Stenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.

Stenberg determined that the easiest route to deliver the mobile home was across the Jacques' land . . . because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. . . . On the morning of delivery, . . . the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. . . .

At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a — what [Mr. Jacque] said, just get the home in there any way you can." . . . The employees, after beginning down the private road, ultimately used a "bobcat" to cut a path through the Jacques' snow-covered field and hauled the home across the Jacques' land to the neighbor's lot. . . . Mr. Jacque called the Manitowoc County Sheriff's Department. After interviewing the parties and observing the scene, an officer from the sheriff's department issued a \$30 citation to Steenberg's assistant manager.

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. . . . [Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques \$1 nominal damages and \$100,000 punitive damages. Steenberg filed post-verdict motions claiming that the punitive damage award must be set aside because Wisconsin law did not allow a punitive damage

award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive damage award. The circuit court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur

II.

. . . Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques.

. . . The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. . . . The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). This court has long recognized "[e]very person['s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 59, 89 N.W. 880 (1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect it. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

[T]hat is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen

Endorsed: The state

Felix S. Cohen, *Dialogue on Private Property*, IX Rutgers Law Review 357, 374 (1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to [the compensatory damage requirement]. Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. . . . Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

The potential for harm resulting from intentional trespass also supports an exception to [the compensatory damage requirement]. A series of intentional trespasses, as the Jacques had the misfortune to discover in an unrelated action, can threaten the individual's very ownership of the land. The conduct of an intentional trespasser, if repeated, might ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. . . . [O]ne can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor. . . . If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting [\$30] forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A \$30 forfeiture and a \$1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [compensatory damage] rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of \$1 . . . and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the [compensatory damage] rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to land. Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land. . . . Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

Reversed and remanded with directions.

Notes and Questions

- 1.1. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call of a suspected heart attack? Of a broken leg? What if the snow-covered private road had instead been a

recently collapsed bridge? What if Steenberg had tried to take the road despite the risks, and the truck had accidentally tipped and fallen onto the Jacques' land?

1.2. Would (or should) the result in *Jacque* have been different if, instead of steadfastly refusing to permit Steenberg's delivery truck to cross their land, the Jacques had demanded a large sum of money as a condition of permitting the crossing, which Steenberg refused to pay? Would the ultimate monetary award have been different? If so, what incentive does this case give property owners facing requests from third parties for the use of their otherwise idle resources? Would Steenberg have been better off not asking permission in the first place?

1.3. Blackstone's description of "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" is one of the most famous—and quotable—definitions of property ever written in English. But it is also widely acknowledged to be hyperbolic to the point of falsity. Can you see why? What aspects of Blackstone's own discussion of the "absolute right" of property are inconsistent with the "total exclusion of the right of any other individual in the universe"?

1.4. Would we really want our system of property to give private owners such "sole and despotic dominion . . . over the external things of the world"? The kind of dominion exercised by the Jacques? No matter what? Consider this: what kinds of problems could a motivated and unscrupulous property owner armed with such awesome power cause?

Marsh v. Alabama

326 U.S. 501 (1946)

Mr. Justice BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.

A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and

because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. The State Supreme Court denied certiorari, and the case is here on appeal

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. . . . [N]either a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held

bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise . . . the reasons . . . in support of the regulation of (those) rights." *Schneider v. State*, 308 U.S. 147, 161 (1939). In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the

State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[Concurring opinion of Justice FRANKFURTER omitted.]

Mr. Justice REED, dissenting.

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to exercise freedom of religion, of speech and of the press. It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise. What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.

Both Federal and Alabama law permit, so far as we are aware, company towns . . . These communities may be essential to furnish proper and con-

venient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, Section 426, Alabama Code 1940 which so far as pertinent reads as follows:

Trespass after warning. —Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months.

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, in-

cluding those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation. . . . In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in *Martin v. Struthers*, 319 U.S. 141 (1943), an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out . . . that after warning the property owner would be protected from annoyance. The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited . . . to show that it would protect the householder, after notice . . .

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited purposes. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The CHIEF JUSTICE and Mr. Justice BURTON join in this dissent.

State of New Jersey v. Shack
58 N.J. 297, 277 A.2d 369 (1971)

WEINTRAUB, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand

of the owner, defendants were charged with violating N.J.S.A. 2A:170–31 which provides that “[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than \$50.” Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial *de novo*. We certified their further appeal before argument in the Appellate Division.

Before us, no one seeks to sustain these convictions. The complaints were prosecuted in the Municipal Court and in the County Court by counsel engaged by the complaining landowner, Tedesco. However Tedesco did not respond to this appeal, and the county prosecutor, while defending abstractly the constitutionality of the trespass statute, expressly disclaimed any position as to whether the statute reached the activity of these defendants.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C. §§ 2861–2864. The role of SCOPE includes providing for the “health services of the migrant farm worker.”

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as “CRLS,” also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. § 2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco’s farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco’s farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been

made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco's property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco's office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco's supervision. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco's written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

I.

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501 (1946) [and its progeny.] Those cases rest upon the fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. . . .

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in

nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II.

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. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. The migrant farmworkers come to New Jersey in substantial numbers. . . . The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III—B of the Economic Opportunity Act of 1964 (42 U.S.C.A. § 2701 et seq.) for “assistance for migrant and other seasonally employed farmworkers and their families.” . . . As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under s 2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks “to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services.”

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator’s rights in his lands may stand between the migrant workers and those who would aid them. . . .

A man’s right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to

injure the rights of others. Broom, Legal Maxims (10th ed. Kersley 1939), p. 238; 39 Words and Phrases, "Sic Utere Tuo ut Alienum Non Laedas," p. 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume or the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.

These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

Notes and Questions

1.5. Why did the property owner win in *Jacque* but lose in *Marsh* and *Shack*? Isn't the property right at issue in each of these cases the same—i.e., isn't it the right to exclude?

1.6. What types of competing principles, policies, or interests will justify a limit on the right to exclude? Who should decide when such a limit is justified, and how? Who decided in *Marsh*? In *Shack*?

1.7. If we decide an interest is important enough to outweigh an owner's right to exclude in one context, does that mean it should do so in all contexts? Consider the following statutes, and their effects on property owners' right to exclude:

Civil Rights Act of 1964, Title II

Codified at 42 U.S.C. § 2000a

Section 201. Prohibition against discrimination or segregation in places of public accommodation

(a) EQUAL ACCESS.—All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) ESTABLISHMENTS AFFECTING INTERSTATE COMMERCE OR SUPPORTED IN THEIR ACTIVITIES BY STATE ACTION AS PLACES OF PUBLIC ACCOMMODATION; LODGINGS; FACILITIES PRINCIPALLY ENGAGED IN SELLING FOOD FOR CONSUMPTION ON THE PREMISES; GASOLINE STATIONS; PLACES OF EXHIBITION OR ENTERTAINMENT; OTHER COVERED ESTABLISHMENTS.—Each of the following establishments which serves the pub-

lic is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment. . . .

(e) PRIVATE ESTABLISHMENTS.—The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Americans with Disabilities Act of 1990

Codified at 42 U.S.C. § 12182-83

§ 302 — Prohibition of discrimination by public accommodations

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

§ 303 — New construction and alterations in public accommodations and commercial facilities

(a) APPLICATION OF TERM.—Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

- (1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible

to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection . . .; and

(2) . . . , a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) ELEVATOR.—Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

1.2 Other Rights of Ownership

Eyerman v. Mercantile Trust Co.

524 S.W.2d 210 (Mo. Ct. App. 1975)

RENDLEN, Judge.

Plaintiffs appeal from denial of their petition seeking injunction to prevent demolition of a house at #4 Kingsbury Place in the City of St. Louis. The action is brought by individual neighboring property owners and certain trustees for the Kingsbury Place Subdivision. We reverse.

Louise Woodruff Johnston, owner of the property in question, died January 14, 1973, and by her will directed the executor “. . . to cause our home at 4 Kingsbury Place . . . to be razed and to sell the land upon which it is located . . . and to transfer the proceeds of the sale . . . to the residue of my estate.” Plaintiffs assert that razing the home will adversely affect their property rights, violate the terms of the subdivision trust indenture for Kingsbury Place, produce an actionable private nuisance and is contrary to public policy.

The area involved is a “private place” established in 1902 by trust indenture which provides that Kingsbury Place and Kingsbury Terrace will be so maintained, improved, protected and managed as to be desirable for private residences. The trustees are empowered to protect and preserve

"Kingsbury Place" from encroachment, trespass, nuisance or injury, and it is "the intention of these presents, forming a general scheme of improving and maintaining said property as desirable residence property of the highest class." The covenants run with the land and the indenture empowers lot owners or the trustees to bring suit to enforce them.

Except for one vacant lot, the subdivision is occupied by handsome, spacious two and three-story homes, and all must be used exclusively as private residences. The indenture generally regulates location, costs and similar features for any structures in the subdivision, and limits construction of subsidiary structures except those that may beautify the property, for example, private stables, flower houses, conservatories, play houses or buildings of similar character.

On trial the temporary restraining order was dissolved and all issues found against the plaintiffs.

. . . Whether #4 Kingsbury Place should be razed is an issue of public policy involving individual property rights and the community at large. The plaintiffs have pleaded and proved facts sufficient to show a personal, legally protectible interest.

Demolition of the dwelling will result in an unwarranted loss to this estate, the plaintiffs and the public. The uncontradicted testimony was that the current value of the house and land is \$40,000.00; yet the estate could expect no more than \$5,000.00 for the empty lot, less the cost of demolition at \$4,350.00, making a grand loss of \$39,350.33 if the unexplained and capricious direction to the executor is effected. Only \$650.00 of the \$40,000.00 asset would remain.

Kingsbury Place is an area of high architectural significance, representing excellence in urban space utilization. Razing the home will depreciate adjoining property values by an estimated \$10,000.00 and effect corresponding losses for other neighborhood homes. The cost of constructing a house of comparable size and architectural exquisiteness would approach \$200,000.00.

. . . To remove #4 Kingsbury from the street was described as having the effect of a missing front tooth. The space created would permit direct access to Kingsbury Place from the adjacent alley, increasing the likelihood the lot will be subject to uses detrimental to the health, safety and beauty of the neighborhood. The mere possibility that a future owner might build a new home with the inherent architectural significance of the present dwelling offers little support to sustain the condition for destruction.

We are constrained to take judicial notice of the pressing need of the community for dwelling units as demonstrated by recent U.S. Census Bureau figures showing a decrease of more than 14% in St. Louis City housing units during the decade of the 60's. This decrease occurs in the face of housing growth in the remainder of the metropolitan area. It becomes apparent that no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served. Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of \$39,000.00 to the estate and is without benefit to the dead woman. No reason, good or bad, is suggested by the will or record for the eccentric condition. This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other interest in the property. To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.

The Missouri Supreme Court held in *State ex rel. McClintock v. Guinotte*, 275 Mo. 298, 204 S.W. 806, 808 (banc 1918), that the taking of property by inheritance or will is not an absolute or natural right but one created by the laws of the sovereign power. The court points out the state "may foreclose the right absolutely, or it may grant the right upon conditions precedent, which conditions, if not otherwise violative of our Constitution, will have to be complied with before the right of descent and distribution (whether under the law or by will) can exist." Further, this power of the state is one of inherent sovereignty which allows the state to "say what becomes of the property of a person, when death forecloses his right to control it." *McClintock v. Guinotte*, *supra* at 808, 809. While living, a person may manage, use or dispose of his money or property with fewer restraints than a decedent by will. One is generally restrained from wasteful expenditure or destructive inclinations by the natural desire to enjoy his property or to accumulate it during his lifetime. Such considerations however have not tempered the extravagance or eccentricity of the testamentary disposition here on which there is no check except the courts.

In the early English case of *Egerton v. Brownlow*, 10 Eng. Rep. 359, 417 (H.L.C.) it is stated: "The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by

a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land, (though it may be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void and allows the devisee to enjoy the estate free from the condition.” . . .

[The Restatement, Second, of Trusts, Section 124, states:] “Although a person may deal capriciously with his own property, his self interest ordinarily will restrain him from doing so. Where an attempt is made to confer such a power upon a person who is given no other interest in the property, there is no such restraint and it is against public policy to allow him to exercise the power if the purpose is merely capricious.” The text is followed by this illustration: “A bequeaths \$1,000.00 to B in trust to throw the money into the sea. B holds the money upon a resulting trust for the estate of A and is liable to the estate of A if he throws the money into the sea.” . . . It is important to note that the purposes of [Mrs. Johnston’s] trust will not be defeated by injunction; instead, the proceeds from the sale of the property will pass into the residual estate and thence to the trust estate as intended, and only the capricious destructive condition will be enjoined.

In *Colonial Trust Co. v. Brown et al.*, 105 Conn. 261, 135 A. 555 (1926) the court invalidated, as against public policy, the provisions of a will restricting erection of buildings more than three stories in height and forbidding leases of more than one year on property known as “The Exchange Place” in the heart of the City of Waterbury. The court stated:

“As a general rule, a testator has the right to impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as cestui que trust. He may not, however, impose one that is uncertain, unlawful or opposed to public policy.” [*Colonial Trust Co.*, 135 A. at 564.]

. . . The term “public policy” cannot be comprehensively defined in specific terms but the phrase “against public policy” has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy “when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.” *Dille v. St. Luke’s Hospital*, 355 Mo. 436, 196 S.W.2d 615, 620 (1946); *Brawner v. Brawner*, 327 S.W.2d 808, 812

(Mo. banc 1959).

Public policy may be found in the Constitution, statutes and judicial decisions of this state or the nation. But in a case of first impression where there are no guiding statutes, judicial decisions or constitutional provisions, "a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will." *In re Mohler's Estate*, 343 Pa. 299, 22 A.2d 680, 683 (1941). In the absence of guidance from authorities in its own jurisdiction, courts may look to the judicial decisions of sister states for assistance in discovering expressions of public policy.

Although public policy may evade precise, objective definition, it is evident from the authorities cited that this senseless destruction serving no apparent good purpose is to be held in disfavor. A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society. It is clear that property owners in the neighborhood of #4 Kingsbury, the St. Louis Community as a whole and the beneficiaries of testatrix's estate will be severely injured should the provisions of the will be followed. No benefits are present to balance against this injury and we hold that to allow the condition in the will would be in violation of the public policy of this state.

Having thus decided, we do not reach the plaintiffs' contentions regarding enforcement of the restrictions in the Kingsbury Place trust indenture and actionable private nuisance, though these contentions may have merit.⁵ . . .

DOWD, P.J., concurs.

CLEMENS, Judge (dissenting).

I dissent.

. . . The simple issue in this case is whether the trial court erred by re-

⁵The dissenting opinion suggests this case be decided under the general rule that an owner has exclusive control and the right to untrammeled use of real property. Although Maxims of this sort are attractive in their simplicity, standing alone they seldom suffice in a complex case. None of the cited cases pertains t[o] the qualified right of testatrix to impose, post mortem, a condition upon her executor requiring an unexplained destruction of estate property Each acknowledges the principle of an owner's "free use" as the starting point but all recognize competing interests of the community and other owners of great importance. Accordingly, the general principle of "free and untrammeled" use is markedly narrowed, supporting in each case a result opposite that urged by the dissent in the case at bar.

fusing to enjoin a trustee from carrying out an explicit testamentary directive. In an emotional opinion, the majority assumes a psychic knowledge of the testatrix' reasons for directing her home be razed; her testamentary disposition is characterized as "capricious," "unwarranted," "senseless," and "eccentric." But the record is utterly silent as to her motives The fact is the majority's holding is based upon wispy, self-proclaimed public policy grounds that were only vaguely pleaded, were not in evidence, and were only sketchily briefed by the plaintiffs.

. . . The court has resorted to public policy in order to vitiate Mrs. Johnston's valid testamentary direction. But this is not a proper case for court-defined public policy.

. . . The leading Missouri case on public policy as that doctrine applies to a testator's right to dispose of property is *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120 [1, 2] (banc 1927), cert. den. 274 U.S. 745. There, an executor refused to pay a bequest on the ground the beneficiary was an enemy alien, and the bequest was therefore against public policy. The court denied that contention: "We may say, at the outset, that the policy of the law favors freedom in the testamentary disposition of property and that it is the duty of the courts to give effect to the intention of the testator, as expressed in his will, provided such intention does not contravene an established rule of law." And the court wisely added, "it is not the function of the judiciary to create or announce a public policy of its own, but solely to determine and declare what is the public policy of the state or nation as such policy is found to be expressed in the Constitution, statutes, and judicial decisions of the state or nation, . . . not by the varying opinions of laymen, lawyers, or judges as to the demands or the interests of the public." And, in cautioning against judges declaring public policy the court stated: "Judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before the court would be warranted in pronouncing a transaction void on this account." In resting its decision on public-policy grounds, the majority opinion has transgressed the limitations declared by our Supreme Court in *Rahn's Estate*.

. . . As much as our aesthetic sympathies might lie with neighbors near a house to be razed, those sympathies should not so interfere with our considered legal judgment as to create a questionable legal precedent. Mrs. Johnston had the right during her lifetime to have her house razed,

and I find nothing which precludes her right to order her executor to raze the house upon her death. It is clear that “the law favors the free and untrammeled use of real property.” *Gibbs v. Cass*, 431 S.W.2d 662[2] (Mo. App. 1968). This applies to testamentary dispositions. *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 222 S.W.2d 750[2] (1949). An owner has exclusive control over the use of his property subject only to the limitation that such use may not substantially impair another’s right to peaceably enjoy his property. Plaintiffs have not shown that such impairment will arise from the mere presence of another vacant lot on Kingsbury Place

Notes and Questions

1.8. What right of ownership is at issue in *Eyerman*? Is it a right of use? Of alienation? Of testation? A distinct right to destroy? If the latter, is such a right among the rights of property owners?

1.9. Could we understand Mrs. Johnston’s instruction to raze her house to the ground as an exercise of the right to exclude, extended in time to after her death? Is this a useful way to think about her instruction? Either way, should we allow owners to continue to control resources *forever*—even long after their deaths—if they so choose? (We will revisit this concern in our unit on Estates and Future Interests).

1.10. If Mrs. Johnston had attempted to raze her house to the ground during her lifetime, could anyone legally prevent her from doing so? If not, why can she be prevented from ordering the destruction of her house by will?

1.3 So What Is Property?

We began this chapter with Blackstone’s strong statement of the “absolute right” of property, and have watched it gradually melt away. We have seen courts use a subtle and diverse array of tools to vindicate interests that conflict with a property owner’s “absolute” rights. In *Marsh*, the Court opined that state-law rights of property must give way to more important principles enshrined in the federal Constitution. In *Shack*, the court explicitly avoids this kind of Constitutional trump card by manipulating the *scope of the owner’s rights* under the common law of property to avoid conflict with competing *statutory* policies. The court in *Eyerman* takes a similar approach to the testatrix’s efforts to direct disposition of her property after death, even where there appears to be no dan-

ger of conflict with any Constitutional—or even statutory—interest. Is there any limit to the scope or variety of these types of manipulations? And if not, how are we ever to say what property *is*?

We might look to two possible foundations for a more resilient concept of property. One foundation might be that property is a particular *cohesive* construct: a package deal. This is, indeed, one common interpretation of the “bundle of rights” metaphor we first encountered in *Jacque*. Thus, when we say that a person *owns* something, we might be saying that the person enjoys the various rights of owners we have been studying (the right to exclude, possess, use, alienate, etc.) with respect to that thing. If we could support this interpretation, it really might help to distinguish property in a meaningful way from other private law rights—such as those that arise in contract or tort—and allow us to predict how particular disputes are likely to shake out. Of course, the cases we have already studied—in which courts limit or deny owners’ rights depending on the circumstances in which they are asserted—may give us some doubts about our likelihood of success. And we’ve only just begun: We will be encountering more legal authorities that will challenge our ability to think about property as a coherent “bundle” of rights, as opposed to an *ad hoc* and unstable collection of whatever rights and duties we choose to apply in a particular set of circumstances:

- In Chapter 2, we will see how some things may be called “property” even though they are not subject to certain of the traditional rights of ownership—particularly the right to alienate.
- In Chapter 11, we will see how property rights can be *temporally* divided—that a property right in land that exists today may nevertheless not entitle its owner to possession of that land until some point in the future.
- In Chapter 14, we will see how the division of ownership rights among *multiple people* similarly cabins the rights to exclude, possess, alienate, and use—at least among co-owners.
- In Chapter 23, we will see that in some circumstances the right to exclude, standing alone, may be a sufficient condition for identifying “property.”

So perhaps this approach is not very promising. While there is a menu of rights that appear to be *consistent* with ownership, it appears that the concept or label of “property” does not *necessarily* depend on a particular combination of those rights being present.

A second possible foundation for our conception of property is that property, at the very least, involves some *thing* that is the subject of the right (or rights): that it is a right *in rem*. In particular, it might be intimately tied up with an individual's right to *control* some *thing*—principally but not only by excluding others from access to that thing. Again, the requirement of intermediation by some *thing* might also help distinguish property from contract and tort—which may but need not involve competing claims to a *thing*.

We will consider the types of *things* that might qualify as property in Chapter 2. But before doing so, we ought to consider whether thinking of property in this way—as a relationship between people and things—is sound, or useful. Consider the following scholarly treatments of these ideas.

Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*
23 Yale L.J. 16, 28-30, 31-33, 45-46, 55 (1913)

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to “rights” and “duties,” and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, “future” interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. That this is so may appear in some measure from the discussion to follow.

The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of “opposites” and “correlatives,” and then proceeding to exemplify their individual scope and application in concrete cases. An effort will be made

to pursue this method:

jural opposites	{	rights	privilege	power	immunity
		no-rights	duty	disability	liability
jural correlatives	{	right	privilege	power	immunity
		duty	no-right	liability	disability

...

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best

As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no-right." In the example last put, whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point, for, always, when it is said that a given privilege is the mere negation of a *duty*, what is meant, of course, is a duty having a content or tenor precisely *opposite* to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the *duty of entering*. The privilege is perfectly consistent with this sort of duty,—for the latter is of the *same* content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty *to stay off*

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which

is most properly called a right or claim. That being so, if further evidence be needed—as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a “no-right,” there being no single term available to express the latter conception. Thus, the correlative of X’s right that Y shall not enter on the land is Y’s duty not to enter; but the correlative of X’s privilege of entering himself is manifestly Y’s “no-right” that X shall not enter. . . .

The nearest synonym [for power] for any ordinary case seems to be (legal) “ability”—the latter being obviously the opposite of “inability,” or “disability.” . . .

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property “in a tangible object” has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object—*e. g.*, the power—to acquire title to the later by appropriating it. *Similarly*, X has the power to transfer his interest to Y—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest The creation of an agency relation involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party P has the power to create agency powers in another party A,—for example, . . . the power to impose (so-called) contractual obligations on P, the power to discharge a debt, owing to P, the power to “receive” title to property so that it shall vest in P, and so forth

Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one’s affirmative claim against another, and a privilege is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative “control” over a given legal relation as against another; whereas an immunity is one’s freedom from the legal power or “control” of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting

the legal interest either to himself or to a third party is concerned

**Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions
as Applied in Judicial Reasoning***
26 Yale L.J. 710, 713-745 (1917)

The phrases *in personam* and *in rem*, in spite of the scope and variety of situations to which they are commonly applied, are more usually assumed by lawyers, judges, and authors to be of unvarying meaning and free of ambiguities calculated to mislead the unwary. The exact opposite is, however, true; and this has occasionally been explicitly emphasized by able judges whose warnings are worthy of notice

A . . . right *in personam* . . . is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A . . . right *in rem* . . . is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.

Probably all would agree substantially on the meaning and significance of a right *in personam*, as just explained; and it is easy to give a few preliminary examples: If B owes A a thousand dollars, A has an *affirmative* right *in personam*, . . . that B shall transfer to A the legal ownership of that amount of money. If, to put a contrasting situation, A already has title to one thousand dollars, his rights against others in relation thereto are . . . rights *in rem*. In the one case the money is *owed* to A; in the other case it is *owned* by A. If Y has contracted to work for X during the ensuing six months, X has an *affirmative* right *in personam* that Y shall render such service, as agreed. Similarly as regards all other contractual or quasi-contractual rights of this character

In contrast to these examples are those relating to rights, or claims, *in rem* If A owns and occupies Whiteacre,* not only B but also a great

*The study of property law was, for much of its history, mainly the study of land. As such, many teachers' and judges' hypotheticals required the identification of some fictional parcel of land. By tradition, these parcels take the name "Whiteacre," "Blackacre," "Greenacre," and so on. —Eds.

many other persons—not necessarily all persons—are under a duty, e.g., not to enter on A's land. A's right against B is a . . . right *in rem*, for it is simply one of A's class of *similar*, though separate, rights, actual and potential, against *very many* persons. The same points apply as regards A's right that B shall not commit a battery on him, A's right that B shall not alienate the affections of A's wife, and A's right that B shall not manufacture a certain article as to which A has a so-called patent

. . . [I]t seems necessary to show very concretely and definitely how, because of the unfortunate terminology involved, the expression “right *in rem*” is all too frequently misconceived, and meanings attributed to it that could not fail to blur and befog legal thought and argument. Some of these loose and misleading usages will now be considered in detail, it being hoped that the more learned reader will remember that this discussion, being intended for the assistance of law school students more than for any other class of persons, is made more detailed and elementary than would otherwise be necessary.

(a) *A right in rem is not a right “against a thing”*: . . . Any person, be he student or lawyer, unless he has contemplated the matter analytically and assiduously, or has been put on notice by books or other means, is likely, first, to translate right *in personam* as a right *against a person*; and then he is almost sure to interpret right *in rem*, naturally and symmetrically as he thinks, as a right *against a thing*. . . . Such a notion of rights *in rem* is, as already intimated, crude and fallacious; and it can but serve as a stumbling-block to clear thinking and exact expression. A man may indeed sustain close and beneficial *physical* relations to a given *physical thing*: he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings. . . .

What is here insisted on,—i.e., that all rights *in rem* are against persons,—is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that. Some concrete examples may serve to make this plain. Suppose

that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that, in consideration of \$100 *actually paid* by A to B, the latter agrees with A never to enter on X's land, Whiteacre. It is clear that A's right against B concerning Whiteacre is a right *in personam* . . . ; for A has no similar and separate rights concerning Whiteacre availing respectively against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right *in rem* . . . ; for it is but one of a very large number of fundamentally similar (though separate) rights which A has respectively against B., C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, *intrinsically considered*, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its "companions." So, in general, we might say that a right *in personam* is one having few, if any, "companions"; whereas a right *in rem* always has many such "companions."

If, then, the Whiteacre right, being a right *in personam*, is recognized as a right against a *person*, must not the Blackacre right also, being, point for point, intrinsically of the same general nature, be conceded to be a right against a *person*? If not that, what is it? How can it be apprehended, or described, or delimited at all? . . .

(b) A . . . right *in rem* is not always one relating to a thing, i.e., a tangible object: . . . [A] right *in rem* is not necessarily one relating to, or concerning, a thing, i.e., a tangible object. . . . The term right *in rem* . . . is so generic in its denotation as to include: 1. . . . [R]ights, or claims, relating to a definite *tangible object*: e.g., a landowner's right that any ordinary person shall not enter on his land, or a chattel owner's right that any ordinary person shall not physically harm the object involved,—be it horse, watch, book, etc. 2. . . . [R]ights (or claims) relating neither to definite tangible object nor to (tangible) person, e. g., a patentee's right, or claim, that any ordinary person shall not manufacture articles covered by the patent; 3. . . . [R]ights, or claims, relating to the holder's *own person*, e. g., his right that any ordinary person shall not strike him, or that any ordinary person shall not restrain his physical liberty, i.e., "falsely imprison" him; 4. . . . [R]ights residing in a given person and relating to *another person*, e. g., the right of a father that his daughter shall not be seduced, or the right of a husband that harm shall not be inflicted on his wife so as to deprive him of her company and assistance; 5. . . . [R]ights, or claims, not relating directly to either a

(tangible) person or a tangible object, e. g., a person's right that another shall not publish a libel of him, or a person's right that another shall not publish his picture, the so-called "right of privacy" existing in some states, but not in all.

It is thus seen that some rights *in rem* . . . relate fairly directly to *physical objects*; some fairly directly to *persons*; and some fairly directly *neither to tangible objects nor to persons*

Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?**

111 Yale L. J. 357, 357-365 (2001)

It is a commonplace of academic discourse that property is simply a "bundle of rights," and that any distribution of rights and privileges among persons with respect to things can be dignified with the (almost meaningless) label "property." By and large, this view has become conventional wisdom among legal scholars: Property is a composite of legal relations that holds between persons and only secondarily or incidentally involves a "thing." Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication—or worse.

. . . In other times and places, a very different conception of property has prevailed. In this alternative conception, property is a distinctive type of right to a thing, good against the world. This understanding of the *in rem* character of the right of property is a dominant theme of the civil law's "law of things." For Anglo-American lawyers and legal economists, however, such talk of a special category of rights related to things presumably illustrates the grip of conceptualism on the civilian mind and a slavish devotion to the gods of Roman law.

Or does it? In related work, we have argued that, far from being a quaint aspect of the Roman or feudal past, the *in rem* character of property and its consequences are vital to an understanding of property as a legal and economic institution.⁷ Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and

*Reproduced by permission of Henry E. Smith. —Eds.

⁷Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) . . . ; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001)

generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing—not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself

Property rights historically have been regarded as *in rem*. In other words, property rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons (“the world”) from the thing. In this sense, property rights are different from *in personam* rights, such as those created by contracts or by judicial judgments. *In personam* rights attach to persons as persons and obtain against one or a small number of other identified persons. A number of historically significant property theorists have recognized the *in rem* nature of property rights and have perceived that this feature is key because it establishes a base of security against a wide range of interferences by others

. . . Blackstone perceived that property rights are important because they establish a basis of security of expectation regarding the future use and enjoyment of particular resources. By establishing a right to resources that holds against all the world, property provides a guarantee that persons will be able to reap what they have sown In other words, property is important because it gives legal sanction to the efforts of the owner of a thing to exclude an indefinite and anonymous class of marauders, pilferers, and thieves, thereby encouraging development of the thing.

. . . In contrast, the role of property emphasized in modern economic discussions—providing a baseline for contractual exchange and a mechanism for resolving disputes over conflicting uses of resources—was at most of secondary importance in these traditional accounts. . . . Early in the twentieth century, Wesley Hohfeld provided an account of legal relations that proved to be especially influential in transforming the underlying assumptions about property rights in Anglo-American scholarship. . . . Hohfeld noted . . . that *in personam* rights are unique rights residing in a person and avail against one or a few definite persons; *in rem* rights, in contrast, reside in a person and avail against “persons constituting a very large and indefinite class of people.”

Significantly, however, Hohfeld failed to perceive that *in rem* property

rights are qualitatively different in that they attach to persons insofar as they have a certain relationship to some thing. Rather, Hohfeld suggested that in personam and in rem rights consist of exactly the same types of rights, privileges, duties, and so forth, and differ only in the indefiniteness and the number of the persons who are bound by these relations. To use a modern expression, Hohfeld thought that in rem relations could be “cashed out” into the same clusters of rights, duties, privileges, liabilities, etc., as are constitutive of in personam relations.

Hohfeld did not use the metaphor “bundle of rights” to describe property. But his theory of jural opposites and correlatives, together with his effort to reduce in rem rights to clusters of in personam rights, provided the intellectual justification for this metaphor, which became popular among the legal realists in the 1920s and 1930s. Different writers influenced by realism took the metaphor to different extremes. For some, the bundle-of-rights concept simply meant that property could be reduced to recognizable collections of functional attributes, such as the right to exclude, to use, to transfer, or to inherit particular resources. For others, property had no inherent meaning at all. As one pair of writers put it, the concept of property is nothing more than “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”³⁶

Notwithstanding these variations, the motivation behind the realists’ fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare. The realist program of dethroning property was on the whole quite successful. The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy. Not coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded.

³⁶Walton H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman ed., 1934).

Henry E. Smith, *Property as the Law of Things**

125 HARV. L. REV. 1691, 1696-98, 1700-08 (2012)

As an analytical device, the bundle picture can be very useful. It provides a highly accurate description of who can do what to whom in a legal (and perhaps nonlegal) sense. It provides an interesting theoretical baseline: how would one describe the relation of a property owner to various others if one were writing on a blank slate and doing the description in a fully bottom-up manner, relation by relation, party by party? In this, the Hohfeldian world is a little like the Coasean world of zero transaction costs—a useful theoretical construct.

The resemblance is no accident. Like the zero-transaction-cost world, no property system ever has or will build up legal relations smallest piece by smallest piece. Interestingly, in a zero-transaction cost world, one could do just that, and any benefit to be secured by parsing out relations in a fine-grained manner could be obtained at zero cost. That is not our world.

The problem with the bundle of rights is that it is treated as a theory of how our world works rather than as an analytical device or as a theoretical baseline. In the realist era, the benefits of tinkering with property were expressed in bundle terms without a corresponding theory of the costs of that tinkering. Indeed, in the most tendentious versions of the picture, the traditional baselines of the law were mocked, and the idea was to dethrone them in order to remove them as barriers to enlightened social engineering. In this version of the bundle picture, Hohfeldian sticks and potentially others are posited to describe the relations holding between persons; the fact that the relations hold with respect to a thing is relatively unimportant or, in some versions, of no importance. “Property” is simply a conclusory label we might attach to the collection. In its classic formulation, the bundle picture puts no particular constraints on the contents of bundles: they are totally malleable and should respond to policy concerns in a fairly direct fashion. These policy-motivated adjustments usually involve adding or subtracting sticks and reallocating them among concerned parties or to society. This version of the bundle explains everything and so explains nothing.

. . . In recent times, various commentators have argued that property is not fully captured by the bundle picture. Going beyond the bundle usually

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involves emphasizing exclusion or some robust notion of the right to use. It can be motivated by analytical jurisprudence, natural rights, or information cost economics. The bundle theory can incorporate some of these perspectives. Consider, for example, the recent resurgence of interest in the *numerus clausus*; this principle that property forms come in a finite and closed menu can be added onto the bundle theory as a “menu” of collections of sticks. Bundle theorists can accommodate this development. But they are being reactive in this regard

In this Article, I present a theory that aims higher. At the most basic level, the extreme bundle picture takes too little account of the costs of delineating rights

. . . Here, I present an alternative to the bundle picture that I call an *architectural* or *modular* theory of property. This theory responds to information costs—it conceives of property as a law of modular “things.” . . .

Because it makes sense in modern property systems to delegate to owners a choice from a range of uses and because protection allows for stability, appropriability, facilitation of planning and investment, liberty, and autonomy, we typically start with an *exclusion* strategy—and that goes not just for private property but for common and public property as well. “Use” can include nonconsumptive uses relating to conservation. The exclusion strategy defines a chunk of the world—a thing—under the owner’s control, and much of the information about the thing’s uses, their interactions, and the user is irrelevant to the outside world. Duty bearers know not to enter Blackacre without permission or not to take cars, without needing to know what the owner is using the thing for, who the owner is, who else might have rights and other interests, and so on. But dividing the world into chunks is not enough: spillovers and scale problems call for more specific rules to deal with problems like odors and lateral support, and to facilitate coordination (for example, covenants, common interest communities, and trusts). These *governance* strategies focus more closely on narrower classes of use and sometimes make more specific reference to their purposes, and so they are more contextual.

The exclusion-governance architecture manages complexity in a way totally uncaptured by the bundle picture, and importantly, the former is modular while the latter is not. The exclusion strategy defines what a thing is to begin with. A fundamental question is how to classify “things,” and, hence, which aspects of “things” are the most basic units of property law. Many important features of property follow from the semitranspar-

ent boundaries between things. Boundaries carve up the world into semi-autonomous components—modules—that permit private law to manage highly complex interactions among private parties. . . .

The modular theory explains property's structure, which includes providing some reason why those structures are not otherwise. In a zero-transaction-cost world, we could use all governance all the time, whether supplied by government or through super fine-grained contracting among all the concerned parties. That is not our world, and the main point of exclusion as a delineation strategy is that it is a *shortcut* over direct delineation of this more “complete” set of legal relations. Analytically, it might be interesting to think of property as a list of use rights availing pairwise between all people in society, but actually creating such a list would be a potentially intractable problem in our world. On the other hand, exclusion is not the whole story either. Causes of action like trespass implement a right to exclude, but the right to exclude is not *why* we have property. Rather, the right to exclude is part of *how* property works. Rights to exclude are a means to an end, and the ends in property relate to people’s interests in using things.

. . . Exclusion is at the core of this architecture because it is a default, a convenient starting point. Exclusion is not the most important or “core” value because it is *not a value at all*. Thinking that exclusion is a value usually reflects the confusion of means and ends in property law: exclusion is a rough first cut—and only that—at serving the purposes of property. It is true that exclusion piggybacks on the everyday morality of “thou shalt not steal,” whereas governance reflects a more refined Golden-Rule, “do unto others” type of morality in more personal contexts. It may be the case that our morality itself is shaped to a certain extent by the ease with which it can be communicated and enforced in more impersonal settings. I leave that question for another day. But the point here is that the exclusion-governance architecture is compatible with a wide range of purposes for property. Some societies will move from exclusion to governance—that is, some systems of laws and norms will focus more on individuated uses of resources—more readily than others, and will do so for different reasons than others.

At the base of the architectural approach is a distinction that the bundle theory—along with other theories—tends to obscure: the distinction between the interests we have in using things and the devices the law uses to protect those interests. Property serves purposes related to use by em-

ploying a variety of delineation strategies. Because delineation costs are greater than zero, which strategy one uses and when one uses it will be dictated in part by the costs of delineation—not just by the benefits that correspond to the use-based purposes of property

The traditional definition of property is a right to a thing good against the world—it is an *in rem* right. The special *in rem* character of property forms the basis of an information-cost explanation of the *numerus clausus* and standardization in property. *In rem* rights are directed at a wide and indefinite audience of duty holders and other affected parties, who would incur high information costs in dealing with idiosyncratic property rights and would have to process more types of information than they would in the absence of the *numerus clausus*. Crucially, parties who might create such idiosyncratic property rights are not guaranteed to take such third-party processing costs into account. There is thus an information-cost externality, and the *numerus clausus* is one tool for addressing this externality. Other devices include title records and technological changes in communication. . . .

Modularity plays a key role in making the standardization of property possible. First, modularity makes it possible to keep interconnections between packages of rights relatively few, thus allowing much of what goes on inside a package of property rights to be irrelevant to the outside world. Second, property rights “mesh” with neighboring property rights and show network effects with more far-flung property rights. The outside interfaces make this possible at reasonable cost. Third, the processes of property are simple enough that they *can feed into themselves*. Many modular structures are hierarchical in that they have modules composed of other modules In this respect, property forms are like a basic grammar or “pattern language” of property.

Notes and Questions

1.11. Note that Hohfeld’s decomposition of *in rem* rights into a collection of *in personam* rights could provide a new interpretation of the “bundle of rights” metaphor. Rather than being a collection of different rights held by one person with respect to a thing (the right to exclude, possess, alienate, etc.), perhaps the “bundle” really is a reference to the various rights an owner has against the “large and indefinite class of people” with whom she might come into conflict with respect to the *res*. Does this distinction matter? Which sense of the

metaphor do you think is being used in *Jacque*? Which do you think is being used by Merrill and Smith?

1.12. Recall the questions in Notes 1.1 and 1.2 on page 8 (following *Jacque*). They may lead us to another way of framing the distinction between the two interpretations of the “bundle” metaphor. Consider this: if I ask you: “Does A have a property right in Whiteacre,” how confident are you that you will be able to answer the question without knowing the answer to a different question: “A right against whom?”

1.13. Are you persuaded by Merrill’s and Smith’s critique of Hohfeld? Is their model of *in rem* rights compatible with Hohfeld’s analysis, or are the two necessarily inconsistent with each other?

1.14. Consider the following two propositions:

- “Property” is a relationship between a person and a thing.
- “Property” is a set of rights and obligations among people with respect to things.

Do you think either of these propositions adequately describes what we mean by the word “property”? Do you think these two propositions are meaningfully different from one another? If so, what is the difference? Do you think the difference might have an effect on the outcome of legal disputes? If so, what effect? And if not, does the difference matter?

1.15. Are you persuaded by Merrill’s and Smith’s claim that treating property as an *in rem* right makes it more resistant to interference and degradation by the state? What feature(s) of their *in rem* conception might give rise to this resistance? If rejection of the *in rem* conception and weakening of private property rights have in fact gone hand in hand, which account do you find more plausible: that lawyers’ and scholars’ rejection of the *in rem* conception of property facilitated increased state interference with property rights, or that state interference with property rights rendered the *in rem* conception untenable? Put another way, do you understand Merrill and Smith to be making an argument about what property *is* (or *was*), or about what it *should be*? If the latter, do you agree? Why or why not?

1.16. Hohfeld observes that, when it comes to property rights, “thing” doesn’t necessarily mean “tangible thing in the physical world.” Indeed, legal authorities identify property rights in all sorts of intangible things, as well as in admittedly physical substances that resist the label of “thing”—like animals, or even human beings. We will discuss this complication of the notion of property as a legal right in “things” in Chapter 2.

Chapter 2

Subject Matter of Property

In this unit we will consider the various types of things that attract the legal label “property.” Let us begin with some examples to pump our intuitions. In light of our discussion of what it means to own something, which of the following things can be usefully thought of as your “property”?

- your home or apartment
- your car or bike
- your computer
- the software on your computer
- the emails stored on your computer
- the emails stored on your cloud-based email service
- your bank account
- the money in your bank account
- the money you lent to your friend that hasn’t been repaid
- the money your friend lent to you that you haven’t paid back
- the things you bought with the money your friend lent to you that you haven’t paid back
- your pet dog

- the rats in your animal research lab
- your dairy cow
- the pig you're raising for meat
- your prescription medications
- your doctor's/pharmacist's/insurance company's records of your prescription medications
- your handwritten diary
- your unpublished novel
- your published novel
- your social media profiles and content
- your password-protected blog

Does categorizing any of these items as “property” or “not property” meaningfully assist in the analysis of any legal problems? Particularly legal disputes that arise over questions of access to or use of any of these things? Why might we choose to recognize (or refuse to recognize) these or other items as “property”?

You may notice there is something of a chicken-and-egg problem here. Is the label “property” a premise or a conclusion? Can we arrive at the label without resorting to circular reasoning? When we say something is a person’s property, or that someone has a “property right,” is that because we have examined the qualities and characteristics of the thing and its relation to the person, and *determined* that they are all consistent with some coherent notion of property ownership? Or is calling something “property” a mere *assertion*, unconstrained by circumstances, that we make because we want the *consequences* of the label “property” to attach to that thing for independent reasons? Is there a difference? Consider the following classic discussion of this question:

2.1 Introduction

Felix Cohen, *Transcendental Nonsense and the Functional Approach*

35 COLUM. L. REV. 809, 814-817 (1935)

There was once a theory that the law of trade marks and trade-names was an attempt to protect the consumer against the “passing off” of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field. Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization. But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar devices. For if they advanced any such argument, it might seem that they were taking sides upon controversial issues of politics and economics. Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal argument runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. This argument may be embellished, in particular cases, with animadversions upon the selfish motives of the infringing defendant, a summary of the plaintiff’s evidence (naturally uncontradicted) as to the amount of money he has spent in advertising, and insinuations (seldom factually supported) as to the inferiority of the infringing defendant’s product.

The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word “Palmo-

“live” is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as “not property,” and no injunction would be issued. In other words, the fact that courts did not protect the word would make the word valueless, and the fact that it was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of that word should be protected.

The circularity of legal reasoning in the whole field of unfair competition is veiled by the “thingification” of *property*. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*. It is by virtue of the property right which the plaintiff has acquired in the word that he is entitled to an injunction or an award of damages. According to the recognized authorities on the law of unfair competition, courts are not *creating* property, but are merely *recognizing* a pre-existent Something.

The theory that judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made by mortal men. The effect of this theory, in the law of unfair competition as elsewhere, is to dull lay understanding and criticism of what courts do in fact.

What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality. If courts, for instance, should prevent a man from breathing any air which had been breathed by another (within, say, a reasonable statute of limitations), those individuals who breathed most vigorously and were quickest and wisest in selecting desirable locations in which to breathe (or made the most advantageous contracts with such individuals) would, by virtue of their property right in certain volumes of air, come to exercise and en-

joy a peculiar economic advantage, which might, through various modes of economic exchange, be turned into other forms of economic advantage, e.g. the ownership of newspapers or fine clothing. So, if courts prevent a man from exploiting certain forms of language which another has already begun to exploit, the second user will be at the economic disadvantage of having to pay the first user for the privilege of using similar language or else of having to use less appealing language (generally) in presenting his commodities to the public.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered. Is there, for practical purposes, an unlimited supply of equally attractive words under which any commodity can be sold, so that the second seller of the commodity is at no commercial disadvantage if he is forced to avoid the word or words chosen by the first seller? If this is not the case, i.e. if peculiar emotional contexts give one word more sales appeal than any other word suitable for the same product, should the peculiar appeal of that word be granted by the state, without payment, to the first occupier? Is this homestead law for the English language necessary in order to induce the first occupier to use the most attractive word in selling his product? If, on the other hand, all words are originally alike in commercial potentiality, but become differentiated by advertising and other forms of commercial exploitation, is this type of business pressure a good thing, and should it be encouraged by offering legal rewards for the private exploitation of popular linguistic habits and prejudices? To what extent is differentiation of commodities by trade names a help to the consumer in buying wisely? To what extent is the exclusive power to exploit an attractive word, and to alter the quality of the things to which the word is attached, a means of deceiving consumers into purchasing inferior goods?

Without a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interests of business and

identifies the interests of business with the interests of society, will not be critically examined by courts and legal scholars until it is recognized and formulated. It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.

Hinman v. Pacific Air Transport

84 F.2d 755 (9th Cir. 1936)

HANEY, Circuit Judge.

Appellants allege . . . that they are the owners and in possession of 72 1/2 acres of real property in the city of Burbank, Los Angeles county, Cal., "together with a stratum of air-space superjacent to and overlying said tract . . . and extending upwards . . . to such an altitude as plaintiffs . . . may reasonably expect now or hereafter to utilize, use or occupy said airspace. Without limiting said altitude or defining the upward extent of said stratum of airspace or of plaintiff's ownership, utilization and possession thereof, plaintiffs allege that they . . . may reasonably expect now and hereafter to utilize, use and occupy said airspace and each and every portion thereof to an altitude of not less than 150 feet above the surface of the land"

It is then alleged that defendants are engaged in the business of operating a commercial air line, and that at all times "after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and trespassed upon the ownership and possession of plaintiffs' tract"; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiffs' property and for [damages].

Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine does not apply in California. We have examined the statutes of California, . . . but we find nothing therein to negative the ad coelum formula If we could

accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

This formula "from the center of the earth to the sky" was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we approach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception.

The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land. This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet.

If the appellants are correct in this premise, it would seem that they would have such a title to the airspace claimed, as an incident to their ownership of the land, that they could protect such a title as if it were an ordinary interest in real property. Let us then examine the appellants' premise. They do not seek to maintain that the ownership of the land actually extends by absolute and exclusive title upward to the sky and downward to the center of the earth. They recognize that the space claimed must have some use, either present or contemplated, and connected with the enjoyment of the land itself.

Title to the airspace unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.

Since, therefore, appellants must confine their claim to 150 feet of the airspace above the land, to the use of the space as related to the enjoyment of their land, to what extent, then, is this use necessary to perfect their

title to the airspace? Must the use be actual, as when the owner claims the space above the earth occupied by a building constructed thereon; or does it suffice if appellants establish merely that they may reasonably expect to use the airspace now or at some indefinite future time?

This, then, is appellants' premise, and upon this proposition they rest their case. Such an inquiry was never pursued in the history of jurisprudence until the occasion is furnished by the common use of vehicles of the air.

We believe, and hold, that appellants' premise is unsound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world. . . . Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.

. . . We cannot shut our eyes to the practical result of legal recognition of the asserted claims of appellants herein, for it leads to a legal implication to the effect that any use of airspace above the surface owner of land, without his consent would be a trespass either by the operator of an airplane or a radio operator. We will not foist any such chimerical concept of property rights upon the jurisprudence of this country

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants'

use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of.

The case differs from the usual case of enjoining a trespass. Ordinarily, if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession.

Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage. The bill fails to do this. It merely draws a naked conclusion as to damages without facts or circumstances to support it. It follows that the complaint does not state a case for injunctive relief

Notes and Questions

2.1. Did the court in *Hinman* "find" the law of property as it applies to the airspace above land? Did it "change" the law in this regard? Or did it—as Felix Cohen argued—"create and distribute a new source of economic wealth or power"?

2.2. Does the court say that Hinman will never be able to obtain the relief sought? Are there any circumstances in which an injunction to restrict over-flights to an altitude of over 150 feet (or any altitude) could be awarded under the court's analysis?

2.3. The court justified its ruling in *Hinman*, at least in part, by reference to the "practical result" that would follow a finding in the landowner's favor. What would that "practical result" be, and why did the court feel the need to avoid it? Is avoiding such undesirable "practical results" an acceptable basis for making a determination as to whether something is a person's "property"?

2.4. **Drones.** The increasing availability of personal aerial robots ("drones") is threatening to bring *Hinman* back into the spotlight. In November of 2014, a hobbyist was flying a custom-built "hexacopter" over his parents' farm in California, when a neighbor's son shot it out of the sky with a shotgun. The neighbor claimed the drone had been flying over his land, though the drone owner disputed this. In any event, the drone owner demanded compensation for damage to the drone, and the neighbor refused. They ended up in small claims court where the neighbor was held liable for \$850 in damages and court costs, on

grounds that he “acted unreasonably in having his son shoot the drone down regardless of whether it was over his property or not.” See Jason Koebler, *The Sky’s Not Your Lawn: Man Wins Lawsuit After Neighbor Shotgunned His Drone*, VICE: MOTHERBOARD (June 28, 2015), <http://motherboard.vice.com/read/the-skys-not-your-lawn-man-wins-lawsuit-after-neighbor-shotgunned-his-drone>.

Imagine that instead of (or in addition to) having his son use the drone for target practice, the farmer had called the police to make a complaint of criminal trespass, or sued the drone owner for trespass. What result? Would it matter how high the drone was flying? Would it matter whether the drone was equipped with a camera? (Recall that the right to exclude is not the only right of owners; trespass may not be our farmer’s only recourse. We will consider some analogous factual scenarios in Chapter 24.)

2.5. Would the “practical result” of a finding for the landowner in *Hinman* necessarily be the same as the “practical result” of a finding in favor of a landowner suing the operator of a drone in the airspace over her land? Again, would it matter how high the drone was flying, or whether it was equipped with a camera?

Chapter 3

Intangible Property

This section considers forms of property that cannot be seen with the eye or held in the hand. Such property raises significant conceptual issues, but, simply put, it is too significant for the legal system to ignore. You have already seen a few examples: corporate shares, for example, are a mixture of voting rights and claims to the income the corporation produces; they give a measure of control over tangible corporate assets, but they are very much distinct from those assets. And contract rights—particularly through the alchemy of assignability and negotiability—come to seem like property rights, too: companies regularly pledge their accounts receivable as security for loans, and no one bats an eye at the intangibility of the account receivable (or of the creditor's rights under the loan, for that matter). You have also now seen how people frequently hold intangible *interests* even in tangible property: a nonpossessory lien is such an interest, and you will meet many more in the study of real property. As you read the cases in this section, consider not just whether the things they describe are “property,” but also whether they are “things” in the first place. To create a system of property rights, a legal system needs to be able to identify the things that are the subject of those rights, to decide who owns those things, and to be able to say when an owner’s rights have been violated. Are these tasks systematically harder for intangibles, and if so, why?

Kremen v. Cohen
337 F. 3d 1024 (9th Cir. 2003)

KOZINSKI, Circuit Judge.*

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

Background

"Sex on the Internet?," they all said. "That'll never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to abandon the domain name sex.com." Why was this unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to

*In 2009, Judge Kozinski was admonished by a judicial disciplinary panel for maintaining a publicly accessible server that included sexually explicit material. In 2017, he abruptly resigned after being accused of sexual misconduct by numerous women, including former law clerks.
—Eds.

transfer sex.com to your corporation.²

Despite the letter's transparent claim that a company called "Online Classifieds" had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. It also told Cohen to hand over his profits, invoking the constructive trust doctrine and California's "unfair competition" statute, Cal. Bus. & Prof. Code § 17200 et seq. It awarded \$40 million in compensatory damages and another \$25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. The district court froze Cohen's assets, but Cohen ignored the order and wired large sums of money to offshore accounts. His real estate property, under the protection of a federal receiver, was stripped of all its fixtures – even cabinet doors and toilets – in violation of another order. The court commanded Cohen to appear and show cause why he shouldn't be held in contempt, but he ignored that order, too. The district judge finally took off the gloves—he declared Cohen a fugitive from justice, signed an arrest warrant and sent the U.S. Marshals after him.

Then things started getting really bizarre. Kremen put up a "wanted" poster on the sex.com site with a mug shot of Cohen, offering a \$50,000 reward to anyone who brought him to justice. Cohen's lawyers responded with a motion to vacate the arrest warrant. They reported that Cohen was under house arrest in Mexico and that gunfights between Mexican authorities and would-be bounty hunters seeking Kremen's reward money posed a threat to human life. The district court rejected this story as "implausible" and denied the motion. Cohen, so far as the record shows, remains at

²The letter was signed "Sharon Dimmick," purported president of Online Classifieds. Dimmick was actually Kremen's housemate at the time; Cohen later claimed she sold him the domain name for \$1000. This story might have worked a little better if Cohen hadn't misspelled her signature.

large.

Given his limited success with the bounty hunter approach, it should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name, invoking four theories at issue here. He argues that he had an implied contract with Network Solutions, which it breached by giving the domain name to Cohen. He also claims the transfer violated Network Solutions's cooperative agreement with the National Science Foundation—the government contract that made Network Solutions the .com registrar. His third theory is that he has a property right in the domain name sex.com, and Network Solutions committed the tort of conversion by giving it away to Cohen. Finally, he argues that Network Solutions was a “bailee” of his domain name and seeks to hold it liable for “conversion by bailee.”

The district court granted summary judgment in favor of Network Solutions on all claims. [Kremen appealed. His contract claim failed on appeal because he was not a paying customer and Network Solutions made no promises to him. He was not an intended third-party beneficiary of Network Solutions' contract with the NSF. And “conversion by bailee” was not an independent tort from conversion under California law. That left his conversion claim.]

Conversion

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show “ownership or right to possession of property, wrongful disposition of the property right and damages.” *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992). The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. This is no surprise, given its positions in prior litigation. See *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80, 86 (2000) (“[Network Solutions] acknowledged during oral argument before this Court that the right to use a domain name is a form of intangible personal property.”).⁵ The district

⁵Network Solutions . . . stresses that Kremen didn't develop the sex.com site before Cohen stole it. But this focus on the particular domain name at issue is misguided. The question is not whether Kremen's domain name in isolation is property, but whether domain names as a class are a species of property.

court agreed with the parties on this issue, as do we.

Property is a broad concept that includes “every intangible benefit and prerogative susceptible of possession or disposition.” *Downing v. Mun. Court*, 198 P.2d 923 (1948). We apply a three-part test to determine whether a property right exists: “First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.” *G.S. Rasmussen*, 958 F.2d at 903. Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars, and they are now even subject to in rem jurisdiction, see 15 U.S.C. § 1125(d)(2).

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant’s and no one else’s. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall.

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions wrongfully disposed of that right to his detriment by handing the domain name over to Cohen. The district court nevertheless rejected Kremen’s conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another’s lost goods, so it applied only to tangible property. SEE PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 89, 91 (W. Page Keeton ed., 5th ed. 1984). Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. Many courts ignore or expressly reject it. See *Kremen*, 325 F.3d at 1045-46 n.5 (Kozinski, J., dissenting) (citing cases); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) (holding that the plaintiff could maintain

a claim for conversion of his website); Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 B.Y.U. L. REV. 1681, 1682. Others reject it for some intangibles but not others. The Restatement, for example, recommends the following test:

- (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
- (2) One who effectively prevents the exercise of intangible rights of the kind customarily *merged in a document* is subject to a liability similar to that for conversion, even though the document is not itself converted.

RESTATEMENT (SECOND) OF TORTS § 242 (1965) (emphasis added). An intangible is “merged” in a document when, “by the appropriate rule of law, the right to the immediate possession of a chattel and the power to acquire such possession is *represented by* [the] document,” or when “an intangible obligation [is] represented by [the] document, which is regarded as equivalent to the obligation.” *Id.* cmt. a (emphasis added).⁶ The district court applied this test and found no evidence that Kremen’s domain name was merged in a document. . . .

We conclude that California does not follow the Restatement’s strict merger requirement. Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether. In *Payne v. Elliot*, 54 Cal. 339, 1880 WL 1907 (1880), the Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that they could, reasoning: “[T]he action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property.” *Id.* at 341 (emphasis added). While *Payne*’s outcome might be reconcilable with the Restatement, its rationale certainly is not: It recognized conversion of shares, not because they are customarily represented by share certificates, but because they are a species of personal property and, perforce, protected.⁷

⁶The Restatement does note that conversion “has been applied by some courts in cases where the converted document is not in itself a symbol of the rights in question, but is merely essential to their protection and enforcement, as in the case of account books and receipts.” *Id.* cmt. b.

⁷Intangible interests in real property, on the other hand, remain unprotected by con-

Notwithstanding *Payne*'s seemingly clear holding, the California Court of Appeal held in *Olschewski v. Hudson*, 87 Cal. App. 282, 262 P. 43 (1927), that a laundry route was not subject to conversion. It explained that *Payne*'s rationale was "too broad a statement as to the application of the doctrine of conversion." *Id.* at 288, 262 P. 43. Rather than follow binding California Supreme Court precedent, the court retheorized *Payne* and held that corporate stock could be converted only because it was "represented by" a tangible document. *Id.*; see also *Adkins v. Model Laundry Co.*, 268 P. 939 (1928) (relying on *Olschewski* and holding that no property right inhered in "the intangible interest of an exclusive privilege to collect laundry").

Were *Olschewski* the only relevant case on the books, there might be a plausible argument that California follows the Restatement. But in *Palm Springs-La Quinta Development Co. v. Kieberk Corp.*, 115 P.2d 548 (1941), the court of appeal allowed a conversion claim for intangible information in a customer list when some of the index cards on which the information was recorded were destroyed. The court allowed damages not just for the value of the cards, but for the value of the intangible information lost. Section 242(1) of the Restatement, however, allows recovery for intangibles only if they are merged in the converted document. Customer information is not merged in a document in any meaningful sense. A Rolodex is not like a stock certificate that actually represents a property interest; it is only a means of recording information.

Palm Springs and *Olschewski* are reconcilable on their facts – the former involved conversion of the document itself while the latter did not. But this distinction can't be squared with the Restatement. The plaintiff in *Palm Springs* recovered damages for the value of his intangibles. But if those intangibles were merged in the index cards for purposes of section 242(1), the plaintiffs in *Olschewski* and *Adkins* should have recovered under section 242(2) – laundry routes surely are customarily written down somewhere. "Merged" can't mean one thing in one section and something else in the other.

California courts ignored the Restatement again in *A & M Records, Inc. v. Heilman*, 75 Cal.App.3d 554 (1977), which applied the tort to a defendant who sold bootlegged copies of musical recordings. The court held broadly

version, presumably because trespass is an adequate remedy. See *Goldschmidt v. Maier*, 73 P. 984, 985 (Cal. 1903) (per curiam) ("[A] leasehold of real estate is not the subject of an action of trover."); *Vuich v. Smith*, 35 P.2d 365 (1934) (same). Some California cases also preserve the traditional exception for indefinite sums of money. See 5 Witkin *Torts* § 614.

that “such misappropriation and sale of the intangible property of another without authority from the owner is conversion.” *Id.* at 570. It gave no hint that its holding depended on whether the owner’s intellectual property rights were merged in some document. One might imagine physical things with which the intangible was associated—for example, the medium on which the song was recorded. But an intangible intellectual property right in a song is not merged in a phonograph record in the sense that the record represents the composer’s intellectual property right. The record is not like a certificate of ownership; it is only a medium for one instantiation of the artistic work.

Federal cases applying California law take an equally broad view. We have applied *A & M Records* to intellectual property rights in an audio broadcast, see *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 725 (9th Cir. 1984), and to a regulatory filing, see *G.S. Rasmussen*, 958 F.2d at 906-07. Like *A & M Records*, both decisions defy the Restatement’s “merged in a document” test. An audio broadcast may be recorded on a tape and a regulatory submission may be typed on a piece of paper, but neither document represents the owner’s intangible interest.

The Seventh Circuit interpreted California law in *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300 (7th Cir. 1990). Observing that “[t]here is perhaps no very valid and essential reason why there might not be conversion’ of intangible property,” *id.* at 305 (quoting PROSSER & KEETON, *supra*, § 15, at 92), it held that a defendant could be liable merely for depriving the plaintiff of the use of his confidential information. In rejecting the tangibility requirement, *FMC* echoes *Payne*’s holding that personal property of any species may be converted. And it flouts the Restatement because the intangible property right in confidential information is not represented by the documents on which the information happens to be recorded. . . .

In short, California does not follow the Restatement’s strict requirement that some document must actually represent the owner’s intangible property right. On the contrary, courts routinely apply the tort to intangibles without inquiring whether they are merged in a document and, while it’s often possible to dream up some document the intangible is connected to in some fashion, it’s seldom one that represents the owner’s property interest. To the extent *Olszewski* endorses the strict merger rule, it is against the weight of authority. That rule cannot be squared with a jurisprudence that recognizes conversion of music recordings, radio shows, customer lists, regulatory filings, confidential information and even domain names.

Were it necessary to settle the issue once and for all, we would toe the line of *Payne* and hold that conversion is “a remedy for the conversion of every species of personal property.” 54 Cal. at 341. But we need not do so to resolve this case. Assuming arguendo that California retains some vestigial merger requirement, it is clearly minimal, and at most requires only some connection to a document or tangible object—not representation of the owner’s intangible interest in the strict Restatement sense.

Kremen’s domain name falls easily within this class of property. He argues that the relevant document is the Domain Name System, or “DNS” – the distributed electronic database that associates domain names like sex.com with particular computers connected to the Internet. We agree that the DNS is a document (or perhaps more accurately a collection of documents). That it is stored in electronic form rather than on ink and paper is immaterial. It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one. Torch-ing a company’s file room would then be conversion while hacking into its mainframe and deleting its data would not. That is not the law, at least not in California.¹¹

The DNS also bears some relation to Kremen’s domain name. We need not delve too far into the mechanics of the Internet to resolve this case. It is sufficient to observe that information correlating Kremen’s domain name with a particular computer on the Internet must exist somewhere in some form in the DNS; if it did not, the database would not serve its intended purpose. Change the information in the DNS, and you change the website people see when they type “www.sex.com.”

Network Solutions quibbles about the mechanics of the DNS. It points out that the data corresponding to Kremen’s domain name is not stored in a single record, but is found in several different places: The components of the domain name (“sex” and “com”) are stored in two different places, and each is copied and stored on several machines to create redundancy and speed up response times. Network Solutions’s theory seems to be that

¹¹The Restatement requires intangibles to be merged only in a “document,” not a tangible document. RESTATEMENT (SECOND) OF TORTS § 242. Our holding therefore does not depend on whether electronic records are tangible. *Compare eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1069 (N.D. Cal. 2000) (“[I]t appears likely that the electronic signals sent by [Bidder’s Edge] to retrieve information from eBay’s computer system are . . . sufficiently tangible to support a trespass cause of action.”), *with Intel Corp. v. Hamidi*, 71 P.3d 296, (2003) (implying that electronic signals are intangible).

intangibles are not subject to conversion unless they are associated only with a single document.

Even if Network Solutions were correct that there is no single record in the DNS architecture with which Kremen's intangible property right is associated, that is no impediment under California law. A share of stock, for example, may be evidenced by more than one document. *See Payne*, 54 Cal. at 342 ("[T]he certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title. . . ."). A customer list is protected, even if it's recorded on index cards rather than a single piece of paper. Audio recordings may be duplicated, and confidential information and regulatory filings may be photocopied. Network Solutions's "single document" theory is unsupported.

Network Solutions also argues that the DNS is not a document because it is refreshed every twelve hours when updated domain name information is broadcast across the Internet. This theory is even less persuasive. A document doesn't cease being a document merely because it is often updated. If that were the case, a share registry would fail whenever shareholders were periodically added or dropped, as would an address file whenever business cards were added or removed. Whether a document is updated by inserting and deleting particular records or by replacing an old file with an entirely new one is a technical detail with no legal significance.

Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "creat[ed] new tort duties" in reaching this result. Cf. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (1990). We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property.

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network So-

lutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he's skipped the country, and his money is stashed in some offshore bank account. Unless Kremen's luck with his bounty hunters improves, Cohen is out of the picture. The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen's domain name. Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force it to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it.

The district court was worried that "the threat of litigation threatens to stifle the registration system by requiring further regulations by [Network Solutions] and potential increases in fees." Given that Network Solutions's "regulations" evidently allowed it to hand over a registrant's domain name on the basis of a facially suspect letter without even contacting him, "further regulations" don't seem like such a bad idea. And the prospect of higher fees presents no issue here that it doesn't in any other context. A bank could lower its ATM fees if it didn't have to pay security guards, but we doubt most depositors would think that was a good idea.

The district court thought there were "methods better suited to regulate the vagaries of domain names" and left it "to the legislature to fashion an appropriate statutory scheme." *Id.* The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. And the common law does not stand idle while people give away the property of others.

The evidence supported a claim for conversion, and the district court should not have rejected it.

Notes and Questions

3.1. Is your name your property? What is it about a domain name that makes it “work” as property?

3.2. Does Kremen’s three-part test for the existence of “property” work on the variety of property forms you have encountered so far? Under it, is a car property? A dog? A house? A right of publicity? Proper alignment of one’s psychic aura?

3.3. There are thriving markets for domain names. People buy and sell them all the time, companies use them as collateral for loans, and Stephen Cohen considered sex.com valuable enough to steal. But do these economic considerations make them “property?” Recall Felix Cohen’s argument against basing property rights on economic value. Does Kremen commit precisely the fallacy the other Cohen warned about?

3.4. Is tangibility the key to the case or a giant red herring? Does the court’s argument in footnote 11 that under the Restatement an intangible must be merged in a document but the document need not itself be tangible suggest that there is something wrong with the Restatement’s test or with the court’s reading of the Restatement.

3.5. The Internet Corporation for Assigned Names and Numbers (ICANN) has promulgated a system of mandatory arbitration for domain-name registrants, the Uniform Domain Name Dispute Resolution Policy (UDRP). Under the UDRP, a trademark owner can bring an expedited proceeding against anyone who has registered a domain name that is “identical or confusingly similar” to their trademark if the domain name “has been registered and is being used in bad faith.” If the arbitrator finds a violation, the remedy is transfer of the domain name to the trademark owner. What does this system of protection for trademark owners’ property in their trademarks do to the security of domain-name registrants’ property in their domain names? Both are systems of property in names, but can they coexist?

Tribune Co. v. Oak Leaves Broadcasting Station

68 Cong. Rec. 216 (Cook Cty. Cir. Ct. Ill. Nov. 17, 1926)

Decision of Judge Wilson on Defendants’ Motion to Dissolve Temporary Injunction

. . . The bill very briefly charges that the complainant is and has been for some time a corporation organized under the laws of the State of Illi-

nois, with its principal place of business in the city of Chicago, and is engaged in the publication of a newspaper known as the Chicago Daily Tribune, and that it has an average daily paid circulation of several hundred thousand subscribers.

It further charges that since March 29, 1924, it has been engaged in broadcasting by radio of daily programs of information, amusement, and entertainment to the general public, and particularly to that part of the general public residing in and in the vicinity of the city of Chicago, and for that purpose the complainant operates an apparatus generally known as a broadcasting station located on the Drake Hotel and another such broadcasting station operated near the city of Elgin.

The bill further charges that it has been the custom for several years for persons engaged in broadcasting to designate their certain stations by certain combinations of letters known as call letters, and that these call letters serve to enable persons using radio receiving sets to identify the particular station, and in this instance the complainant has been using the letters WGN, which stand for the abbreviation of the World's Greatest Newspaper which appears to have been adopted by the complainant as a sort of trade name indicating the Chicago Daily Tribune.

It is further charged in the bill that it is the custom for such newspapers owning and operating broadcasting stations to make announcements of their programs in the daily editions of the paper, and that the complainant has, since March 29, 1924, used the designation WGN, and further charges that its program is of a high-class character, and that by reason of its broadcasting it has built up a good will with the public, which is of great value to the complainant, in that it has enhanced the value of the newspaper and increased the profits.

Further charges, on information and belief, that the number of persons who listen to the said broadcasting of the complainant is in excess of 500,000 and that these persons are educated to listen in or tune in on the wave length of the complainant for the purpose of hearing and enjoying the programs so broadcasted.

The bill further charges that, when two stations are broadcasting on the same or nearly the same wave length, the result will be that the users of the radio will either hear one of the stations to the exclusion of the other or hear both of the stations at the same time, which will cause confusion to the listener, or will hear one to the exclusion of the other but accompanied by a series of noises, such as whistles and roars, which render the program

practically useless.

The bill further charges that for several years the broadcasting in the United States and Canada has been done on sending wave lengths varying from 201 meters to 550 meters, inclusive, the United States Government, by an enactment of Congress, having forbidden to private and commercial broadcasters the use of wave lengths from 601 meters to 1,600 meters, and the use of wave lengths under 200 meters because of the impracticability of the use of said wave lengths under 200 meters by reason of natural causes and because of the fact that this field is open to amateurs and used by a large number of the same.

Furthermore, that most of the radio receiving sets are so constructed it to be adapted to the receiving of broadcasting within this band of wave lengths included above the 200 meters and under 500 meters.

The bill further charges that the sending waves used by broadcasting stations are also classified by the number of kilocycles denoting the frequency of vibration per second characteristic of each wave. The higher the wave length the less is the number of kilocycles, and a definite number of kilocycles is characteristic of each wave.*

Further charges that the radio receiving sets in general use in the United States and Canada are scaled and marked with numerical divisions and that by means of dials or indicators persons receiving over radio can set such dials or indicators at particular points and hear the particular broadcasting station over the particular wave length that they desire.

Further charges that the users of radios have become familiar with the different wave lengths and broadcasting stations designated by the particular letters employed and that this fact is of value to the broadcaster because the public has been educated to their particular wave length and their particular designation.

The bill also charges that knowledge of this particular wave length by a broadcaster is of great value to the broadcaster because the person receiving through the radio has been educated to know when to place his dials or indicators in order to receive a particular station and that the public generally in the locality of the complainant has become familiar with the wave length of the complainant and that its loss by interference would

*The formula is $f = c/\lambda$, where λ is the wavelength in meters, f is the frequency in cycles per second, and c is the speed of light (299,792,458 meters per second). So, for example, to use WGN's numbers, $299,792,458 / 990 = 302,820$ cycles per second, or 302.8 kilocycles per second.
—Eds.

work great damage to the complainant.

The complainant further charges that on the 14th of December, 1925, it did, and ever since then has, broadcast on a sending wave length of 302.8 meters (the kilocycles characteristic of such wave length being 990) and that it broadcasts from both the Drake Hotel and from its Elgin broadcasting station and that, at that time, no other broadcasting station in the city of Chicago or in the entire State of Illinois was using said wave length or any wave length sufficiently near to interfere with complainant's broadcasting and that this fact was generally known to the public and that the public had access by reason thereof to the programs of the complainant as broadcast over the same wave length from the two broadcasting stations and which programs were announced at different periods of time by arrangement of the complainant.

Further charges that the complainant has expended large sums of money during said period of time in the building up and betterment of said broadcasting stations and in the furnishing of high-class talent for its programs and in the payment of salaries and expenses in its business of broadcasting. . . .

That the defendants, the Oak Leaves Broadcasting Station (Inc.), and the Coyne Electrical School (Inc.) are corporations existing under and by virtue of the laws of Illinois, and that the defendant, Guyon, is a resident of Chicago, Ill., engaged in business in said city under the name of Guyon's Paradise Ball Room, and operates a dance hall in the city of Chicago.

The bill further charges that the broadcasting station, heretofore used and operated by the defendants, Oak Leaves Broadcasting Station (Inc.), and Coyne Electrical School (Inc.), which had been operated from Oak Park, a suburb of the city of Chicago, was moved to 124 North Crawford Avenue, where Guyon's Paradise Ball Room is located, and is being now operated from that point, and charges that the said defendant, Guyon, became the owner and operator of said broadcasting station and that the other defendants have some interest in saint station which is unknown to the complainant, but which is charged to be true on information and belief.

The bill further charges that said station of the defendants had originally used a wave length of 220 meters (1,350 kilocycles) . . . and that, later, it changed its wave length to 249.9 meters (1,200 kilocycles), which it continued to use until on or about September 7, 1926, and further charges that the defendants had never enjoyed any considerable degree of the good will

of the public, nor was it popular with the users of radio receiving sets, but was comparatively unknown in Chicago or its vicinity.

That on or about September 7, 1926, the said Guyon's Paradise Broadcasting Station, used and operated by the defendants, changed its sending wave length to a wave length either the same as that of the complainant (i.e. 302.8) or one having a frequency of considerably less than 50 kilocycles different than that of the complainant, and that it is now using said wave length and has from that time until the date of the filing of the bill herein

The bill further charges that the defendants have, since September 7, 1926, used the said new wave length during the hours of the day when complainant is broadcasting, and that by reason thereof said broadcasting by the said defendants has interfered with and destroyed complainant's broadcasting to the public in the city of Chicago and throughout the region where complainant's newspaper circulates, and that by reason thereof radio receivers have been unable to hear the programs of the complainant, and that if it is allowed to continue it will work incalculable damage and injury to the good will of the complainant's broadcasting, and consequently will injure the circulation of the complainant so far as its newspaper is concerned and deprive it of great profits.

Further charges that there are other wave lengths which are usable by the defendants and that this wave length can be changed with practically no expense and within a short period of time.

The bill prays for an order restraining the defendants from broadcasting from said station in such a manner as to interfere with the broadcasting of the complainant, and more particularly from using any wave length within 100 miles of the city of Chicago having a frequency of less than 1,040 kilocycles per second, or more than 940 kilocycles per second, charging, in effect, that any wave length within that designated number of kilocycles would necessarily cause an interference with the broadcasting of the complainant.

The answer . . . admits that where a broadcasting station is operating on a wave length the frequency of which is within 50 kilocycles per second of the number of kilocycles per second characteristic of the wave length of the first station, that some interference will result but that such interference is natural where stations are operating in close proximity one to the other, but that where two broadcasting stations in the same locality are properly constructed and operated and the wave length employed sharply

defined and the power of sold stations substantially equal there will be no appreciable interference by the stations if they are separated by 40 kilocycles. . . .

The answer admits that on September 7, 1926, the said defendants' station changed its wave length, but denies that they are broadcasting over the same wave length as that of the complainant, but state that they are sending over a wave length which is removed 40 kilocycles from the wave length used by the complainant, and that said wave being used is 315.6 meters with a frequency of 950 kilocycles.

The answer further admits that the defendant . . . has since about September, 1926, used and operated the broadcasting station described in the bill of complaint Guyon's Paradise Broadcasting Station, but denies that they are drowning out the hearers of WGN, and state that, if such is the fact, it is because said complainant's broadcasting station is improperly constructed and operated.

The answer further admits that on or about September 7, 1926, there was available to them a wave length of 249.9 metres with a frequency of 1,200 kilocycles, but state that said wave length is not desirable for the purpose of broadcasting and that its use would render WGES of little or no value as a broadcasting station.

And further sets forth that there are other wave lengths which would be usable by the defendants, but states that their use would cause greater interference to other broadcasters than the interference now caused to WGN by the use of the present wave length now employed by them.

The defendants further charge that they have invested large sums of money in and about their plant and will suffer damage in the event the temporary injunction heretofore issued should not be dissolved.

The facts in this case, as charged by the bill and admitted by the answer, together with the additional facts set out in the bill as matters of defense, disclose a situation new and novel in a court of equity and a consideration of the law applicable to the facts requires an understanding of the present conditions for the purpose of ascertaining whether or not the old adage of "Old laws should be adapted to new facts" should be applied and for that reason a short statement of general existing conditions is not out of order at this time before considering the legal and equitable aspects of the cause.

It is a matter of general knowledge that in the last few years there has grown up in the United States, as well as abroad, a well recognized calling or business known as broadcasting which consists in sending from a

central station, electrically equipped, programs of music and amusement, speeches by men of prominence, news of the day and items of interest taking place in the world, and that these various programs are received by the public over radio receiving sets which have been installed in homes, hotels, and various other places, and that a large industry has grown up and developed in the making and manufacturing of radio sets, so that in the United States, at this time, there are millions of dollars invested by the public at large, which has made the investment for the purpose of and with the knowledge that they could receive these programs, speeches, and items of interest from various broadcasting stations located in various parts of the United States and in other countries.

It might also be stated that, so far as broadcasting stations are concerned, there has almost grown up a custom which recognizes the rights of the various broadcasters, particularly in that certain broadcasters use certain hours of the day, while the other broadcasters remain silent during that particular period of time. Again, in this particular locality, a certain night is set aside as silent night, when all local broadcasters cease broadcasting in order that the radio receivers may be able to tune in on outside distant stations.

Wave lengths have been bought and sold and broadcasting stations have changed hands for a consideration. Broadcasting stations have contracted with each other so as to broadcast without conflicting and in this manner be able to present their different programs to the waiting public. The public itself has become educated to the use or its receiving sets so as to be able to obtain certain particular items of news, speeches, or programs over its own particular sets.

The theory of the bill in this case is based upon the proposition that by usage of a particular wave length for a considerable length of time and by reason of the expenditure of a considerable amount of money in developing its broadcasting station and by usage of a particular wave length educating the public to know that that particular wave length is the wave length of the complainant and by furnishing programs which have been attractive and thereby cause a great number of people to listen in to their particular programs that the said complainant has created and carved out for itself a particular right or easement in and to the use of said wave length which should be recognized in a court of equity and that outsiders should not be allowed thereafter, except for good cause shown, to deprive them of that right and to make use of a field which had been built up by the

complainant at a considerable cost in money and a considerable time in pioneering. . . .

The defendants further insist that a wave length can not be made the subject of private control and, further and lastly, that as a matter of fact they are not interfering with the complainant by the use of the present wave length employed by them from their broadcasting station. . . .

[The court discussed the 1912 federal statute which required a license to broadcast by radio and restricted the wavelengths available, as discussed above. It concluded that the statute did not displace state law.]

In the first place, it is argued that there are no rights in the air and that the law has no right or authority to restrict the using of wave lengths or to exclude others from their use. In answer to this it might be said that Congress has already attempted to regulate the use of the air in its enactment of August 13, 1912, by providing that only certain strata of the air or ether may be used for broadcasting purposes and, further, requiring persons to take out a license before they are permitted to exercise the use of the air or ether. Moreover, it appears to this court that the situation is such from the past development of the industry of broadcasting and radio receiving and from the apparent future, as indicated by the past, that, unless some regulatory measures are provided for by Congress or rights recognized by State courts, the situation will result in chaos and a great detriment to the advancement of an industry which is only in its infancy.

While it is true that the case in question is novel in its newness, the situation is not devoid, however, of legal equitable support. The same answer might be made, as was made in the beginning; that there was no property right, or could be, in a name or sign, but there has developed a long line of cases, both in the Federal and State courts, which has recognized, under the law known as the law of unfair competition, the right to obtain a property right in a name or word or collection of names or words[†] which gives the person who first made use of the same a property right therein, provided that by reason of their use, he has succeeded in building up a business and created a good will which has become known to the public and to the trade and which has served as a designation of some particular output so that it has become generally recognized as the property of such person. The courts have held that persons who attempt to imitate or to make use of such trade name or names or words evidently do so for the

[†]I.e., a trademark. —Eds.

purpose of enriching themselves through the efforts of some other person who by the investment of money and time has created something of value. Equity has invariably protected the rights of such persons in the use of said names.

It is also true that the courts have recognized, particularly in the west, the right to the use of running water for the purposes of mining and other uses. (*Atchison v. Peterson*, 20 Wall. 507; *Cache La Poudre Reservoir v. Water Supply & Storage Co.*, 25 Colo. 161.)

Some of the States have also recognized the rights of telephone and telegraph companies in the operation of their lines free from interference by lines of other companies placed in such close proximity as to create confusion by reason of electrical interference. (*Western Union Telegraph Co. v. Los Angeles Electric Co.*, 70 Fed. 178; *Northwestern Telephone Exchange Co. v. Twin City Telephone Co.*, 89 Minn, 4115; and other cases.)

It us argued that the electrical cases generally involve a franchise and thereby a property right, but the cases on electrical interference are cited more particularly for the purpose of their analogy to the case at bar and not as authorities on the question.

In regard to the water cases, counsel for the defendants call our attention to the rule in this State, as set forth in the case of *Druley v. Adam* (102 Ill. 177), where the court says in its opinion, page 193,

The law has been long settled in this State that there can be no property merely in the water of a running stream. The owner of land over which a stream of water flows has, as incident to his ownership of the land, a property right in the flow of the water at that place for all the beneficial uses that may result from it, whether for motive power in propelling machinery or in imparting fertility to the adjacent soil, etc.; in other words, he has a usufruct in the water while it passes; but all other riparian proprietors have precisely the same rights in regard to it and, apart from the right of consumption for supplying natural wants, neither can, to the injury of the other, abstract the water or divert or arrest its flow.

The same court, however, in its opinion, on page 201, while holding that the western water cases are not applicable, recognized the law as laid down in those cases and distinguished them on the ground that it is appar-

ent that the law necessarily arose in those cases by reason of the peculiar circumstances and necessities existing in those countries at the time.

It is the opinion of the court that, under the circumstances as now exist, there is a peculiar necessity existing and that there are such unusual and peculiar circumstances surrounding the question at issue that a court of equity is compelled to recognize rights which have been acquired by reason of the outlay and expenditure of money and the investment of time and that the circumstances and necessities are such, under the circumstances of this case, as will justify a court of equity in taking jurisdiction of the cause. Such being the case, it becomes the duty of the court to consider the last question, namely, whether or not there is such an interference by the defendants with the broadcasting station of complainant that the temporary injunction heretofore granted should be kept in force until a final hearing of the cause.

[W]e believe that the equities of the situation are in favor of the complainant on the facts as heretofore shown, particularly in that the complainant has been using said wave length for a considerable length of time and has built up a large clientage, whereas the defendants are but newly in the field and will not suffer as a result of an injunction in proportion to the damage that would be sustained by the complainant after having spent a much greater length of time in the education of the general radio-receiving public to the wave length in question.

We are of the opinion further that, under the circumstances in this case, priority of time creates a superiority in right, and the fact of priority having been conceded by the answer it would seem to this court that it would lie only just that the situation should be preserved in the status in which it was prior to the time that the defendants undertook to operate over or near the wave length of the complainant. . . .

It is difficult to determine at this time how a radio station should be properly run, but it is, also, true that the science of broadcasting and receiving is being subject every day to change and it is possible that within it short time this may be accomplished, although it is the opinion of the court from an examination of the affidavits and exhibits in the cause that 40 kilocycles is not at this time recognized as a safe limitation for the prevention of interference between stations located in the same locality. It is true that stations sufficiently removed from each other can broadcast even over the same wave length, but it necessarily follows that they must be so far apart that the wave lengths do not reach or come in contact with each

other to the extent of creating interference.

In the case at bar the contestants are so located with reference to each other that the court does not feel that 40 kilocycles is sufficient. The court is of the opinion, however, that until there has been a final hearing of this cause no order prohibiting the defendants from the use of any particular wave length should be entered and to that extent the order heretofore entered will be modified so that it will read that the defendants are restrained and enjoined from broadcasting over a wave length sufficiently near to the one used by the complainant so as to cause any material interference with the programs or announcements of the complainant over and from its broadcasting station to the radio public within a radius of 100 miles, and in order that the defendants may be apprised of the feeling of the court in this regard, while the order is not expressly one of exact limitation, nevertheless the court feels that a distance removed 50 kilocycles from the wave length of the complainant would be a safe distance and that if the defendants use a wave length in closer proximity than the one stated it must be at the risk of the defendants in this cause.

Notes and Questions

3.6. *Oak Leaves* is a road not taken. This report of the case comes from the *Congressional Record*. Senator Clarence Dill (D-WA) had it read into the record on December 10, 1926 (i.e. the month after it was decided) because of its bearing on a radio regulation bill he co-sponsored.¹ That bill became the Radio Act of 1927, which established the licensing system whose essentials are still in force today. Broadcasters require a license from the Federal Communications Commission; those licenses specify, in some detail, the frequency on which they can broadcast, the locations of their transmitters, and the power they can use. The licenses started out being heavily regulated to ensure that each broadcaster's programs served the public interest, but over time the licensing process has become far more ministerial. Subject to some concentrated-ownership restrictions and a few miscellaneous content rules (e.g. compliance with the Emergency Broadcasting System and some rules on children's programming), a broadcaster is free to transmit whatever programming it wants as long as it complies with the FCC's technical requirements. The result is a system that

¹Being read into the record is not necessarily a sign of importance. Five pages later, Senator Byron Harrison (D-MS) had one of Aesop's fables read into the record to make a point about Republican political maneuvering.

divides the airwaves into geographic and frequency blocks, and gives each of these blocks an exclusive licensee. Anyone else broadcasting on these frequencies in these places is violating the law. Similar systems hand out the right to use other frequencies for other purposes (e.g. mobile phone towers, police radios, satellite communications, etc.). In effect, any unauthorized use of someone else's assigned spectrum is illegal.

Compare this system with the common-law process illustrated by *Oak Leaves*. One obvious difference is how one acquires rights in a frequency: prior use versus governmental assignment. Which of the two seems more likely to lead to an efficient allocation of resources to those best able to make good use of them? Which is fairer to participants? Which is more likely to serve the interests of the listening public? Another evident difference is the different tests for violation of another's rights. Is it fair to say that the FCC exclusive licensing are protected by a kind of right against trespass, while *Oak Leaves* more closely resembles the test for nuisance? Are there any other relevant differences?

The change in the FCC's policies over time is interesting, too. If broadcasting is to be based on licenses, how ought those licenses be given out? And should the FCC care what a licensee does with a license after that? There was a time when listeners' groups routinely filed lawsuits to keep radio stations from changing their formats. See, e.g., *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F. 2d 926 (D.C. Cir. 1973) (remanding to FCC for hearing on whether to allow WGLN to change from "progressive rock" to "middle of the road"). Would that be a better system? Or should the FCC get even further out of the business and not care how licensees use their assigned spectrum at all—e.g., if a licensee wants to stop transmitting FM radio and use the spectrum for mobile phone calls, why should the FCC care? Does calling broadcasting licenses "property" do anything to answer these questions?

Here's another alternative: no licenses at all, and let anyone use the spectrum however they see fit. Before you scoff at this "commons" approach to spectrum allocation, consider that this is how WiFi works. You don't need an FCC license to plug in a home wireless router. The frequency range from 2.4 gigahertz (i.e. 2.4 billion cycles per second) to 2.5 gigahertz is "unlicensed"; the FCC regulates the maximum power that a device can emit, but otherwise, anyone is basically free to use any device they want however they want. How well does your WiFi connection typically work? What about the chaos of interference *Oak Leaves* feared? Would this approach work on a wider scale?

3.7. *Oak Leaves* presents its holding as an almost inevitable consequence of the nature of spectrum. But what is spectrum? Radio broadcasting works

by running an electric current through the right kind of circuit, which results in electromagnetic radiation spreading in certain ways that people with the right kinds of devices can detect. Why isn't the relevant "property" here the transmitter and the receiver (both tangible personal property), or the land over which the radiation passes (real property)? So why not handle broadcasting cases using personal property torts ("You damaged my radio tower by interfering with its transmissions") or real property torts ("You trespassed by sending electromagnetic radiation over my land")? Consider this passage from Ronald Coase, *The Federal Communications Commission*, 2 J. L. ECON. 1 (1959):

What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. Earlier we discussed a case in which it had to be decided whether a confectioner had the right to use machinery which caused noise and vibrations in a neighboring house. It would not have facilitated our analysis of the case if it had been discussed in terms of who owned sound waves or vibrations or the medium (whatever it is) through which sound waves or vibrations travel. Yet this is essentially what is done in the radio industry. The reason why this way of thinking has become so dominant in discussions of radio law is that it seemed to have developed by using the analogy of the law of airspace. In fact, the law of radio and television has been commonly treated as part of the law of the air. It is not suggested that this approach need lead to the wrong answers, but it tends to obscure the question that is being decided. Thus, whether we have the right to shoot over another man's land has been thought of as depending on who owns the airspace over the land. It would be simpler to discuss what we should be allowed to do with a gun. . . . The problem confronting the radio industry is that signals transmitted by one person may interfere with those transmitted by another. It can be solved by delimiting the rights which various persons possess.

Is this any more helpful than *Oak Leaves*'s analogies to trademarks and water rights?

A related argument is that “spectrum” is the wrong abstraction for regulating multiple people’s simultaneous broadcasting. It is true that given the amplitude-modulating radio technology of 1926, WGN’s and WGES’s broadcasts on nearby frequencies from nearby locations were likely to cause frustrating interference for listeners. But technology changes, and more broadcast technologies don’t depend on exclusive assignments of slices of spectrum. One approach is “spread-spectrum,” in which a device transmits at a given frequency only for a very short burst and then “hops” to a different frequency for the next bit of its transmission, and so on. This is basically how modern cell phones communicate with towers; the system allows many devices to “share” the same nominal slice of spectrum. Another emerging technology is “ultra-wideband,” in which a device transmits on an immensely wide range of frequencies but with very low power—so low that it interferes only minimally with other spectrum users. There are also techniques that involve shaping the geometry of a transmission so it travels only in desired directions. What would *Oak Leaves* have to say about these new technologies? Is it more or less accommodating of them than the FCC’s regulatory system?

3.8. What do you make of the defendant’s argument that WGN’s station was “improperly constructed and operated?” If WGES is causing interference to WGN’s signal, should it matter that WGN could avoid the problem by fixing its equipment? Should it matter how much the changes would cost? On how well-established the appropriate technical standards are?

For that matter, what about better receivers? If more modern radios would allow people in the Chicago area to tune in to WGN at 990 kilohertz without hearing interference from WGES at 950 kilohertz (and vice versa), should WGN really be able to push WGES off the airwaves just because some listeners have antiquated radios? (To borrow the court’s analogy to trademarks, what if some people are just confused all the time about everything?)

These can be high-stakes fights. The company LightSquared wanted to build a nationwide wireless network using a mixture of cell towers and satellites. It had FCC permission to use frequencies between 1525 and 1559 megahertz, but the next spectrum band up, from 1559 to 1610 megahertz, was allocated to “radionavigation satellite services”—i.e., GPS. Technical reports agreed with the arguments of GPS makers that LightSquared’s proposed transmissions would cause many GPS units, including some on airplanes, to stop working. LightSquared argued that this was not because it would be improperly transmitting outside its assigned band, but because GPS units would be improperly *listening* to transmissions outside of their assigned band. According to LightSquared, in-

expensive filters in GPS units would have fixed the problem—but there are millions of GPS units already out there in the world without those filters. In the end, the FCC scrapped LightSquared’s plan. Would you have? LightSquared spent three years in bankruptcy following the FCC’s decision, and racked up nearly \$2 billion in losses. Could a better system of property rights in spectrum have avoided the conflict entirely?

3.9. Does *Oak Leaves* give legal recognition to property that already exists or create property where none existed before? Or is “property” the wrong way to refer to WGN’s rights here?

United States v. Turoff
701 F. Supp. 981 (E.D.N.Y. 1988)

GLASSER, District Judge:

Defendants have moved to dismiss the indictment in this case on the ground that . . . it fails to allege a violation of the mail fraud statute, 18 U.S.C. § 1341.

For the reasons stated below, defendants’ motion is denied.

Facts

According to the indictment, in late 1978, the [Taxi and Limousine Commission, abbreviated as] TLC, which regulates the City’s medallion taxicabs, authorized the issuance of 100 temporary taxi medallions to a corporation (“Research Cab Corporation”) to be formed by defendant Donald Sherman. The purpose of the temporary medallions was to test the feasibility of diesel engines in New York City taxicabs.

The indictment alleges that in late 1980, the TLC’s chairman, defendant Turoff, caused an additional 23 unauthorized medallions to be diverted to his codefendants and placed on gasoline- and diesel-powered taxicabs registered to Research Cab and to Tulip Cab Corporation. These taxicabs allegedly operated in the City from late 1980 to early 1985. Defendants Donald and Ronald Sherman allegedly deposited the proceeds from those taxicabs, which exceeded \$500,000, in the bank account of a shell corporation (“Exdie Cab Corporation”).

Allegedly, defendants never paid the TLC the annual license renewal fees for the unauthorized medallions. In connection with the conspiracy, the defendant Turoff allegedly gave false and misleading information to the TLC Commissioners and the Mayor’s office, and destroyed TLC records

on the Tulip Cab Corporation and all the defendants allegedly gave false and misleading information to the New York State Commission of Investigation. The indictment alleges fourteen instances in which the mails were used to effectuate the scheme.

Discussion

I.

The mail fraud statute under which defendants have been indicted was first enacted in 1872. In its present form, it now reads:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Defendants move to dismiss the indictment on the ground that it does not state a cognizable violation of the mail fraud statute as interpreted in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court reversed the mail fraud convictions of Charles J. McNally and James E. Gray on the ground that the mail fraud statute does not reach schemes which violate "the intangible right of the citizenry to good government." The case involved a scheme devised by Gray, who held two top government posts in the Kentucky state government, and Howard P. "Sonny" Hunt, a state Democratic party chairman who had been given de facto power by the governor to select the insurance agencies from which the state would buy its policies. Hunt selected a certain agency as the state's agent

for securing a workmen's compensation policy, on the condition that that agency would share any resulting commissions in excess of \$50,000 a year with twenty-one other insurance agencies specified by Hunt. Among the designated agencies was one controlled by Hunt and Gray (who had formed it for the exclusive purpose of obtaining the excess commissions). McNally served as the agency's front man. . . .

[McNally and Gray were convicted of mail fraud.]

The jury convicted defendants, and the Court of Appeals affirmed the convictions, relying on many prior decisions holding that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government."

The Supreme Court reversed, holding that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." The Court framed the issue in the case narrowly:

The issue is thus whether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions. We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent. . . . We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for con-

duct not within the reach of § 1341.² . . .

Most significantly for this case, the Court in *McNally* held that, because the mail fraud statute “had its origin in the desire to protect individual property rights, . . . any benefit which the Government derives from the [mail fraud] statute must be limited to the Government’s interest as property-holder.” Accordingly, in the present case, the government’s failure to demonstrate the City’s interest “as property-holder” in the medallions would be fatal to that charge in the indictment that is based upon the fraudulent procurement of the medallions.

However, even if the court accepted this argument, the indictment would still stand insofar as it is based on the scheme to avoid payment of license renewal fees. Money is the most concrete and tangible of property. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Court stated: “In its dictionary definitions and in common usage ‘property’ comprehends anything of material value owned or possessed . . . Money, of course, is a form of property.” On this basis alone, defendant’s motion to dismiss the indictment must be denied.

As regards the medallions, the court concludes that the fraudulent misappropriation of them deprived the City of a property interest cognizable under the mail fraud statute.

Defendants cite *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) for the proposition that the City’s interest in the medallions “is ancillary to a regulation, not to property.” *Id.*, 844 F.2d at 42. *Evans* concerned a scheme to transfer arms regulated by the federal government from various foreign nations to Iran. The scheme required defendants to deceive the government about the true identity of the purchasing country in order to obtain the necessary approval for the transaction. The government’s right to regulate such transfers arose either from a statutorily-required clause in the contract between the United States and the original foreign buyer, or by regulation.

The Second Circuit, affirming the district court’s dismissal of the mail and wire fraud counts against defendants, held that the government had

²The narrowness of *McNally*’s holding was underscored in *Carpenter v. United States*, 484 U.S. 19, (1987), which held that a newspaper had a property right under § 1341 in the exclusive pre-publication use of confidential business information, and noted that “*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.”

not shown that it had some property interest in the arms. Furthermore, the court rejected the government's contention that "the right of the United States Government to prevent the resale or retransfer of U.S. military weaponry from foreign nations to other, unacceptable foreign powers" constituted "an interest in, and a right to exercise control over, property" for purposes of the mail fraud statute. *Id.*, 844 F.2d at 40.

In addressing the latter argument, the court rejected the government's analogies to common law property rights. The court reasoned that, while a right to control the future alienation and use of a thing can be a traditional property right (e.g., the fee simple determinable, the fee simple subject to a condition subsequent, the possibility of reverter, and the power of termination), that does not mean that every such right is cognizable under the mail and wire fraud statutes.⁴ Specifically, the court noted that the government's right to control arms transfers between foreign powers would never permit the United States to possess the weapons in question, and had no effect on the purchaser's title to the arms or the seller's right to profits from the sale. Rather, the regulatory scheme governing such transfers "substitutes for the traditional property remedies of replevin, damages or specific performance, a substitution that is further proof that the right is not property." *Id.*, 844 F.2d at 41. Moreover, the court expressed its reluctance to apply common law property rules in the fundamentally different context of weapons transfers, which are governed by foreign policy and human rights considerations in addition to the usual economic laws of supply and demand.

⁴I note that the possessory and future interests named are not intrinsically "devices through which a nonpossessor controls land" or "control[s] alienation." 844 F.2d at 41. The estates in land described are expressions of the extent of one's present interest in property measured in terms of time. The owner of a fee simple determinable has a present, possessory interest in property which will continue "until" or "so long as" a specified event does or does not occur. The possibility of reverter is the present interest one has in the future use and enjoyment of the property when the fee simple determinable ends. The owner of a fee simple subject to a condition subsequent has a present possessory interest in property "upon condition that" or "provided that" a specified event does or does not occur. The power of termination is the present interest one has in the future use and enjoyment of that property upon the exercise of his power to terminate the possessory estate. All the estates described are present property interests in the sense that they are all descendible, devisable and alienable. N.Y. Est. Powers & Trusts Law § 6-5.1 (McKinney 1967). That a person who acquired either of those estates in property by or through a scheme or artifice to defraud would acquire a present interest in property is beyond cavil.

The court summed up by finding that the government's interest in the weapons was essentially regulatory:

All of these distinctions suggest to us that the government's interest here is ancillary to a regulation, not to property. A law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right. If it did, many government regulations would create property rights. For example, laws preventing the sale of heroin or the dumping of toxic waste would create government property rights in the drugs or chemicals. Admittedly, the line between regulation and property is difficult to draw with scientific precision . . . and we do not mean to imply that the government never has a property interest in the limits it imposes on property use.

Id., 844 F.2d at 42 (citation omitted).

Evans is distinguishable. As discussed above, in *Evans* the United States had no possessory interest in the weapons, nor did the deception practiced by the defendants affect the purchaser's title to the weapons or the seller's right to profit from the sale of the weapons. Here, defendants are accused of taking 23 items of tangible personal property from the City's possession. Title to those medallions in the hands of third persons would be affected. Citation of authority is not required for the principle that a thief cannot transfer title even to a bona fide purchaser for value. While the government in *Evans* had no possessory interest in the weapons, the TLC in this case did have a possessory interest in the medallions. It maintained them under lock and key at its offices. It had title to them. An action for conversion of those medallions would lie and either replevin or damages would be an available and appropriate remedy. . . . Given the impetus to return to the arcane learning of the law of property prompted by McNally, a quotation from Book III of Blackstone's Commentaries on the Laws of England (Lewis' Ed. 1902) seems appropriate. At pages 145-46 that venerable author wrote:

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the Law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the

loss sustained by such unjust invasion; which is effected by action of replevin; . . .

That the medallions themselves are a valuable, marketable commodity was adverted to years ago by Professor Charles A. Reich in his seminal article entitled *The New Property*, 73 YALE L.J. 733 (1964). He wrote, at page 735:

A New York City taxi medallion, which costs very little when originally obtained from the city, can be sold for over twenty thousand dollars.

In a footnote at that point, the author observed:

7. A New York Taxi Medallion is a piece of tin worth 300 times its weight in gold. No new transferable medallions have been issued since 1937. Their value in 1961 was estimated at \$21,000 to \$23,000; banks will lend up to \$13,000 on one. The cabbie pays the City only \$200 a year for his medallion. There is a brisk trade in them: out of 11,800, about 600 changed hands in 1961. One company, National Transportation Co., sold 100 medallions at \$21,000 each, a transaction totaling \$2,100,000. A non-transferable license, of which there are a few, has no market value. *N.Y. Times*, Dec. 5, 1961, p. 46, col. 3.

The government also contends that the medallion is, in essence, the equivalent of an easement to use the city streets. At the risk of dwelling too long on the esoterica of property, the medallions could not properly be equated with easements. An easement is generally appurtenant, which is to say that it is a right which the owner of one parcel of land (the dominant tenement) may exercise in or over the land of another (the servient tenement) for the benefit of the former. An easement in gross is a right created in a person to use the land of another, which the owner of that easement may enjoy even though he does not own or possess a dominant estate. Although the concept of an easement in gross has been recognized, such an easement is rare. The government's contention would have been more technically correct had it characterized the medallion as a "special franchise" which confers a right to do something in the public highway which, except for the grant, would be a trespass.

A franchise is property. It is assignable, taxable and transmissible. *Hatfield v. Straus*, 82 N.E. 172 (1907). A mere license, on the other hand, is nothing more than a personal, revocable privilege. See, e.g., *Brooklyn Heights R.R. Co. v. Steers*, 106 N.E. 919 (1914). It would not be seriously disputed that a taxicab "license" is, accurately speaking, a special franchise which is not revocable at will and may not be taken away except by due process. *Hecht v. Monaghan*, 121 N.E.2d 421 (1954). See also, *Wignall v. Fletcher*, 303 N.Y. 435 (1952). The resolution of this motion will not be dependent, however, upon the technically correct characterization of the matter in issue as being either a franchise, license, or easement.

The government also contends that the physical medallions themselves are "property" for purposes of the mail fraud statute. The defendants ridicule that contention by deprecatingly referring to the medallions as nothing more than "23 pieces of tin". Thus, the defendants impliedly, but never explicitly, assert a *de minimis* qualification to the tort of conversion or the crime of larceny. No authority is cited to support that oblique assertion, nor is the court aware of any. In his dissenting opinion in *McNally*, Justice Stevens was prescient when he expressed doubt about the gravity of the ramifications of the Court's decision and said that "Congress can, of course, negate it by amending the statute." As has already been noted, Congress did exactly that. Justice Stevens went on, however, to observe that:

Even without Congressional action, prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove *some* loss of money or property.

Id. (emphasis added). In this respect Justice Stevens was also prescient. The medallion is a tangible, physical object. The Administrative Code of the City of New York § 19-502(h) provides as follows:

"Medallion" means the metal plate issued by the commission for displaying the license number of a licensed taxicab on the outside of the vehicle.

By charging the defendants with obtaining by false and fraudulent representations and promises 23 unauthorized taxi medallions, the government is seeking to prosecute these defendants by attempting to prove they caused some loss of property as alleged.

In *Evans*, upon which the defendants so heavily rely, the defendants were charged with making false statements to United States agencies to obtain approval to export arms. Here, the defendants are accused of taking 23 items of tangible personal property (the metal plates) from the City of New York in which the City did have a possessory interest. This is not a case where it is alleged that the citizenry is merely deprived of the honest services of a public official. This is a case where the public official is accused of conspiring with others to misappropriate tangible personal property. To view this case otherwise would be to hold, in effect, that a City cashier who embezzled money merely deprived the City of her honest and faithful services to which the embezzled money is an inconsequential appurtenance. . . .

Whether the medallions are tangible property or not to support a charge of mail fraud may also be discerned by asking whether the wrongful taking of the medallions from the offices of the TLC would be larceny. Defendants advise that a state prosecution has been commenced on that ground. See N.Y. Penal Law § 155.00(1) (McKinney 1988), defining property for purpose of state larceny statute as “any article, substance or thing of value”. Thus, the reluctance of the *McNally* Court to read the mail fraud statute as criminalizing conduct on the part of a state official which is not otherwise prohibited by state law need not deter here. . . .

Mindful that “an overspeaking judge is no well-tuned cymbal,” I nevertheless make several additional observations.

The rule announced in *McNally* was that the mail fraud statute is applicable only to “frauds involving money or property” and not to schemes relating to good government. It logically followed, said the Court in *Evans*, 844 F.2d at 39, “that the deceived party must lose some money or property.” *Carpenter* explained that *McNally* did not limit the scope of the mail fraud statute “to tangible as distinguished from intangible property rights.” From those pronouncements, the view has been expressed that obtaining from a sovereign by means of a fraudulent scheme utilizing the mails, a license to engage in a business, profession or occupation is not a violation of the mail fraud statute because the license, although property in the hands of the licensee is not property in the hands of the licensor. Upon reflection, the view is that A has nothing which, when he gives it to B, becomes something. This brings to mind L. CARROLL, THROUGH THE LOOKING GLASS, Ch. V (Modern Library Ed. at p. 200):

. . . the Queen remarked . . . “I’m just one hundred and one, five months and a day.”

“I can’t believe *that*” said Alice.

“Can’t you?” the Queens said in a pitying tone. “Try again; draw a long breath and shut your eyes.”

Alice laughed. “There’s no use trying,” she said: “one *can’t* believe impossible things.”

“I daresay you haven’t had much practice,” said the Queens. “When I was your age, I always did it for half-an-hour a day, why, sometimes I’ve believed as many as six impossible things before breakfast.”

To view the sovereign’s power to grant licenses, or franchises, or easements as being something other than money or property is to equate, erroneously in my view, the sovereign with an individual or corporation. What the latter sells, buys, creates or manufactures and the proceeds derived from those activities is money or property in the traditional sense. The sovereign can buy and sell and manufacture and derive proceeds from those activities only by virtue of the power it possesses as sovereign—namely its police power, its power to tax, etc. It is only through the exercise of those powers that the sovereign obtains the revenues which enable it to function at all and acquire, if it chooses, “property” in the traditional sense. To rob the sovereign of the due exercise of that power by schemes or artifices to defraud, is to rob it of “property” as surely as the goods or chattels or money obtained from a private person by similar schemes or artifices.

The view of cases that licenses are only property in the hands of the licensee, but never in the hands of the government represents an inversion of historical fact. In the seminal article to which reference has already been made, which urged that various important government benefits (including licenses) be accorded a status akin to “property,” Professor Charles Reich noted that traditionally, just the opposite was true—licenses, and all other forms of government largess were considered government property long before the property rights of the licensee or recipient were accorded legal recognition:

The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that *it is originally public*

property, comes from the state, and may be withheld completely. But this need not be an obstacle. *Traditional property also comes from the state, and in much the same way.* Land, for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group. Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts. Many other natural resources—water, minerals and timber, passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws “give” the property to one who performs certain actions. Even the man who catches a wild animal “owns” the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.

Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964) (footnotes omitted; emphasis added).

The salutary fact that, in modern times, courts have recognized the property rights of licensees⁵ need not blind us to the equally compelling fact that licenses, like other forms of public largess, originate in the state and are “public property,” in the first instance. . . .

Notes and Questions

3.10. Reich’s article is closely linked with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that welfare benefits could not be terminated without notice and a hearing. In a footnote, the Court quoted *The New Property* and added, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of

⁵See, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) (driver’s license); *Dixon v. Love*, 431 U.S. 105 (1977) (same); *Mackey v. Montrym*, 443 U.S. 1 (1979) (same); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (license to practice optometry); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (license to practice law); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainers’ harness racing license).

rights that do not fall within traditional common-law concepts of property.” *Id.* at 262 n.8. Two years later, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court held that a state college professor on a renewable one-year contract did not have a “property” interest in continued employment, so he had no Fourteenth Amendment right to a statement of reasons for the nonrenewal of his contract.² The court had this to say about the nature of “property”:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Is this an improvement on Kremen’s formulation? Does this formulation work for all property, all intangible property, or just for government benefits? What do you make of its thoughts about where property comes from?

3.11. Money is property because it is “concrete and tangible,” says the court in *Turoff*. Really? What if medallion owners pay their license renewal fees by check? By credit card? Is it more or less tangible than the “piece of tin” that is a taxicab medallion, the public’s right to honest services, or the franchise of operating a taxicab?

3.12. The Springfield Athletic Commission regulates boxing in the sense that boxing for money or charging admission to a boxing match within the state

²The court had previously held that written contracts or state tenure law could create the necessary interest to trigger due process protections, see *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551 (1956), and a companion case to *Roth* held that a professor might be entitled to due process protections when he alleged the existence of an implicit understanding that professors who had been employed for seven years would be dismissed only for cause. *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972),

of Springfield is prohibited unless the match takes place under regulations promulgated by the Commission. Some of the Commission's rules establish a system of weight classes and determine who is the "World" champion within each of those classes. Vinnie Watson is the current World Heavyweight Boxing Champion, as determined by the Commission, whose rules allow it to revoke his title unless he "defends his title against a suitable challenger" at least once per year. Watson was been challenged to a match by Drederick Tatum, but declined the challenge. The Commission then voted to revoke Watson's title and award it to Tatum instead; Watson has sued the Commission, claiming that Tatum's poor win-loss record makes him not a "suitable" challenger. Do the Commission's actions deny him "property, without due process of law" within the meaning of the Fourteenth Amendment? Is his title property? Does it matter whether the Commission has demanded that he return the ceremonial belt that new champions hold over their heads?

3.13. Taxicab medallions typically can be sold on the open market. Liquor licenses typically require a hearing before a local alcoholic beverages commission before they can be transferred. A license to practice law is personal and cannot be transferred at all. Does this mean that liquor licenses and law licenses are not "property?"

3.14. Is a franchise excludable? If someone steals the medallion from off your taxicab, can you sue for replevin or conversion? What are the damages? Does possession of the medallion give them the right to operate a taxicab on the streets of New York? What are you to do in the meantime—in fact, what if you never find the thief? Is your franchise gone? Now suppose that instead of stealing your medallion, a fraudster forges one, using your medallion number. Presumably this is an offense under state law, but does it invade your property rights in your franchise? What if the fraudster forges a medallion using an unassigned number?

3.15. If Uber starts operating in your city without the approval of the TLC, does that violate your property rights in your franchise? If the TLC doesn't take action, can you sue the city for failing to enforce its franchise laws? Does it matter whether you have an exclusive franchise—e.g., to be the only operator of shuttle van service at an airport—or a nonexclusive franchise—e.g., to be one of a number of operators of shuttle van service at the airport? Or, from the other side, can the *denial* of a franchise invade property rights? Is there a "property" interest in being allowed to operate a taxicab for hire, such that a city government triggers the Fourteenth Amendment when it refuses to allow Uber-dispatched cars to pick up passengers within city limits?

Chapter 4

Intellectual Property

This section takes up **intellectual property**: rights governing the ownership of information. There is no one distinctive set of doctrines governing all intellectual property in the same way that the law of finders applies to all (well, most) personal property or the law of trespass applies to all (well, most) real property. Instead, the name “intellectual property” is a catch-all used to group several related sets of legal rights, each of which gives the rightsholder an exclusive right to use certain information in certain ways. A defendant who uses that information in that way without the rightsholder permission is said to be an *infringer*.

It is common, and in some respects accurate, to describe the rightsholder as the “owner” of the information, but keep in mind that only certain specified uses count as infringement. There is no body of intellectual property law that prohibits possessing or thinking about information, for example. Instead, different bodies of intellectual property law restrict different kinds of uses. In each case, the scope of the owner’s rights is closely tied to what kinds of information that body of law protects and to the rules governing when someone becomes a rightsholder. The latter is a familiar question: just as first possession gives initial title to personal property, and conquest is at the root of title to real property, creation can provide intellectual property rights. But the former is a new kind of question; we have taken it largely for granted that land is proper subject matter for real property and other tangible things are proper subject matter for personal property. Intellectual property is different, because not every kind of information qualifies. In copyright, for example, processes are not proper subject matter: as a consequence, the list of ingredients in a recipe and the steps for combining them are not copyrightable—even if they meet all of copyright law’s other requirements.



Figure 4.1: Left: Sarah Scurr. Right: Marisol Ortiz Elfeldt

Learning a body of intellectual property law, therefore, requires learning its subject matter, its rules of initial ownership, and its rules of infringement. In this section, we will study three such bodies from the federal level: copyrights, patents, and trademarks. We will study copyright in more detail as an example, and then examine patents and trademarks to see how they are both similar to and different from copyright's model. But there are other systems of intellectual property law as well. Here are a few of the most important ones.

Federal **copyright** law protects “original works of authorship,” like novels, biographies, songs, screenplays, paintings, blueprints, and sculptures. Copyright law has a very low threshold for protection: a work must merely display a “modicum of creativity” and have been written down (“fixed in a tangible medium of expression”). The copyright so obtained is valid during its author’s lifetime, and for the next seventy years after that. It gives copyright owners the exclusive right to reproduce their works, to make adaptations of them, to distribute them to the public, and to perform or display them publicly—but this right only applies against people who copy from the owner. Someone who independently and coincidentally comes up with similar expression is an author in her own right, not an infringer. In Figure 4.1, for example, are two photographs of the same iceberg, taken by different photographers from nearby locations at almost exactly the same time. Neither infringes on the other.

Federal **patent** law protects “any new and useful process, machine, manufacture, or composition of matter.” Examples include mechanical devices like tractor plows and can openers, chemical processes used to refine oil, pharmaceutical products like anti-HIV drugs, and, a little infamously, a “Method and apparatus for automatically exercising a curious animal” by encouraging it to



Figure 4.2: A few IP-protected things that you might know.

chase a laser pointer. See U.S. Pat. No. 6,701,872. To obtain a patent, an inventor must go through a detailed and expensive application process, which involves convincing the U.S. Patent and Trademark Office (USPTO) that her invention is genuinely new (“novel”), that it represents a sufficient advance on previous inventions (that it be “nonobvious”), and that it has some practical use in the world, however slight (“utility”). She must also disclose to the public, in detail, how her invention works and how best to use it. Once the USPTO issues a patent, it gives the owner the exclusive right for twenty years (from the date she filed her application with the USPTO) to make, use, offer to sell, or sell the invention. (This means that anyone is free to copy or to study the *patent* on a new kind of steering wheel, but they cannot make, use, or sell *steering wheels* as described in the patent.)

Trademark law is a hybrid of state and federal rights. Its basis for protection is a little different. A trademark is a word or symbol, like NIKE or the “swoosh” logo in Figure 4.2 that distinguishes goods or services in the marketplace. One gains trademark rights by using a mark on goods so that consumers associate the mark with a particular source—i.e., they know that NIKE shoes come from one company (Nike) and not another (Adidas or Reebok). These associations are called “goodwill” and it is common to say that what a trademark owner owns is the goodwill (even though it exists only in consumers’ minds). These rights exist under state common law as soon as the goodwill exists; trademark owners can also register their marks with the USPTO, which gives nationwide and not just local rights. Trademark law gives a trademark owner the right to prevent uses of the mark that cause “consumer confusion” about the source of goods: a consumer who sees non-Nike shoes falsely labeled NIKE and who mistakenly believes they come from Nike has been confused about the origin of the goods, and Nike can sue the company slapping its trademark on ersatz shoes.

State-created **rights of publicity** protect against the commercial use of

one's name, picture, voice, or other indicia of identity without permission. For example, photoshopping a celebrity's face onto a model wearing one of your company's sweaters and using the photograph in an ad for those sweaters is likely to trigger the right of publicity. Some states require that one's identity have "commercial value" to bring a right of publicity suit, others do not. (How would one build up commercial value in one's identity? It is something one can do deliberately, or does it just happen to some people and not others?) The federal trademark law, the Lanham Act, provides a closely related cause of action for false claims about endorsement: quoting a person as saying "I always shop at Acme Hardware" is actionable if the person didn't say it and you don't have their permission to quote them as saying it.

Trade secret law was previously almost entirely a matter of common law, but now almost all states have adopted a version of the Uniform Trade Secrets Act, and the federal Defend Trade Secrets Act of 2016 substantially incorporates the UTSA's definitions. To be protected as a trade secret, information must be valuable because it is secret. Canonical examples of trade secrets include chain restaurants' secret sauces, customer lists, business plans, manufacturing designs, information on the location of valuable resources like shipwrecks and oil fields, and inventions in the development stage before they are ready to be patented. (Because obtaining a patent involves extensive disclosure, it is impossible to have a patent and a trade secret on exactly the same information; one of the major strategic decisions inventors must make when they apply for a patent is how much to include in the application to obtain a stronger or broader patent, and how much to try to hold back as a trade secret.) In general, a defendant is liable only for obtaining a trade secret through "improper means." Breach of a duty of confidentiality is far and away the most common such means – such as when employees take company documents stamped "CONFIDENTIAL" with them to their new jobs at a competitor. More colorfully, industrial espionage, such as breaking into labs or hacking into computers, is also improper means. Note that trade secret law, like copyright law, protects only against infringers who obtain the secret information, directly or indirectly, from the owner: independent rediscovery of the same information is a complete defense. So is reverse engineering, in which a defendant takes publicly available information (including legally obtained copies of the owner's goods containing or made using with the trade secret) and studies it to understand how the secret works.

In addition to the patents discussed above (technically, "utility patents"), the federal government also issues **design patents** on "any new, original, and ornamental design for an article of manufacture" and **plant patents** for "any

distinct and new variety of plant.” Design patents have become big business, particularly in the technology world where the shape of a device and its user interface are crucial aspects in selling it to consumers. Apple, for example, sued Samsung for infringing several design patents on elements of the iPhone design in Figure 4.2.

Despite the name, it is highly controversial whether intellectual property should be considered a species of “property” at all. As you read the cases in this section, consider why advocates might want to embrace or deny that label, and what if anything is at stake. Also, pay close attention to the distinction between the intellectual property rights in an object and property rights in the object itself. (In copyright terms, this is the distinction between a “work” and a “copy” of the work.) These rights can overlap or conflict, and some of the most important doctrines of intellectual property law are devoted to sorting out these issues. Finally, consider the extent to which the fact that intellectual property rights deal with information raises distinctive free expression concerns. Are they different in kinds from the free expression concerns in a case like *Shack*?

4.1 Copyrights

Feist Publications, Inc. v. Rural Telephone Service Co.
499 U.S. 340 (1991)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of

charge to its subscribers, but earns revenue by selling yellow pages advertisements.

[Feist published a telephone directory, containing both white and yellow pages, covering a much larger geographic area. It contained 46,878 white-pages listings. Feist requested a license to Rural's listings; Rural refused.]

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. . . .

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently

created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. Id., § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. . . .

Originality is a constitutional requirement. The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.” In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U. S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (1884)—this Court defined the crucial terms “authors” and “writings.” In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. . . .

It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations. “No one may claim originality as to facts.” Nimmer, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . .

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. . . .

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the

same selection and arrangement. . . .

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement. . . .

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co.*, 281 F., at 88:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or *originality*, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

. . . Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U. S., at 563. But "sweat of the brow" courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. . . .

C

. . . In enacting the Copyright Act of 1976, Congress dropped the reference to "all the writings of an author" and replaced it with the phrase "original works of authorship." 17 U. S. C. § 102(a). . . .

As discussed earlier, however, the originality requirement [for compilations] is not particularly stringent. A compiler may settle upon a selec-

tion or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright. . . .

In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not “sweat of the brow,” is the touchstone of copyright protection in directories and other fact-based works. . . . The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101. . . .

III

. . . The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages are entirely typical. Persons desiring’ telephone service in Rural’s service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural’s selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural’s white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. Accordingly,

one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution. . . .

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'" *Baker v. Selden*, 101 U. S., at 105.

Notes and Questions

4.1. Even on a sweat-of-the-brow theory, there is a decent argument that Rural didn't have to sweat very much. But if originality rather than investment of labor is the basis for copyright protection, then some who labor will not be rewarded with a copyright. Take *Jeweler's Circular Publishing Co.*, quoted in *Feist*. The plaintiff published a 326-page directory of jewelers, *Trade-Marks of the Jewelry and Kindred Trades*. It obtained the information in the directory at great effort, by writing to a large number of jewelers. The defendant—according to the court, at least—skipped this work by copying from the plaintiff's book rather than by doing its own research. Presumably, after *Feist*, there is no copyright in books like *Trade-Marks of the Jewelry and Kindred Trades*. Does this result make sense? Without copyright, will telephone books and jewelers' directories cease to exist because no one will invest in creating them?

Castle Rock Entertainment v. Carol Publishing Group

150 F.3d 132 (2d Cir. 1998)

JOHN M. WALKER, Jr., Circuit Judge:

This case presents two interesting and somewhat novel issues of copyright law. The first is whether *The Seinfeld Aptitude Test*, a trivia quiz book devoted exclusively to testing its readers' recollection of scenes and events from the fictional television series *Seinfeld*, takes sufficient protected expression from the original, as evidenced by the book's substantial similarity to the television series, such that, in the absence of any defenses, the book would infringe the copyright in *Seinfeld*. The second is whether *The Seinfeld Aptitude Test* (also referred to as *The SAT*) constitutes fair use of the *Seinfeld* television series. . . .

We conclude that *The SAT* unlawfully copies from *Seinfeld* and that its copying does not constitute fair use and thus is an actionable infringement. Accordingly, we affirm the judgment in favor of Castle Rock.

Background

The material facts in this case are undisputed. Plaintiff Castle Rock is the producer and copyright owner of each episode of the *Seinfeld* television series. The series revolves around the petty tribulations in the lives of four single, adult friends in New York: Jerry Seinfeld, George Costanza, Elaine Benes, and Cosmo Kramer. Defendants are Beth Golub, the author, and Carol Publishing Group, Inc., the publisher, of *The SAT*, a 132-page book containing 643 trivia questions and answers about the events and characters depicted in *Seinfeld*. These include 211 multiple choice questions, in which only one out of three to five answers is correct; 93 matching questions; and a number of short-answer questions. The questions are divided into five levels of difficulty, labeled (in increasing order of difficulty) "Wuss Questions," "This, That, and the Other Questions," "Tough Monkey Questions," "Atomic Wedgie Questions," and "Master of Your Domain Questions." Selected examples from level 1 are indicative of the questions throughout *The SAT*:

1. To impress a woman, George passes himself off as
 - a) a gynecologist
 - b) a geologist
 - c) a marine biologist
 - d) a meteorologist

11. What candy does Kramer snack on while observing a surgical procedure from an operating-room balcony?
12. Who said, “I don’t go for those nonrefundable deals ... I can’t commit to a woman ... I’m not committing to an airline.”?
 - a) Jerry
 - b) George
 - c) Kramer

The book draws from 84 of the 86 *Seinfeld* episodes that had been broadcast as of the time *The SAT* was published. Although Golub created the incorrect answers to the multiple choice questions, every question and correct answer has as its source a fictional moment in a *Seinfeld* episode. Forty-one questions and/or answers contain dialogue from *Seinfeld*. The single episode most drawn upon by *The SAT*, “The Cigar Store Indian,” is the source of 20 questions that directly quote between 3.6% and 5.6% of that episode (defendants’ and plaintiffs’ calculations, respectively).

The name “*Seinfeld*” appears prominently on the front and back covers of *The SAT*, and pictures of the principal actors in *Seinfeld* appear on the cover and on several pages of the book. On the back cover, a disclaimer states that “This book has not been approved or licensed by any entity involved in creating or producing *Seinfeld*.” The front cover bears the title “*The Seinfeld Aptitude Test*” and describes the book as containing “[h]undreds of spectacular questions of minute details from TV’s greatest show about absolutely nothing.” The back cover asks:

Just how well do you command the buzz-words, peccadilloes, petty annoyances, and triflingly complex escapades of Jerry *Seinfeld*, Elaine Benes, George Costanza, and Kramer—the fabulously neurotic foursome that makes the offbeat hit TV series *Seinfeld* tick?

....

If you think you know the answers—and really keep track of *Seinfeld* minutiae—challenge yourself and your friends with these 550 trivia questions and 10 extra matching quizzes. No, *The Seinfeld Aptitude Test* can’t tell you whether you’re Master of Your Domain, but it will certify your status as King or Queen of *Seinfeld* trivia. So twist open a Snapple, double-dip a chip, and open this book to satisfy your between-episode cravings.

Golub has described The SAT as a “natural outgrowth” of Seinfeld which, “like the Seinfeld show, is devoted to the trifling, picayune and petty annoyances encountered by the show’s characters on a daily basis.” According to Golub, she created The SAT by taking notes from Seinfeld programs at the time they were aired on television and subsequently reviewing videotapes of several of the episodes, as recorded by her or various friends.

The SAT’s publication did not immediately provoke a challenge. The National Broadcasting Corporation, which broadcasted Seinfeld, requested free copies of The SAT from defendants and distributed them together with promotions for the program. Seinfeld’s executive producer characterized The SAT as “a fun little book.” There is no evidence that The SAT’s publication diminished Seinfeld’s profitability, and in fact Seinfeld’s audience grew after The SAT was first published.

Castle Rock has nevertheless been highly selective in marketing products associated with Seinfeld, rejecting numerous proposals from publishers seeking approval for a variety of projects related to the show. Castle Rock licensed one Seinfeld book, *The Entertainment Weekly Seinfeld Companion*, and has licensed the production of a CD-ROM product that includes discussions of Seinfeld episodes; the CD-ROM allegedly might ultimately include a trivia bank. Castle Rock claims in this litigation that it plans to pursue a more aggressive marketing strategy for Seinfeld-related products, including “publication of books relating to Seinfeld.”

In November 1994, Castle Rock notified defendants of its copyright and trademark infringement claims. In February 1995, after defendants continued to distribute The SAT, Castle Rock filed this action alleging federal copyright and trademark infringement and state law unfair competition. Subsequently, both parties moved, pursuant to Fed.R.Civ.P. 56, for summary judgment on both the copyright and unfair competition claims.

The district court granted summary judgment to Castle Rock on the copyright claim. It held that defendants had violated plaintiff’s copyrights in Seinfeld and that such copying did not constitute fair use. . . . The parties then stipulated to damages and attorneys’ fees on the copyright infringement claim and, presumably to facilitate the appeal, to the dismissal without prejudice of all remaining claims. . . . The district court entered final judgment on the copyright infringement claim, awarded Castle Rock \$403,000 with interest, permanently enjoined defendants from publishing or distributing The SAT, and ordered defendants to destroy all copies of

The SAT in their custody or control. Defendants now appeal.

II. Copyright Infringement

The Copyright Act of 1976 (“Copyright Act”), 17 U.S.C. §§ 101-803, grants copyright owners a bundle of exclusive rights, including the rights to “reproduce the copyrighted work in copies” and “to prepare derivative works based upon the copyrighted work.” *Id.* § 106. “Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying.” *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997); *see Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). There are two main components of this *prima facie* case of infringement: “a plaintiff must first show that his work was actually copied . . . [and] then must show that the copying amounts to an improper or unlawful appropriation.” *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992) (quotation marks and citations omitted). Actual copying may be established “either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony.” *Id.* at 140. . . . “It is only after actual copying is established that one claiming infringement” then proceeds to demonstrate that the copying was improper or unlawful by showing that the second work bears “substantial similarity” to protected expression in the earlier work. *Webber*, 132 F.3d at 889; *Laureyssens*, 964 F.2d at 140.

In the instant case, no one disputes that Castle Rock owns valid copyrights in the Seinfeld television programs and that defendants actually copied from those programs in creating The SAT. Golub freely admitted that she created The SAT by taking notes from Seinfeld programs at the time they were aired on television and subsequently reviewing videotapes of several of the episodes that she or her friends recorded. Since the fact of copying is acknowledged and undisputed, the critical question for decision is whether the copying was unlawful or improper in that it took a sufficient amount of protected expression from Seinfeld as evidenced by its substantial similarity to such expression.

A. “Substantial Similarity”

We have stated that “substantial similarity”

requires that the copying [be] quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement (*actionable* copying) has occurred. The qualitative component

concerns the copying of expression, rather than ideas [, facts, works in the public domain, or any other non-protectable elements] The quantitative component generally concerns the amount of the copyrighted work that is copied,

which must be more than “de minimis.” *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) (emphasis added).

As to the quantitative element, we conclude that The SAT has crossed the de minimis threshold. At the outset, we observe that the fact that the copying appears in question and answer form is by itself without particular consequence: the trivia quiz copies fragments of Seinfeld in the same way that a collection of Seinfeld jokes or trivia would copy fragments of the series. . . . Had The SAT copied a few fragments from each of 84 unrelated television programs (perhaps comprising the entire line-up on broadcast television), defendants would have a stronger case under the de minimis doctrine. By copying not a few but 643 fragments from the Seinfeld television series, however, The SAT has plainly crossed the quantitative copying threshold under *Ringgold*.

As to *Ringgold*’s qualitative component, each SAT trivia question is based directly upon original, protectable expression in Seinfeld. As noted by the district court, The SAT did not copy from Seinfeld unprotected facts, but, rather, creative expression. Cf. *Feist*, 499 U.S. at 364 (finding no infringement where defendant produced a multi-county phone directory, in part, by obtaining names and phone numbers from plaintiffs’ single-county directory). Unlike the facts in a phone book, which “do not owe their origin to an act of authorship,” *id.* at 347, each “fact” tested by The SAT is in reality fictitious expression created by Seinfeld’s authors. The SAT does not quiz such true facts as the identity of the actors in Seinfeld, the number of days it takes to shoot an episode, the biographies of the actors, the location of the Seinfeld set, etc. Rather, The SAT tests whether the reader knows that the character Jerry places a Pez dispenser on Elaine’s leg during a piano recital, that Kramer enjoys going to the airport because he’s hypnotized by the baggage carousels, and that Jerry, opining on how to identify a virgin, said “It’s not like spotting a toupee.” Because these characters and events spring from the imagination of Seinfeld’s authors, The SAT plainly copies copyrightable, creative expression.

We find support for this conclusion in a previous case in which we held that a series of still photographs of a ballet may in some cases infringe

the copyright in an original choreographic work. *See Horgan v. Macmillan, Inc.*, 789 F.2d 157, 163 (2d Cir. 1986). The defendants in *Horgan* claimed that still photographs could not “capture the flow of movement, which is the essence of dance,” that “the staged performance could not be recreated from the photographs,” and thus, that the photographs were not substantially similar to the choreographic work. *Id.* at 161-62 (quotation marks omitted). Although noting that the issue “was not a simple one,” this court rejected that argument, holding that “the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is substantially similar to the former.” *Id.* at 162 (quotation marks omitted). That observation applies with equal force to the trivia quiz fragments in this case. Although *Seinfeld* could not be “recreated” from *The SAT*, Castle Rock has nevertheless established both the quantitative and qualitative components of the substantial similarity test, establishing a *prima facie* case of copyright infringement.

B. Other Tests

As defendants note, substantial similarity usually “arises out of a claim of infringement as between comparable works . . . [where] because of the equivalent nature of the competing works, the question of similarity can be tested conventionally by comparing comparable elements of the two works.” Because in the instant case the original and secondary works are of different genres and to a lesser extent because they are in different media, tests for substantial similarity other than the quantitative/qualitative approach are not particularly helpful to our analysis.

Under the “ordinary observer” test, for example, “[t]wo works are substantially similar where ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same.’” *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.) (comparing dress designs)) (alterations in original). Undoubtedly, Judge Hand did not have in mind a comparison of aesthetic appeal as between a television series and a trivia quiz and, in the usual case, we might question whether any “ordinary observer” would “regard [the] aesthetic appeal” in a situation-comedy television program as being identical to that of any book, let alone a trivia quiz book, about that program. Cf. *Laureyssens*, 964 F.2d at 132,

141 (applying “ordinary observer” test to compare two sets of foam rubber puzzles). We note here, however, that plaintiff has a plausible claim that there is a common aesthetic appeal between the two works based on The SAT’s plain copying of Seinfeld and Golub’s statement on the back cover that the book was designed to complement the aesthetic appeal of the television series. See The SAT (“So twist open a Snapple, double-dip a chip, and open this book to satisfy your between episode cravings.”).

Under the “total concept and feel” test, urged by defendants, we analyze “the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting” of the original and the allegedly infringing works. *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (comparing children’s books with novel and movie); *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976) (comparing children’s book with story in Sesame Street Magazine). Defendants contend that The SAT and the Seinfeld programs are incomparable in conventional terms such as plot, sequence, themes, pace, and setting. For example, The SAT has no plot; “[t]he notion of pace . . . cannot be said even to exist in the book”; The SAT’s “sequence has no relationship to the sequences of any of the Seinfeld episodes, since it is a totally random and scattered collection of questions relating to events that occurred in the shows”; and The SAT’s only theme “is how much a Seinfeld fan can remember of 84 different programs.” The total concept and feel test, however, is simply not helpful in analyzing works that, because of their different genres and media, must necessarily have a different concept and feel. Indeed, many “derivative” works of different genres, in which copyright owners have exclusive rights, see 17 U.S.C. § 106, may have a different total concept and feel from the original work. . . .

The SAT easily passes the threshold of substantial similarity between the contents of the secondary work and the protected expression in the original.

III. Fair Use

Defendants claim that, even if The SAT’s copying of Seinfeld constitutes *prima facie* infringement, The SAT is nevertheless a fair use of Seinfeld. “From the infancy of copyright protection,” the fair use doctrine “has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., art. I, § 8, cl. 8). As

noted in *Campbell*, “in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Id.* (quotation marks omitted). Until the 1976 Copyright Act, the doctrine of fair use grew exclusively out of the common law. See *id.* at 576; *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (Story, J.) (stating fair use test); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1105 (1990) (“Leval”).

In the Copyright Act, Congress restated the common law tradition of fair use:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. This section “intended that courts continue the common law tradition of fair use adjudication” and “permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Campbell*, 510 U.S. at 577 (quotation marks omitted). Fair use analysis, therefore, always “calls for case-by-case analysis.” *Id.* The fair use examples provided in § 107 are “illustrative and not limitative” and “provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.” *Id.* at 577-78. Similarly, the four listed statutory factors in § 107 guide but do not control our fair use analysis and “are

to be explored, and the results weighed together, in light of the purposes of copyright.” *Id.*; see 4 Nimmer § 13.05[A], at 13-153 (“[T]he factors contained in Section 107 are merely by way of example, and are not an exhaustive enumeration.”). The ultimate test of fair use, therefore, is whether the copyright law’s goal of “promot[ing] the Progress of Science and useful Arts,” U.S. Const., art. I, § 8, cl. 8, “would be better served by allowing the use than by preventing it.” *Arica*, 970 F.2d at 1077.

A. Purpose/Character of Use

The first fair use factor to consider is “the purpose and character of the [allegedly infringing] use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). That The SAT’s use is commercial, at most, “tends to weigh against a finding of fair use.” *Campbell*, 510 U.S. at 585 (quotation marks omitted); *Texaco*, 60 F.3d at 921. But we do not make too much of this point. As noted in *Campbell*, “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research ... are generally conducted for profit in this country,” 510 U.S. at 584 (quotation marks omitted), and “no man but a blockhead ever wrote, except for money,” *id.* (quoting 3 Boswell’s *Life of Johnson* 19 (G. Hill ed. 1934)). We therefore do not give much weight to the fact that the secondary use was for commercial gain.

The more critical inquiry under the first factor and in fair use analysis generally is whether the allegedly infringing work “merely supersedes” the original work “or instead adds something new, with a further purpose or different character, altering the first with new . . . meaning [] or message,” in other words “whether and to what extent the new work is ‘transformative.’” *Id.* at 579, (quoting Leval at 1111). If “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” Leval at 1111. In short, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Campbell*, 510 U.S. at 579.

Defendants claim two primary “transformative” qualities of The SAT. First, as noted by the district court, “a text testing one’s knowledge of Joyce’s Ulysses, or Shakespeare’s Hamlet, would qualify as ‘criticism, com-

ment, scholarship, or research,’ or such. The same must be said, then, of a text testing one’s knowledge of Castle Rock’s *Seinfeld*.” *Castle Rock*, 955 F. Supp. at 268 (citing *Twin Peaks*, 996 F.2d at 1374 (“A comment is as eligible for fair use protection when it concerns ‘Masterpiece Theater’ and appears in the New York Review of Books as when it concerns ‘As the World Turns’ and appears in Soap Opera Digest.”)). In other words, the fact that the subject matter of the quiz is plebeian, banal, or ordinary stuff does not alter the fair use analysis. Criticism, comment, scholarship, research, and other potential fair uses are no less protectable because their subject is the ordinary.

Second, defendants style The SAT as a work “decod[ing] the obsession with ... and mystique that surround[s] ‘Seinfeld,’” by “critically restruktur[ing] [Seinfeld’s mystique] into a system complete with varying levels of ‘mastery’ that relate the reader’s control of the show’s trivia to knowledge of and identification with their hero, Jerry Seinfeld.” Citing one of their own experts for the proposition that “[t]he television environment cannot speak for itself but must be spoken for and about,” defendants argue that “The SAT is a quintessential example of critical text of the TV environment . . . expos[ing] all of the show’s nothingness to articulate its true motive forces and its social and moral dimensions.” (Quotation marks omitted). Castle Rock dismisses these arguments as post hoc rationalizations, claiming that had defendants been half as creative in creating The SAT as were their lawyers in crafting these arguments about transformation, defendants might have a colorable fair use claim.

Any transformative purpose possessed by The SAT is slight to non-existent. We reject the argument that The SAT was created to educate *Seinfeld* viewers or to criticize, “expose,” or otherwise comment upon *Seinfeld*. The SAT’s purpose, as evidenced definitively by the statements of the book’s creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers. The SAT’s back cover makes no mention of exposing *Seinfeld* to its readers, for example, as a pitifully vacuous reflection of a puerile and pervasive television culture, but rather urges SAT readers to “open this book to satisfy [their] between-episode [Seinfeld] cravings.” Golub, The SAT’s author, described the trivia quiz book not as a commentary or a *Seinfeld* research tool, but as an effort to “capture *Seinfeld*’s flavor in quiz book fashion.” Finally, even viewing The SAT in the light most favorable to defendants, we find scant reason to conclude that this trivia quiz book seeks to educate, criticize, parody, comment, report upon, or

research Seinfeld, or otherwise serve a transformative purpose. The book does not contain commentary or analysis about Seinfeld, nor does it suggest how The SAT can be used to research Seinfeld; rather, the book simply poses trivia questions. The SAT's plain purpose, therefore, is not to expose Seinfeld's "nothingness," but to satiate Seinfeld fans' passion for the "nothingness" that Seinfeld has elevated into the realm of protectable creative expression.

Although a secondary work need not necessarily transform the original work's expression to have a transformative purpose, see, e.g., 4 Nimmer § 13.05[D][2], at 13-227-13-228 (discussing reproduction of entire works in judicial proceedings), the fact that The SAT so minimally alters Seinfeld's original expression in this case is further evidence of The SAT's lack of transformative purpose. To be sure, the act of testing trivia about a creative work, in question and answer form, involves some creative expression. While still minimal, it does require posing the questions and hiding the correct answer among three or four incorrect ones. Also, dividing the trivia questions into increasing levels of difficulty is somewhat more original than arranging names in a telephone book in alphabetical order. *See Feist*, 499 U.S. at 362-63. The SAT's incorrect multiple choice answers are also original. However, the work as a whole, drawn directly from the Seinfeld episodes without substantial alteration, is far less transformative than other works we have held not to constitute fair use. See, e.g., *Twin Peaks*, 996 F.2d at 1378 (book about Twin Peaks television series that discusses show's popularity, characters, actors, plots, creator, music, and poses trivia questions about show held not to be fair use). . . .

B. Nature of the Copyrighted Work

The second statutory factor, "the nature of the copyrighted work," 17 U.S.C. § 107(2), "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586. Defendants concede that the scope of fair use is somewhat narrower with respect to fictional works, such as Seinfeld, than to factual works. *See Stewart v. Abend*, 495 U.S. 207 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works"); *Twin Peaks*, 996 F.2d at 1376 (second factor "favor[s] . . . creative and fictional work"). Although this factor may be of less (or even of no) importance when assessed in the context of certain transformative uses, see,

e.g., *Campbell*, 510 U.S. at 586 (creative nature of original “Pretty Woman” song “not much help” to fair use analysis “since parodies almost invariably copy . . . expressive works”), the fictional nature of the copyrighted work remains significant in the instant case, where the secondary use is at best minimally transformative. Thus, the second statutory factor favors the plaintiff.

C. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

As a preliminary matter, the district court held that its determination that The SAT is substantially similar to *Seinfeld* “should suffice for a determination that the third fair use factor favors the plaintiff.” *Castle Rock*, 955 F. Supp. at 269-70 (quoting *Twin Peaks*, 996 F.2d at 1377). However, because secondary users need invoke the fair use defense only where there is substantial similarity between the original and allegedly infringing works, and thus actionable copying, the district court’s analysis is of little if any assistance. Under the district court’s analysis, the third fair use factor would always and unfairly favor the original copyright owner claiming no fair use. See 4 Nimmer § 13.05[A], at 13-152 (“[F]air use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial.”).

In *Campbell*, a decision post-dating *Twin Peaks*, the Supreme Court clarified that the third factor—the amount and substantiality of the portion of the copyrighted work used—must be examined in context. The inquiry must focus upon whether “[t]he extent of . . . copying” is consistent with or more than necessary to further “the purpose and character of the use.” 510 U.S. at 586-87; see *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (reproduction of entire work “does not have its ordinary effect of militating against a finding of fair use” as to home videotaping of television programs); *Harper & Row*, 471 U.S. at 564 (“[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech” but not in a scoop of a soon-to-be-published memoir.). “[B]y focussing [sic] on the amount and substantiality of the original work used by the secondary user, we gain insight into the purpose and character of the use as we consider whether the quantity of the material used was reasonable in relation to the purpose of the copying.” *Texaco*, 60 F.3d at 926 (quotation marks omitted). In *Campbell*, for example, the Supreme Court determined that a “parody must be able

to ‘conjure up’ at least enough of [the] original [work] to make the object of its critical wit recognizable” and then determined whether the amount used of the original work was “no more than necessary” to satisfy the purpose of parody. 510 U.S. at 588-89.

In the instant case, it could be argued that The SAT could not expose Seinfeld’s “nothingness” without repeated, indeed exhaustive examples deconstructing Seinfeld’s humor, thereby emphasizing Seinfeld’s meaninglessness to The SAT’s readers. That The SAT posed as many as 643 trivia questions to make this rather straightforward point, however, suggests that The SAT’s purpose was entertainment, not commentary. Such an argument has not been advanced on appeal, but if it had been, it would not disturb our conclusion that, under any fair reading, The SAT does not serve a critical or otherwise transformative purpose. Accordingly, the third factor weighs against fair use.

D. Effect of Use Upon Potential Market for or Value of Copyrighted Work

Defendants claim that the fourth factor favors their case for fair use because Castle Rock has offered no proof of actual market harm to Seinfeld caused by The SAT. To the contrary, Seinfeld’s audience grew after publication of The SAT, and Castle Rock has evidenced no interest in publishing Seinfeld trivia quiz books and only minimal interest in publishing Seinfeld-related books. . . .

In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps or substitutes for the market of the original work. *Id.* at 593. The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original. *Id.* at 591. As noted by the district court, “[b]y the very nature of [transformative] endeavors, persons other than the copyright holder are undoubtedly better equipped, and more likely, to fill these particular market and intellectual niches.” *Castle Rock*, 955 F. Supp. at 271. And yet the fair use, being transformative, might well harm, or even destroy, the market for the original. See *Campbell*, 510 U.S. at 591-92 (“[A] lethal parody, like a scathing theater review, kills demand for the original, [but] does not produce a harm cognizable under the Copyright Act.”); *New Era Publications*, 904 F.2d at 160 (“a critical biography serves a different function than does an authorized, favorable biography, and thus injury to the potential market for the favorable biography by the publication of

the unfavorable biography does not affect application of factor four").

Unlike parody, criticism, scholarship, news reporting, or other transformative uses, The SAT substitutes for a derivative market that a television program copyright owner such as Castle Rock "would in general develop or license others to develop." *Campbell*, 510 U.S. at 592. Because The SAT borrows exclusively from Seinfeld and not from any other television or entertainment programs, The SAT is likely to fill a market niche that Castle Rock would in general develop. Moreover, as noted by the district court, this "Seinfeld trivia game is not critical of the program, nor does it parody the program; if anything, SAT pays homage to Seinfeld." *Castle Rock*, 955 F. Supp. at 271-72. Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on Seinfeld, such as by creating and publishing Seinfeld trivia books (or at least trivia books that endeavor to "satisfy" the "between-episode cravings" of Seinfeld lovers), the copyright law must respect that creative and economic choice. "It would . . . not serve the ends of the Copyright Act—i.e., to advance the arts—if artists were denied their monopoly over derivative versions of their creative works merely because they made the artistic decision not to saturate those markets with variations of their original." *Castle Rock*, 955 F. Supp. at 272; see Salinger, 811 F.2d at 99 ("The need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."). The fourth statutory factor therefore favors Castle Rock.

E. Other Factors

As we have noted, the four statutory fair use factors are non-exclusive and serve only as a guide to promote the purposes underlying the copyright law. One factor that is of no relevance to the fair use equation, however, is defendants' continued distribution of The SAT after Castle Rock notified defendants of its copyright infringement claim, because "[i]f the use is otherwise fair, then no permission need be sought or granted . . . [B]eing denied permission to use a work does not weigh against a finding of fair use." *Campbell*, 510 U.S. at 585 n.18; see Wright, 953 F.2d at 737 (rejecting as irrelevant to fair use analysis argument that defendant failed to get plaintiff's permission to create work).

We also note that free speech and public interest considerations are of little relevance in this case, which concerns garden-variety infringement of creative fictional works. See 4 Nimmer § 13.05[B][4], at 13-205 ("The pub-

lic interest is also a factor that continually informs the fair use analysis."); *cf. Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (discussing importance of access to information about President Kennedy assassination in fair use analysis of home video of assassination).

F. Aggregate Assessment

Considering all of the factors discussed above, we conclude that the copyright law's objective “[t]o promote the Progress of Science and useful Arts” would be undermined by permitting The SAT's copying of Seinfeld, *see Arica*, 970 F. 2d at 1077, and we therefore reject defendants' fair use defense. . . .

Notes and Questions

4.2. *Castle Rock* illustrates two essential copyright doctrines: the substantial similarity test for infringement and the fair use defense. Compare them with the tests used in real- and personal-property torts like trespass, nuisance, and conversion. Which of them are more definite and which are more open-ended? What might account for the difference? Land has definite boundaries; what are the “boundaries” of a copyrighted work?

4.3. Fair use comes in many forms. Examples of uses protected as fair uses include 2 Live Crew's filthy cover rap version of the Roy Orbison song “Oh, Pretty Woman,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), a retelling of Gone With the Wind from the slaves' point of view, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), using a VCR to record live over-the-air TV shows to watch them later, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 451 (1984), making digital copies of physical books to create a search engine, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), quoting from an author's works as part of a critical biography, *New Era Publications Intl. v. Carol Pub. Group*, 904 F.2d 152 (2d. Cir. 1990), reproducing Grateful Dead concert posters as part of a timeline in a coffee-table book about the band's history, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d. Cir. 2006), and making copies of a work to be used as evidence in a lawsuit, *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982). Is there any unifying principle tying together such disparate uses?

UMG Recordings, Inc. v. Augusto
628 F. 3d 1175 (9th Cir. 2011)

CANBY, Circuit Judge:

The material facts of the case are undisputed. UMG is among the world's largest music companies. One of its core businesses is the creation, manufacture, and sale of recorded music, or phonorecords, the copyrights of which are owned by UMG. These phonorecords generally take the form of compact discs ("CDs").

Like many music companies, UMG ships specially-produced promotional CDs to a large group of individuals ("recipients"), such as music critics and radio programmers, that it has selected. There is no prior agreement or request by the recipients to receive the CDs. UMG does not seek or receive payment for the CDs, the content and design of which often differs from that of their commercial counterparts. UMG ships the promotional CDs by means of the United States Postal Service and United Parcel Service. Relatively few of the recipients refuse delivery of the CDs or return them to UMG, and UMG destroys those that are returned.

Most of the promotional CDs in issue in this case bore a statement (the "promotional statement") similar to the following:

This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.

Some of the CDs bore a more succinct statement, such as "Promotional Use Only—Not for Sale."

Augusto was not among the select group of individuals slated to receive the promotional CDs. He nevertheless managed to acquire numerous such CDs, many of which he sold through online auctions at eBay.com. Augusto regularly advertised the CDs as "rare ... industry editions" and referred to them as "Promo CDs."

After several unsuccessful attempts at halting the auctions through eBay's dispute resolution program, UMG filed a complaint against Augusto in the United States District Court for the Central District of California, alleging that Augusto had infringed UMG's copyrights in eight promotional CDs for which it retained the "exclusive right to distribute." The district

court granted summary judgment in favor of Augusto, and UMG appealed.

....

Although UMG, as the owner of the copyright, has exclusive rights in the promotional CDs, “[e]xemptions, compulsory licenses, and defenses found in the Copyright Act narrow [those] rights.” *Wall Data Inc. v. Los Angeles Cnty. Sheriff’s Dept.*, 447 F.3d 769, 777 (9th Cir. 2006). Augusto invokes the “first sale” doctrine embodied in § 109(a) of the Act. 17 U.S.C. § 109(a). He argues that the circumstances attending UMG’s distribution of the discs effected a “sale” (transfer of ownership) of the discs to the original recipients and that, under the “first sale” doctrine, the recipients and subsequent owners of those particular copies were permitted to sell or otherwise dispose of those copies without authorization by the copyright holder.

UMG, on the other hand, contends that the promotional statement effected a license with the recipients and, because the recipients were not owners but licensees of the CDs, neither they nor Augusto were entitled to sell or otherwise transfer the CDs.

The first sale doctrine provides that “the owner of a particular copy or phonorecord lawfully made under [the Act], or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a). Notwithstanding its distinctive name, the doctrine applies not only when a copy is first sold, but when a copy is given away or title is otherwise transferred without the accouterments of a sale. The seminal illustration of the principle is found in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), where a copyright owner unsuccessfully attempted to restrain the resale of a copyrighted book by including in it the following notice: “The price of this book at retail is \$1 net. No dealer is licensed to sell it at a less price, and a sale at less price will be treated as an infringement of the copyright.” The Court noted that the statutory grant to a copyright owner of the “sole right of vending” the work did not continue after the first sale of a given copy.. “The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.” The attempt to limit resale below a certain price was therefore held invalid.

The rule of *Bobbs-Merrill* remains in full force, enshrined as it is in § 109(a) of the Act: a copyright owner who transfers title in a particular copy to a purchaser or donee cannot prevent resale of that particular copy. We

have recognized, however, that not every transfer of possession of a copy transfers title. Particularly with regard to computer software, we have recognized that copyright owners may create licensing arrangements so that users acquire only a license to use the particular copy of software and do not acquire title that permits further transfer or sale of that copy without the permission of the copyright owner. . . .

The same question is presented here. Did UMG succeed in creating a license in recipients of its promotional CDs, or did it convey title despite the restrictive labeling on the CDs? We conclude that, under all the circumstances of the CDs' distribution, the recipients were entitled to use or dispose of them in any manner they saw fit, and UMG did not enter a license agreement for the CDs with the recipients. Accordingly, UMG transferred title to the particular copies of its promotional CDs and cannot maintain an infringement action against Augusto for his subsequent sale of those copies.

Our conclusion that the recipients acquired ownership of the CDs is based largely on the nature of UMG's distribution. First, the promotional CDs are dispatched to the recipients without any prior arrangement as to those particular copies. The CDs are not numbered, and no attempt is made to keep track of where particular copies are or what use is made of them. As explained in greater detail below, although UMG places written restrictions in the labels of the CDs, it has not established that the restrictions on the CDs create a license agreement.

We also hold that, because the CDs were unordered merchandise, the recipients were free to dispose of them as they saw fit under the Unordered Merchandise Statute, 39 U.S.C. § 3009, which provides in pertinent part that,

(a) [e]xcept for ... free samples clearly and conspicuously marked as such,... the mailing of unordered merchandise... constitutes an unfair method of competition and an unfair trade practice....

(b) Any merchandise mailed in violation of subsection (a) of this section ... may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. . . .

Id. § 3009(a), (b) (emphasis added). The statute defines "unordered merchandise" as "merchandise mailed without the prior expressed request or consent of the recipient" but leaves "merchandise" itself undefined. *Id.* § 3009(d). Although the statute applies in terms to "mailed" mer-

chandise, the Federal Trade Commission has applied its prohibitions to other types of shipment, as violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. See 43 Fed.Reg. 4113 (Jan. 31, 1978). . . .

There are additional reasons for concluding that UMG's distribution of the CDs did not involve a consensual licensing operation. Some of the statements on the CDs and UMG's purported method of securing agreement to licenses militate against a conclusion that any licenses were created. The sparest promotional statement, "Promotional Use Only—Not for Sale," does not even purport to create a license. But even the more detailed statement is flawed in the manner in which it purports to secure agreement from the recipient. The more detailed statement provides:

This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.

It is one thing to say, as the statement does, that "acceptance" of the CD constitutes an agreement to a license and its restrictions, but it is quite another to maintain that "acceptance" may be assumed when the recipient makes no response at all. This record reflects no responses. Even when the evidence is viewed in the light most favorable to UMG, it does not show that any recipients agreed to enter into a license agreement with UMG when they received the CDs.

Because the record here is devoid of any indication that the recipients agreed to a license, there is no evidence to support a conclusion that licenses were established under the terms of the promotional statement. Accordingly, we conclude that UMG's transfer of possession to the recipients, without meaningful control or even knowledge of the status of the CDs after shipment, accomplished a transfer of title. . . .

Because we conclude that UMG's method of distribution transferred the ownership of the copies to the recipients, we have no need to parse the remaining provisions in UMG's purported licensing statement; UMG dispatched the CDs in a manner that permitted their receipt and retention by the recipients without the recipients accepting the terms of the promotional statements. UMG's transfer of unlimited possession in the circumstances present here effected a gift or sale within the meaning of the first sale doctrine, as the district court held. . . .

Notes and Questions

4.4. The first sale doctrine draws a sharp distinction between ownership of a *work* (which remains in UMG) and ownership of a *copy* of that work (which passes to the recipients, thence to Augusto, thence to his eBay buyers). Every major body of intellectual property law has a similar doctrine: the intellectual property rights holder's rights over a particular item end when it gives up its personal property rights in the item. Because of this, it depends heavily on the law of personal property to define who is an "owner" of that item.

4.5. Do you see why libraries would be impossible without first sale? The market for used books, records, and DVDs depends on it. Publishers, for their part, can be more ambivalent about it. In the summer of 2014, the law school casebook publisher WoltersKluwer announced a program called "Connected Casebook" under which students would buy discounted access to online versions of their casebooks. Participating students would receive a paper copy of the casebook for use in the class, but would be required to return the book at the end of the semester. What effects would this have on the used-book market? On students' first sale rights?

Capitol Records, Inc. v. Thomas-Rasset
692 F.3d 899 (8th. Cir. 2012)

COLLOTON, Circuit Judge.

This appeal arises from a dispute between several recording companies and Jammie Thomas-Rasset. There is a complicated procedural history involving three jury trials, but for purposes of appeal, it is undisputed that Thomas-Rasset willfully infringed copyrights of twenty-four sound recordings by engaging in file-sharing on the Internet.

[The Copyright Act makes it an act of infringement to "reproduce" a copyrighted work, 17 U.S.C. § 106(1), or to "distribute copies or phonorecords of the copyrighted work to the public," *id.* § 106(3). A court may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright," *id.* § 502(a). As for damages, "The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." *Id.* § 504(b). A victorious copyright owner may, however, "elect, at any time before final

judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.” *Id.* § 504(c)(1). This amount may be increased up to \$150,000 per infringed work “where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully,” *id.* § 504(c)(2), or decreased down to \$200 per infringed work “where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” *id.*

The court conducted three jury trials. All three found Thomas-Rasset liable. For reasons discussed below, the court entered an injunction against further infringement but reduced the third jury’s award to \$54,000 in statutory damages.]

The companies appeal two aspects of the remedy ordered by the district court. They object to the district court’s ruling on damages, and they seek an award of \$222,000, which was the amount awarded by the jury in the first trial. They also seek a broader injunction that bars Thomas-Rasset from making any of their sound recordings available to the public. . . . In a cross-appeal, Thomas-Rasset argues that *any* award of statutory damages is unconstitutional, and urges us to vacate the award of damages altogether.

I.

Capitol Records, Inc., Sony BMG Music Entertainment, Arista Records LLC, Interscope Records, Warner Bros. Records, and UMG Recordings, Inc., are recording companies that own the copyrights to large catalogs of music recordings. In 2005, they undertook to investigate suspected infringement of these copyrights. MediaSentry, an online investigative firm hired by the recording companies, discovered that an individual with the username “tereastarr” was participating in unauthorized file sharing on the peer-to-peer network KaZaA.

During the relevant time period, KaZaA was a file-sharing computer program that allowed its users to search for and download specific files from other users. KaZaA users shared files using a share folder. A share folder is a location on the user’s computer in which the user places files — such as audio or video recordings — that she wants to make available for other users to download. KaZaA allowed its users to access other users’

share folders, view the files in the folder, and download copies of files from the folder.

MediaSentry accessed tereastarr's share folder. The investigative firm determined that the user had downloaded copyrighted songs and was making those songs available for download by other KaZaA users. MediaSentry took screen shots of tereastarr's share folder, which included over 1,700 music files, and downloaded samples of the files. But MediaSentry was unable to collect direct evidence that other users had downloaded the files from tereastarr. MediaSentry then used KaZaA to send two instant messages to tereastarr, notifying the user of potential copyright infringement. Tereastarr did not respond to the messages. MediaSentry also determined tereastarr's IP address, and traced the address to an Internet service account in Duluth, Minnesota, provided by Charter Communications. MediaSentry compiled this data in a report that it prepared for the recording companies.

Using the information provided by MediaSentry, the recording companies, through the Recording Industry Association of America (RIAA), issued a subpoena to Charter Communications requesting the name of the person associated with tereastarr's IP address. Charter informed the RIAA that the IP address belonged to Jammie Thomas-Rasset. The RIAA then sent a letter to Thomas-Rasset informing her that she had been identified as engaging in unauthorized trading of music and inviting her to contact them to discuss the situation and settle the matter. Thomas-Rasset contacted the RIAA as directed in the letter and engaged in settlement conversations with the organization. The parties were unable to resolve the matter.

In 2006, the recording companies sued Thomas-Rasset, seeking statutory damages and injunctive relief for willful copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.* They alleged that Thomas-Rasset violated their exclusive right to reproduction and distribution under 17 U.S.C. § 106 by impermissibly downloading, distributing, and making available for distribution twenty-four copyrighted sound recordings. . . .

A jury trial was held in October 2007. At trial, Thomas-Rasset conceded that "tereastarr" is a username that she uses regularly for Internet and computer accounts. She admitted familiarity with and interest in some of the artists of works found in the tereastarr KaZaA account. She also acknowledged that she wrote a case study during college on the legality

of Napster — another peer-to-peer file sharing program — and knew that Napster was shut down because it was illegal. Nonetheless, Thomas-Rasset testified that she had never heard of KaZaA before this case, did not have KaZaA on her computer, and did not use KaZaA to download files. The jury also heard evidence from a forensic investigator that Thomas-Rasset removed and replaced the hard drive on her computer with a new hard drive after investigators notified her of her potential infringement. The new hard drive did not contain the files at issue.

[The court instructed the jury it could find Thomas-Rasset liable for “making available” the plaintiffs’ songs by for download by other users placing MP3 files in her shared folder on the KaZaA filesharing network, whether or not the plaintiffs showed that anyone else had actually downloaded them. The jury found her liable and awarded \$222,000 in damages.]

Several months later, the district court *sua sponte* raised the issue whether it erred by instructing the jury that making sound recordings available for distribution on a peer-to-peer network violates a copyright owners’ exclusive right to distribution, “regardless of whether actual distribution has been shown.” The parties filed supplemental briefs in which the recording companies defended the court’s instruction and Thomas-Rasset argued that the court erred when it instructed the jury on the “making available” issue. After a hearing, the district court granted Thomas-Rasset’s motion for a new trial on this alternative ground, holding that making a work available to the public is not “distribution” under 17 U.S.C. § 106(3). The issue whether making copyrighted works available to the public is a right protected by § 106(3) has divided the district courts. *Compare, e.g., Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-84 (D. Ariz. 2008), and *London-Sire Records v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008), with *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007), and *Warner Bros. Records, Inc., v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006).

The district court convened a second trial in June 2009, at which the recording companies produced substantially the same evidence of Thomas-Rasset’s liability. At this trial, however, Thomas-Rasset attempted to deflect responsibility by suggesting for the first time that her children and former boyfriend might have done the downloading and file-sharing attributed to the “tereastarr” username. The court again instructed the jury that reproduction or distribution constituted copyright infringement. But this time, the court omitted reference to making works available and

instructed the jury that “[t]he act of distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners, violates the copyright owners’ exclusive distribution right.” The jury again found Thomas-Rasset liable for willful infringement, and awarded the recording companies statutory damages of \$80,000 per work, for a total of \$1,920,000.

Following the second trial, Thomas-Rasset filed a post-trial motion in which she argued that any statutory damages award would be unconstitutional in her case, but in the alternative that the court should reduce the jury’s award either through remittitur or based on the Due Process Clause. The district court declined to rule on the constitutional issue and instead remitted damages to \$2,250 per work, for a total of \$54,000, on the ground that the jury’s award was “shocking.” The recording companies declined the remitted award and exercised their right to a new trial on damages.

A third trial was held in November 2010, and the only question for the jury was the amount of statutory damages. The jury awarded the recording companies statutory damages of \$62,500 per work, for a total of \$1,500,000.

Thomas-Rasset then moved to alter or amend the judgment, again arguing that any statutory damages award would be unconstitutional, but alternatively that the district court should reduce the award under the Due Process Clause. The district court, relying in part on the now-vacated decision in *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010), vacated in relevant part by, 660 F.3d 487 (1st Cir. 2011), granted Thomas-Rasset’s motion and reduced the award to \$2,250 per work, for a total of \$54,000. The court ruled that this amount was the maximum award permitted by the Due Process Clause. The district court also entered a permanent injunction against Thomas-Rasset, but refused to include language enjoining her from “making available” copyrighted works for distribution to the public.

The recording companies appeal the judgment of the district court, arguing that the district court erred in (1) granting a new trial based on the “making available” instruction in the first trial, and (2) holding that the Due Process Clause limits statutory damages to \$2,250 per infringed work. They request that we reinstate and affirm the first jury’s \$222,000 award, and remand with instructions to grant an injunction prohibiting Thomas-Rasset from making the copyrighted works available to the public. Thomas-Rasset cross-appeals, arguing that even an award of the minimum statutory damages authorized by the Copyright Act would be uncon-

stitutional. . . .

II.

. . . .

For the reasons set forth below, we conclude that when the district court entered judgment after the verdict in the third trial, the court should have enjoined Thomas-Rasset from making copyrighted works available to the public, whether or not that conduct by itself violates rights under the Copyright Act. We also conclude that statutory damages of at least \$222,000 were constitutional, and that the district court erred in holding that the Due Process Clause allowed statutory damages of only \$54,000. We therefore will vacate the district court's judgment and remand with directions to enter a judgment that includes those remedies. . . .

A.

After the third trial, the district court entered an injunction that prohibits Thomas-Rasset from "using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, or to distribute (*i.e.*, upload) any of Plaintiff's Recordings." The recording companies urged the district court to amend the judgment to enjoin Thomas-Rasset from making any of their sound recordings available for distribution to the public through an online media distribution system. The district court declined to do so on the ground that the Copyright Act does not provide an exclusive right to making recordings available. The court further reasoned that the injunction as granted was adequate to address the concerns of the companies. We review the grant or denial of a permanent injunction for abuse of discretion. *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 649 (8th Cir. 1996). "Abuse of discretion occurs if the district court reaches its conclusion by applying erroneous legal principles or relying on clearly erroneous factual findings." *Id.*

We conclude that the district court's ruling was based on an error of law. Even assuming for the sake of analysis that the district court's ruling on the scope of the Copyright Act was correct, a district court has authority to issue a broad injunction in cases where "a proclivity for unlawful conduct has been shown." See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). The district court is even permitted to "enjoin certain otherwise lawful conduct" where "the defendant's conduct has demonstrated that prohibiting only unlawful conduct would not effectively protect the

plaintiff's rights against future encroachment." *Russian Media Grp., LLC v. Cable America, Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) (citing authorities). If a party has violated the governing statute, then a court may in appropriate circumstances enjoin conduct that allowed the prohibited actions to occur, even if that conduct "standing alone, would have been unassailable." *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994) (internal quotation omitted).

Thomas-Rasset's willful infringement and subsequent efforts to conceal her actions certainly show "a proclivity for unlawful conduct." The recording companies rightly point out that once Thomas-Rasset makes copyrighted works available on an online media distribution system, she has completed all of the steps necessary for her to engage in the same distribution that the court did enjoin. The record also demonstrates the practical difficulties of detecting actual transfer of recordings to third parties even when a party has made large numbers of recordings available for distribution online. The narrower injunction granted by the district court thus could be difficult to enforce.

For these reasons, we conclude that the district court erred after the third trial by concluding that the broader injunction requested by the companies was impermissible as a matter of law. An injunction against making recordings available was lawful and appropriate under the circumstances, even accepting the district court's interpretation of the Copyright Act. Thomas-Rasset does not resist expanding the injunction to include this relief. We therefore will direct the district court to modify the judgment to include the requested injunction.

B.

On the question of damages, we conclude that a statutory damages award of \$9,250 for each of the twenty-four infringed songs, for a total of \$222,000, does not contravene the Due Process Clause. The district court erred in reducing the third jury's verdict to \$2,250 per work, for a total of \$54,000, on the ground that this amount was the maximum permitted by the Constitution.

The Supreme Court long ago declared that damages awarded pursuant to a statute violate due process only if they are "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919). Under this standard, Congress possesses a "wide latitude of discretion" in setting

statutory damages. *Id.* at 66. *Williams* is still good law, and the district court was correct to apply it.

Thomas-Rasset urges us to consider instead the “guideposts” announced by the Supreme Court for the review of punitive damages awards under the Due Process Clause. When a party challenges an award of punitive damages, a reviewing court is directed to consider three factors in determining whether the award is excessive and unconstitutional: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

The Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586-88 (6th Cir. 2007). Due process prohibits excessive punitive damages because “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). This concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute. The guideposts themselves, moreover, would be nonsensical if applied to statutory damages. It makes no sense to consider the disparity between “actual harm” and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate. *See Cass Cnty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996). Nor could a reviewing court consider the difference between an award of statutory damages and the “civil penalties authorized,” because statutory damages *are* the civil penalties authorized.

Applying the *Williams* standard, we conclude that an award of \$9,250 per each of twenty-four works is not “so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.” 251 U.S. at 67. Congress, exercising its “wide latitude of discretion,” *id.* at 66, set a statutory damages range for willful copyright infringement of \$750 to \$150,000 per infringed work. 17 U.S.C. § 504(c). The award here is toward the lower end of this broad range. As in *Williams*, “the interests of

the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to [federal law]” support the constitutionality of the award. *Id.* at 67.

Congress’s protection of copyrights is not a “special private benefit,” but is meant to achieve an important public interest: “to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). With the rapid advancement of technology, copyright infringement through online file-sharing has become a serious problem in the recording industry. Evidence at trial showed that revenues across the industry decreased by fifty percent between 1999 and 2006, a decline that the record companies attributed to piracy. This decline in revenue caused a corresponding drop in industry jobs and a reduction in the number of artists represented and albums released. See *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 492 (1st Cir. 2011).

Congress no doubt was aware of the serious problem posed by online copyright infringement, and the “numberless opportunities for committing the offense,” when it last revisited the Copyright Act in 1999. To provide a deterrent against such infringement, Congress amended § 504(c) to increase the minimum per-work award from \$500 to \$750, the maximum per-work award from \$20,000 to \$30,000, and the maximum per-work award for willful infringement from \$100,000 to \$150,000. *Id.*

Thomas-Rasset contends that the range of statutory damages established by § 504(c) reflects only a congressional judgment “at a very general level,” but that courts have authority to declare it “severe and oppressive” and “wholly disproportioned” in particular cases. The district court similarly emphasized that Thomas-Rasset was “not a business acting for profit, but rather an individual consumer illegally seeking free access to music for her own use.” By its terms, however, the statute plainly encompasses infringers who act without a profit motive, and the statute already provides for a broad range of damages that allows courts and juries to calibrate the award based on the nature of the violation. For those who favor resort to legislative history, the record also suggests that Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the range. See H.R. Rep. 106-216, at 3 (1999), 1999 WL 446444, at *3. Congressional amendments to the criminal provisions of

the Copyright Act in 1997 also reflect an awareness that the statute would apply to noncommercial infringement. *See* No Electronic Theft (NET) Act, Pub.L. No. 105-147, § 2(a), 111 Stat. 2678 (1997); *see also* H.R. Rep. 105-339, at 5 (1997), 1997 WL 664424, at *5.

In holding that any award over \$2,250 per work would violate the Constitution, the district court effectively imposed a treble damages limit on the \$750 minimum statutory damages award. The district court based this holding on a “broad legal practice of establishing a treble award as the upper limit permitted to address willful or particularly damaging behavior.” Any “broad legal practice” of treble damages for statutory violations, however, does not control whether an award of statutory damages is within the limits prescribed by the Constitution. The limits of treble damages to which the district court referred, such as in the antitrust laws or other intellectual property laws, represent congressional judgments about the appropriate maximum in a given context. They do not establish a *constitutional* rule that can be substituted for a different congressional judgment in the area of copyright infringement. Although the United States seems to think that the district court’s ruling did not question the constitutionality of the statutory damages statute, the district court’s approach in our view would make the statute unconstitutional as applied to a significant category of copyright infringers. The evidence against Thomas-Rasset demonstrated an aggravated case of willful infringement by an individual consumer who acted to download and distribute copyrighted recordings without profit motive. If an award near the bottom of the statutory range is unconstitutional as applied to her infringement of twenty-four works, then it would be the rare case of noncommercial infringement to which the statute could be applied.

Thomas-Rasset’s cross-appeal goes so far as to argue that *any* award of statutory damages would be unconstitutional, because even the minimum damages award of \$750 per violation would be “wholly disproportional to the offense” and thus unconstitutional. This is so, Thomas-Rasset argues, because the damages award is not based on any evidence of harm caused by her specific infringement, but rather reflects the harm caused by file-sharing in general. The district court similarly concluded that “statutory damages must still bear *some* relation to actual damages.” The Supreme Court in *Williams*, however, disagreed that the constitutional inquiry calls for a comparison of an award of statutory damages to actual damages caused by the violation. 251 U.S. at 66. Because the damages award “is im-

posed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.” *Id.* The protection of copyrights is a vindication of the public interest, *Sony Corp. of Am.*, 464 U.S. at 429, and statutory damages are “by definition a substitute for unproven or unprovable actual damages.” *Cass Cnty. Music Co.*, 88 F.3d at 643. For copyright infringement, moreover, statutory damages are “designed to discourage wrongful conduct,” in addition to providing “restitution of profit and reparation for injury.” *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952).

Thomas-Rasset highlights that if the recording companies had sued her based on infringement of 1,000 copyrighted recordings instead of the twenty-four recordings that they selected, then an award of \$9,250 per song would have resulted in a total award of \$9,250,000. Because that hypothetical award would be obviously excessive and unreasonable, she reasons, an award of \$222,000 based on the same amount per song must likewise be invalid. Whatever the constitutionality of the hypothetical award, we disagree that the validity of the lesser amount sought here depends on whether the Due Process Clause would permit the extrapolated award that she posits. The absolute amount of the award, not just the amount per violation, is relevant to whether the award is “so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.” *Williams*, 251 U.S. at 67. The recording companies here opted to sue over twenty-four recordings. If they had sued over 1,000 recordings, then a finder of fact may well have considered the number of recordings and the proportionality of the total award as factors in determining where within the range to assess the statutory damages. If and when a jury returns a multi-million dollar award for noncommercial online copyright infringement, then there will be time enough to consider it. . . .

Notes and Questions

4.6. As *Thomas-Rasset* notes in passing, a victorious copyright owner in an infringement suit is entitled to “the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” (The plaintiffs here elected statutory damages instead.) Does this remedy sound at all familiar? Where have we seen it before?

4.7. In light of *Thomas-Rasset*, was the punitive damage award in *Jacque* unconstitutional? After all, the amount of punitive damages there was determined entirely by a court with no legislative guidance whatsoever.

4.8. Are the plaintiffs' actual damages in *Thomas-Rasset* unproven, or are they nonexistent? What are actual damages in a case involving only the copying of intangible information? Does it matter whether copyright infringement is defined to require actual distribution of a copyrighted work or merely making one available? Are the actual damages here any more or less real than the \$1 in nominal damages suffered by Lois and Harvey Jacque?

4.9. Is this a case where an injunction is warranted to protect property rights? Does it matter whether we call a copyright "property" or not? Does *Thomas-Rasset* have a freedom-of-speech argument like the defendants in *Shack*? If an injunction is appropriate here, why was there no injunction in *Jacque*?

4.2 Patents

Innovention Toys, LLC v. MGA Entertainment, Inc.

637 F.3d 1314 (Fed. Cir. 2011)

LOURIE, Circuit Judge.

MGA Entertainment, Inc.; Wal-Mart Stores, Inc.; and Toys "R" Us, Inc. (collectively, "MGA") appeal from the summary judgment decision of the United States District Court for the Eastern District of Louisiana that the asserted claims of U.S. Patent 7,264,242 ("the '242 patent") were infringed and were not invalid for obviousness. *Innovention Toys, LLC v. MGA Entm't, Inc.*, 665 F. Supp. 2d 636 (E.D. La. 2009). Because the district court correctly found no genuine issues of material fact regarding infringement based on its construction of the claim term "movable," we affirm the court's grant of summary judgment of literal infringement. The district court, however, erred in several of its factual findings underlying its nonobviousness determination. We therefore vacate the court's grant of summary judgment of nonobviousness and remand.

Background

I.

Innovention Toys, LLC (“Innovention”) brought suit against MGA for infringement of the ’242 patent, which claims a chess-like, light-reflecting board game and methods of playing the same. The disclosed game includes a chess-styled playing surface, laser sources positioned to project light beams over the playing surface when “fired,” mirrored and non-mirrored playing pieces used to direct the lasers’ beams, and non-mirrored “key playing pieces” equivalent to the king pieces in chess. *See* ’242 patent col.2 l.64-col.3 l.35. To play the game, players take turns either moving a playing piece to an unoccupied, adjacent square or rotating (reorienting) a piece within a square. *Id.* col.3 ll.21-24; col.8 l.49-col.9 l.12. After moving or rotating a piece, a player then fires his laser, and if the laser’s beam strikes the non-mirrored surface of a playing piece, that piece is eliminated from the game. *Id.* col.3 ll.26-30; col.9 ll.13-17. To win the game, a player must direct his laser beam to strike, or illuminate, his opponent’s non-mirrored key playing piece, ending the game. *Id.* col.3 ll.17-20; col.6 ll.44-47.

All the asserted claims, claims 31-33, 39-41, 43-44, 48-50, and 53-54, include a “key playing pieces” limitation in which the key pieces are “movable.” Claim 31 is representative:

A board game for two opposing players or teams of players comprising:

a game board, movable playing pieces having at least one mirrored surface, *movable* key playing pieces having no mirrored surfaces, and a laser source,

wherein alternate turns are taken to move playing pieces for the purpose of deflecting laser beams, so as to illuminate the key playing piece of the opponent.

Id. claim 31 (emphasis added).

MGA counterclaimed, denying infringement and alleging, *inter alia*, that the ’242 patent was invalid under 35 U.S.C. § 103. In making its obviousness argument, MGA relied on the combination of (1) two articles

describing computer-based, chess-like strategy games, Laser Chess and Advanced Laser Chess (collectively, “the Laser Chess references”); and (2) U.S. Patent 5,145,182 (“the Swift patent”) describing a physical, chess-like, laser-based strategy game.

The Laser Chess game is described in an article entitled “Laser Chess™ First Prize \$5,000.00 Winner Atari ST Programming Contest,” published in the April 1987 edition of Compute!. J.A. 1775-78. Advanced Laser Chess is described in an article published in the Summer 1989 edition of Compute!’s Amiga Resource. J.A. 1784-87. Both articles disclose chess-like computer games with virtual lasers and mirrored and non-mirrored pieces, which are moved or rotated by players during alternating turns on a virtual, chess-like playing board. The goal of each game is to manipulate one’s laser beam using the various game pieces to eliminate the other player’s non-mirrored king piece by striking it with the laser beam. In Laser Chess, a player’s king piece may move squares during game play: “[The king] can capture any opposing piece by moving onto its square.” J.A. 1776. Similarly, in Advanced Laser Chess “Kings possess the ability to capture other pieces [by moving on top of them].” J.A. 1784.

The Swift patent discloses a physical (rather than electronic) strategy game in which players take turns placing mirrored game pieces onto squares of a chess-styled game board. The players position the pieces so as to direct their laser’s beam towards the opposing player’s scoring module and away from their own. A player scores when his laser beam, having been deflected around the game board, strikes his opponent’s scoring module. The scoring modules are mounted to the frame of the game board, see Swift patent col.2 ll.51-56, and thus are not physically capable of movement on the game board.

MGA’s accused game, Laser Battle, is a physical board game for playing a chess-like strategy game. Players take turns moving or rotating mirrored playing pieces so as to direct a laser beam to strike the opposing player’s non-mirrored Tower playing piece to win the game. According to the rules of Laser Battle, in “Classic Game Play,” the Tower pieces are placed on the board at the beginning of the game at one of various standard positions. J.A. 1986. Although the Towers are physically capable of movement on the game board, the rules provide that they “should always remain in their original positions on the board.” J.A. 1985. However, the standard starting configuration illustrated in the rules show that the Tower pieces can be placed at different locations on the board, and the rules state that dur-

ing “Advanced Game Play,” the Towers need not remain in their standard positions. J.A. 1986.

II.

On October 14, 2009, the district court ruled on the parties’ cross-motions for summary judgment of infringement and invalidity. *Innovation Toys*, 665 F. Supp. 2d 636. The district court granted Innovention’s motion for summary judgment of literal infringement. *Id.* at 647. The court first construed the claim term “movable” in light of the term’s plain meaning as “capable of movement as called for by the rules of the game or game strategy.” *Id.* at 644-45. In so holding, the court rejected MGA’s more “cramped” construction that the movement must be “from space to space or by rotation within a single space.” *Id.* at 643-45; *see also id.* at 644 n.15. The district court also rejected Innovention’s broader construction of “movable” to mean “able to be moved, or possible to move,” without any tie to the rules or strategy of the game. *Id.* at 642-43.

Based on its construction, the district court then found that the accused Laser Battle game’s Tower pieces met the “movable” claim limitation, the only disputed limitation. The court found that those key pieces were “moveable” when the players selected and “set up the game pieces in various start formations and layouts.” *Id.* at 647 n.18. The court reasoned that even if “the instructions to Laser Battle suggest that its key pieces, the Towers, are not supposed to be moved during game play,” they “are capable of movement . . . in that they fit into the recessed spaces on the board like the other pieces, and are capable of rotation within whatever recessed space a player may choose to place the Tower in for the start of game play.” *Id.* at 646-47. The court also observed that although the instructions to Laser Battle note that “[t]he Towers should always remain in their original positions on the board,” *id.* at 647 n. 18, they also explain that “[e]xcept for Advanced Game Play, the Target Tower and the Laser Guns will remain in their standard positions in all formations,” *see id.* at 647 n.18 & 19; J.A. 1986. This instruction suggests that the Tower pieces could be moved in Advanced Game Play because they fit in and are rotatable in the recessed spaces on the board.

The district court also granted Innovention’s motion for summary judgment of nonobviousness. *Id.* at 655. The court first found that the Laser Chess references were non-analogous art because they described electronic, rather than real-world, laser games. *Id.* at 653. The district court then held that, because MGA had provided no evidence to support a find-

ing as to the level of ordinary skill in the art, MGA's obviousness argument could be pursued only on the basis of what would have been obvious to a layperson. *Id.* at 654. The court then decided that because MGA had not provided any evidence that a layperson would have known of the Laser Chess articles or would have had any reason to modify the teachings of the Laser Chess references, MGA had failed to state a *prima facie* case of obviousness. *Id.*

Finally, the court found that Innovention had demonstrated several secondary considerations of nonobviousness. These included (1) commercial success based on the sale of 140,000 games by Innovention, a small company with minimal marketing capabilities, and evidence that fans had started clubs and tournaments around the world; (2) long-felt need based on the game's sudden success and media praise; and (3) industry praise based on, *inter alia*, the game's nomination for Outstanding Technology of the Year by the International Academy of Science and its being one of five finalists for the Toy Industry Association's 2007 Game of the Year award. *Id.* at 654-55. In light of its summary judgment rulings, the district court granted Innovention's motion for a permanent injunction on January 13, 2010.

MGA appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

Discussion

This court reviews a district court's decision on summary judgment *de novo*, reapplying the same standard applied by the district court. *Io-vate Health Scis., Inc. v. Bio-Engineered Supplements & Nutrition, Inc.*, 586 F.3d 1376, 1380 (Fed. Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

I. Infringement

A determination of infringement involves two steps: First, the court determines the scope and meaning of the asserted patent claims. The court then compares the properly construed claims to the allegedly infringing device to determine whether all of the claim limitations are present, either literally or by a substantial equivalent. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998) (en banc). . . .

On appeal, MGA does not argue that the district court erred in construing "movable" to mean "capable of movement as called for by the rules of

the game or game strategy.” Rather, MGA argues that the court improperly broadened its construction during the second step of the infringement analysis by adding capable of movement “during game set up,” and thus erred in finding that Laser Battle’s Tower pieces meet the “movable” limitation. Under the court’s original construction, MGA asserts, Laser Battle’s instructions definitively show that the Tower pieces are not to be moved, either from space to space or by rotation within a space, as part of the game’s rules or strategy. Rather, MGA urges, the only way that the Tower pieces can be “movable” during game play or strategy is if the players ignore the game’s rules and cheat. Moreover, according to MGA, because all the pieces must be moved onto the game board at some point, the district court’s altered construction renders everything “movable” and the “movable” limitation superfluous.

Innovention responds that Laser Battle’s Tower pieces are clearly “capable of movement”; each Tower piece is a separate component that can be placed at any space on the game board and afterwards rotated within that space or moved to another space. In other words, Innovention argues, the Towers are “movable” since they are not permanently mounted to the game board as are the key playing pieces (scoring modules) disclosed in the Swift patent. Furthermore, according to Innovention, Laser Battle’s instructions do not require the Tower pieces to remain stationary during all game play; the rules invite players to create “more intricate games” and tell players that the Towers “remain in their standard positions in all formations” except during “Advanced Game Play.” J.A. 1986–87.

We agree in main with the district court’s infringement analysis, and we affirm the district court’s decision holding that MGA’s Laser Battle game literally infringes the asserted claims of the ’242 patent. During claim construction, the district court rejected MGA’s narrower construction of “movable” in which “movable” was limited to the movements explicitly permitted by the rules of the game during game play, i.e., movable from space to space or by rotation within a single space. *Innovention Toys*, 665 F. Supp. 2d at 642–43. Rather, the court embraced a definition that distinguished “movable” from “mounted” by contrasting the “movable key playing pieces” of the ’242 patent with the fixed scoring modules of Swift. In particular, the district court stated that while the “key pieces disclosed in the Swift reference are permanently fixed to the game board and, therefore, cannot be moved prior to or during game play,” the key pieces of the ’242 patent “may be positioned in different spaces at the beginning of each game and can

also be moved during game play.” *Id.* at 644; *see also id.* at 644 n.15. Thus, the court’s construction of “movable” includes the capability of being positioned in different spaces during set up (i.e., at the beginning of each game) and the capability of being moved during Advanced Game Play. In other words, the Tower pieces “are capable of movement as called for by the rules of the game or game strategy.”

Accordingly, MGA is incorrect when it argues that the district court expanded its construction of “movable” during the second step of the infringement analysis. The court’s construction, not just its application, encompasses movement during game set up. Moreover, such a construction does not render “movable” superfluous, as MGA asserts, since it distinguishes the ’242 patent’s key pieces from the mounted scoring modules disclosed in Swift. Laser Battle’s Tower pieces thus meet the “movable” limitation under the district court’s consistent construction based on the pieces’ undisputed ability to be physically positioned in different squares on the game board. No reasonable jury could find otherwise. . . .

II. Obviousness

Under the Patent Act, “[a] patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” 35 U.S.C. § 103(a). Although the ultimate determination of obviousness under § 103 is a question of law, it is based on several underlying factual findings, including (1) the scope and content of the prior art; (2) the level of ordinary skill in the pertinent art; (3) the differences between the claimed invention and the prior art; and (4) evidence of secondary factors, such as commercial success, long-felt need, and the failure of others. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). A patent is presumed valid, 35 U.S.C. § 282, and this presumption can be overcome only by clear and convincing evidence to the contrary. *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1374 (Fed. Cir. 2001).

MGA argues that, rather than being nonobvious, the asserted claims would have been obvious based on the combination of the Laser Chess references, which teach the claimed game in electronic form, and the Swift patent, which teaches a physical laser-based game. According to MGA, the district court erred both (1) in concluding that because the ’242 patent re-

lates to a physical game, the Laser Chess articles were non-analogous art; and (2) in assuming that a person of skill in the art was a layperson rather than, as put forth by Innovention, a mechanical engineer with knowledge of optics. Finally, MGA argues, Innovention's unsupported and conclusory assertions of secondary considerations fail to overcome MGA's *prima facie* case of obviousness. . . .

We conclude that the district court clearly erred in several of the factual findings underlying its obviousness analysis. The district court erred in finding that the Laser Chess references fail to qualify as analogous art. The court also erred in concluding that the level of skill in the art is that of a layperson. We address each in turn.

A. Analogous Art

A reference qualifies as prior art for a determination under § 103 when it is analogous to the claimed invention. *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992). “Two separate tests define the scope of analogous art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). . . .

Innovention argues that the Laser Chess articles are non-analogous art because the '242 patent's inventors were concerned with making a non-virtual, three-dimensional, laser-based board game, a project that involves mechanical engineering and optics, not computer programming. The district court appears to have agreed, finding that the Laser Chess references were non-analogous art since each discloses “an electronic version of the '242 patent.” *Innovention Toys*, 665 F. Supp. 2d at 653. The court, however, failed to consider whether a reference disclosing an electronic, laser-based strategy game, even if not in the same field of endeavor, would nonetheless have been reasonably pertinent to the problem facing an inventor of a new, physical, laser-based strategy game. In this case, the district court clearly erred in not finding the Laser Chess references to be analogous art based on this test as a matter of law. See *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010) (holding as a matter of law that prior art padlock seals were analogous since directed to the same problem of preventing the ingress of contaminants into the locking mechanism).

The '242 patent and the Laser Chess references are directed to the same

purpose: detailing the specific game elements comprising a chess-like, laser-based strategy game. Specifically, the '242 patent describes (1) the game's components, including the game board, '242 patent col.4 ll.45-56, and various types of playing pieces, *id.* col.6 l.48-col.7 l.24; (2) the game's specific rules, including how the pieces may move on the game board during a player's turn, *id.* col.3 ll.21-28, col.8 l.49-col.9 l.17; and (3) the game's ultimate objective, namely, illuminating an opponent's key playing piece with a laser beam, *id.* col.6 ll.45-47. The specification even distinguishes prior art patents based on these game elements, stating that U.S. Patent 3,516,671 lacks "the unique elements and rules of the ['242 patent's] invention," *id.* col.1 ll.47-50, and U.S. Patent 6,702,286 contemplates a game in which the objective is not to "illuminate playing pieces," but rather "to maneuver one's pieces to flank (or surround) those of the opposing player," *id.* col.2 ll.16-21.

The Laser Chess references likewise describe specific playing pieces, rules, and objectives to create a chess-like, laser-based strategy game. Both Laser Chess and Advanced Laser Chess disclose, for example, (1) various game pieces, each with unique capabilities, J.A. 1775-77, 1784-85; (2) rules for each player's turn, J.A. 1777-78, 1785-86; and (3) an ultimate objective of eliminating an opponent's king piece, J.A. 1775, 1784.

Accordingly, the '242 patent and the Laser Chess references relate to the same goal: designing a winnable yet entertaining strategy game. The '242 patent's specification confirms that game design was one objective facing its inventors. In particular, the specification states that "[s]trategy games may differ in a variety of ways," such as in board layout, the number and types of playing pieces, and the manner in which each piece moves on the game board, and that "[e]ach of these variations affects the strategy of the play and the degree of skill required to play the game." '242 patent col.2 ll.19-46. The specification thus admonishes that if the game elements "are overly simplistic, the game is too easy, will usually end in a draw or a predictable manner, and quickly become uninteresting for the average player." *Id.* col.2 ll.49-54. Conversely, according to the specification, if the game elements "are overly complicated, the game takes too long to learn [and] is frustrating and uninteresting for the average player." *Id.* col.2 ll.57-60.

The specific combination of game elements disclosed and claimed in the '242 patent thus deals with the problem of game design, and game elements from any strategy game, regardless how implemented, "logically

would have commended itself to an inventor's attention in considering [this] problem." *Clay*, 966 F.2d at 659. Basic game elements remain the same regardless of the medium in which they are implemented: whether molded in plastic by a mechanical engineer or coded in software by a computer scientist. And, as MGA's evidence shows, inventors of numerous prior art patents contemplated the implementation of their strategy games in both physical and electronic formats. *Innovention Toys*, 665 F. Supp. 2d at 650 n. 23. For example, the Swift patent states that "[a]lthough the preferred embodiment is played by two players, obvious modifications of the game allow for . . . a single player playing against a computer." Swift col.2 ll.47-51. Thus, because no reasonable jury could find that the Laser Chess references do not qualify as analogous prior art, and the district court erred in not so concluding as a matter of law.

Because of its error, the district court failed to properly consider the scope and content of the relevant prior art as well as the differences between that art and the claimed invention, including whether one of ordinary skill in the art would have been motivated to combine the teachings of the Laser Chess references with the Swift patent in light of the standard articulated in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007). We therefore remand these factual determinations to the district court to consider in the first instance. Furthermore, should the district court conclude that MGA has made out a *prima facie* case of obviousness based on the Laser Chess articles and the Swift patent, the court must then determine whether Innovention's secondary considerations overcome MGA's *prima facie* case. . . .

III. Permanent Injunction

The district court, based on its grant of summary judgment of infringement and nonobviousness, granted a permanent injunction to Innovention. Because we vacate and remand the district court's decision of summary judgment of nonobviousness, we also vacate the district court's permanent injunction. . . .

Notes and Questions

4.10. Copyright law requires only independent creation, a modicum of creativity, and fixation in a tangible medium of expression. These are all easy thresholds to meet: scribble on a napkin and you're done. But patent law has

much more rigorous screening doctrines.

Novelty. An invention must be *novel* in an absolute sense. A patent will not be granted if “the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public.” 35 U.S.C. § 102.

Nonobviousness. An invention must not be “obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains.” *Id.* § 103. This means that only significant improvements on the prior art are patentable, and not minor advances. As Justice Kennedy explained for the Supreme Court in *KSR Intern. Co. v. Teleflex, Inc.*, 550 U.S. 398, 427 (2007):

We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts.

Reduction to Practice and Enablement. It is not enough to have the idea for an invention (“conceive” of it) or even to write it down. An inventor must also “reduce the invention to practice” by establishing that it works for its intended purpose. What is more, in her patent application – which will be published if and when she is issued a patent (or sooner, under some circumstances) – she must “enable” the invention by providing “a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same.” 35 U.S.C. § 112(a). (Notice the “person skilled in the art” is back for a return appearance; she is the hypothetical reasonable person of patent law.)

4.11. Until 2011, the United States patent law worked on a “first to invent” basis. If more than one applicant came to the USPTO with an application for the same invention, the patent would be awarded to the one who could prove the earliest date of conception for the invention (provided that she was reasonably diligent about reducing it to practice and had not abandoned it), regardless of who filed first. But in 2011, to bring the U.S. closer to patent systems in the rest

of the world, the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”) switched to a “first to file” basis. Now (subject to some exceptions) the patent will be issued to the inventor whose application was filed first, regardless of who was first to conceive of the invention or reduce it to practice. Which of these systems strikes you as fairer? Which will be better at promoting invention and encouraging inventors to disclose their inventions to the public? Which is easier to administer? Which is more consistent with the principles of first possession you studied in the context of personal property?

4.12. The test for patent infringement is whether every limitation in a claim is present in the defendant’s product or process. So if a patent claim includes an axle and a wheel, a product containing both an axle and a wheel will infringe, but a product containing only an axle but not a wheel will not. The hard part, however, is that a court will need to interpret the words of a claim to determine what kinds of things it does and does not describe. (In *Innovention Toys*, the crucial term is “movable.”) How is this test different from the substantial-similarity and fair-use tests in copyright law?

The claims of a patent, it is sometimes said, establish the “metes and bounds” of the owner’s rights in the same way that a description of real property does (“... thence 30 feet 6 inches north, thence 74 feet 1 inch west ...”). Is this an accurate metaphor? Which provides clearer notice to potential defendants of what they can and cannot do?

4.13. The patent equivalent to first sale is the doctrine of *exhaustion*: the owner of an item covered by a patent may legally sell or use it without the patent owner’s permission. She just can’t make more. For example, in *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013), Monsanto owned a patent on a pesticide-resistant strain of soybeans and charged farmers a premium price for these “Roundup Ready” beans. Bowman, who liked the beans but not the price, bought Roundup Ready soybeans not from Monsanto, but from other farmers’ harvests. The Supreme Court unanimously held that Bowman was an infringer. When he planted the beans he “made” more patented beans without Monsanto’s permission. Bowman argued that there should be an exception for technologies that automatically replicate themselves, but the Court rejected this “blame-the-bean defense.”

4.14. Patent remedies are broadly similar to copyright remedies. But there are a few notable differences. For one thing, there are no statutory damages. Instead, courts are authorized to award the plaintiff up to treble damages in cases of “willful” infringement. For another, instead of copyright’s restitutory damage measure, patent law specifies that the patentee is entitled to “dam-

ages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. § 284.

4.15. Patent rights are broader than copyright rights in an important way. While copyright has an independent creation defense, patent does not. Even if you have never heard of the plaintiff or her patent, if you make, use, or sell the invention it describes, you are an infringer. Recent years have seen a boom in litigation by so-called “non-practicing entities”—or, less charitably, patent “trolls,” so called because they allegedly lurk in the shadows like trolls in fairy tails and then spring out to demand tolls from unsuspecting travelers who have unknowingly wandered onto their bridges. We will return with some regularity to the problem of notice in property law; would you expect notice problems more or less severe in intellectual property than for real and tangible personal property?

4.3 Trademarks

Dixi-Cola Laboratories v. Coca-Cola Co.

117 F. 2d 352 (4th Cir. 1941)

SOPER, Circuit Judge:

... The plaintiff is the owner of the trademark “Coca-Cola” for a syrup to be used with carbonated water as a beverage. The defendants make and sell a concentrate and a syrup to be used in the production of a similar beverage under the names, MarBert the Distinctive Cola and Dixi-Cola. The defendants do not use the word “coca”; but they claim the right to use the word “cola” in the combinations mentioned. The evidence shows that they have also used other terms, such as Apola Cola and Lola-Kola, but as to them they now make no defense. The plaintiff concedes that the names Dixi-Cola and MarBert the Distinctive Cola are not so similar to the name Coca-Cola, that a purchaser of the beverage known as Dixi-Cola or MarBert the Distinctive Cola would be led to believe that he was buying the beverage Coca-Cola, but the plaintiff nevertheless charges infringement on the ground that the use of the word “cola” in defendants’ trade-marks or trade-names leads the public to believe that their products originate with the plaintiff. . . .

The broad claim of the plaintiff to the exclusive use of the word “cola” in

a trade-mark or trade-name is based upon the contention that Coca-Cola is a technical common-law trade-mark, adopted as a fanciful and arbitrary word by the first producer of the beverage in 1886. The plaintiff also relies on five registrations of the mark in the United States Patent Office, one under the Act of March 3, 1881, 21 Stat. 502, and four under the Act of February 20, 1905, 33 Stat. 724, 15 U.S.C.A. § 81 et seq. . . .

It is certainly beyond dispute that the word "Coca-Cola" is the exclusive property of the Coca-Cola Company. The evidence in the pending case shows that what was said of the name in *Coca-Cola Co. v. Koke Co.*, 254 U.S. 143 [(1920)], and *Coca-Cola Co. v. Old Dominion Beverage Corp.*, [271 F. 600 (4th Cir. 1921)], is equally true today. There has been no let-up in the popular demand for the drink or in the extent of its advertising. On the contrary, both have greatly increased. In 1920 the gallons of syrup sold were 18,656,445 and the advertising expense \$2,330,710.40, while in 1938 the gallons sold were 48,508,414, and the advertising expense \$7,122,863.31. No one else can lawfully use the word "Coca-Cola" for a trade-mark, even though it originally may have been a descriptive name.

The plaintiff, however, is not content with this measure of protection. It insists in addition that no one shall use the word "cola" in a trade-mark, even in connection with a prefix that prevents all confusion with the name Coca-Cola. The reason given is that the word is so closely associated with Coca-Cola in the public mind that any drink, bearing the word as part of its name, will be thought to proceed from the same source. Forty-one witnesses from Baltimore, Springfield and Birmingham testified that when they saw goods labeled by a name containing the suffix "cola," they were led to believe, not that the goods were Coca-Cola, but that they originated with the Coca-Cola Company. Hence, it is said, the defendants have appropriated the result of the plaintiff's efforts and expenditures, and imperiled the reputation of the Coca-Cola Company and its product.

Confusion of origin, as well as confusion of goods, from the use of the same trade-mark, may constitute infringement, especially when the name has a fanciful and arbitrary character. We must, therefore, consider the defense now set up to this phase of the plaintiff's case that the word "cola" is a descriptive and generic term, open to all the world, which may be lawfully used as part of a trademark by competitors so long as the whole trademark is not confusingly similar to Coca-Cola.

There are many cases which hold that it is not infringement for a trader to use as part of his trade-name to designate his product a descriptive or

generic word which has already been adopted by another, provided that the competing marks, taken as a whole, are clearly distinguishable. Thus "Sal-Vet" was held not infringed by "Sal Tone", since the word "Sal", meaning salt, was descriptive of the principal ingredient of both products, and no ordinary purchaser would confuse one of the complete names with the other. *S. R. Feil Co. v. John E. Robins Co.* [220 F.650 (7th Cir. 1915)].

In the light of these decisions, it is important to inquire whether or not the word "cola" has a descriptive significance apart from its use in the trade-mark Coca-Cola, and has become a generic term, generally used to indicate a class of beverage. The answer is to be found, we believe, in scientific and popular literature, in the discussions of Coca-Cola cases by the courts, and the attitude of the Coca-Cola Company itself in the conduct of its business. The beverage was devised and the name Coca-Cola was adopted by John S. Pemberton in Atlanta in 1886. The product was sold under a label registered in the Patent Office, which advertised Coca-Cola syrup as an extract for carbonated beverages possessing a peculiar flavor and the tonic and nerve stimulant qualities of the coca plant and cola nuts. Both of these substances were well known at that time. The word "cola" was recognized as the name of a tree native to Africa, which bears the small brown "cola nut" that was introduced in England in 1865 and later in the United States. Prior to 1886 the stimulant qualities of the cola nut were frequently referred to in pharmaceutical and scientific publications and periodicals, and it was suggested that it could be used to make a beverage that would successfully compete with tea and coffee as a refreshing and invigorating drink.

These facts led to the contention in the court below that at best the word Coca-Cola, taken as a whole, is a descriptive name, entitled to protection only because it has acquired a secondary significance. But the contention was rejected. It was said that while relatively small amounts of coca and cola extracts are found in the drink, the basic ingredients are sugar, phosphoric acid and a small amount of caffeine; and also that the words comprising the mark were so little known to the general public when adopted that they did not suggest at that time that the beverage was made from coca leaves or cola nuts. Hence it was decided that the name is not clearly descriptive of the product, but should be considered a coined word with all the characteristics of a technical trade mark. Other courts have reached the same conclusion. [citing cases]. . . .

The decision of the Supreme Court in *Coca-Cola Co. v. Koke Co.* has al-

ready been mentioned. The court rejected the charge that the right to protection against infringement because of misrepresentations implied by the name that the product contained cocaine, which had formerly been used in small amounts, but had been eliminated after the passage of the Food and Drug Act. The court said, "We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words 'Coca-Cola' probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. . . . The coca leaves and whatever of cola nut is employed may be used to justify the continuance of the name or they may affect the flavor as the plaintiff contends, but before this suit was brought the plaintiff had advertised to the public that it must not expect and would not find cocaine, and had eliminated every thing tending to suggest cocaine effects except the name and the picture of the leaves and nuts, which probably conveyed little or nothing to most who saw it. It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication. The plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time." . . .

It must be concluded, we think, from this history that the word "Coca-Cola," taken as a whole, is in some sense descriptive of the drink which it designates. It is true that the name identifies the goods of the plaintiff, but it has also come to characterize them. This process has been hastened by the fact that the combination of extract of coca leaves and extract of cola nuts employed by Pemberton was new, and it gave to the product a new and distinctive flavor for which there was no other name than that which he employed. Hence the drink came to be known to the public by this name in much the same fashion as other soft drinks are named for a small quantity of flavoring ingredient rather than the large quantities of sugar and water that mainly compose them. The process was further

stimulated by the great public response to the drink and the activities of numerous competitors who speedily entered the field and were enabled lawfully to make the same or a similar beverage, since Coca-Cola was not covered by a patent.

The record is replete with references to the number of competing drinks in this class. The District Judge in his opinion said that "since Coca-Cola appeared, there has been a veritable flood of drinks of this type, as evidenced by the fact that there have been no less than 143 registrations in the United States Patent Office of names embodying the word 'cola' as a suffix." In 1907 the Supreme Court of Mississippi, in the case of *Coca-Cola Co. v. Skillman*, 91 Miss. 677, 44 So. 985, discussed a statute imposing a privilege tax on Coca-Cola, Celery-Cola, Afri-Cola, Hecks Cola, Cola-Beta, Colavin, Nervola, and Nervocola, or any similar or proprietary drinks. Some cola drinks have had a long and continuous history. Thus the record shows that Lime-Cola has been made for more than twenty years in the United States and that Pepsi-Cola has been in existence as a beverage for more than thirty-five years.

The adoption of the word "cola" to characterize a class of drinks thus came about very naturally, to some extent with the consent of the Coca-Cola Company, as we shall see, and to a greater extent because in the course of events it could not be prevented. It was attended by a vast increase after 1886 in the literature relating to the cola nut and its uses. Publications of various types recognized the fact that it could be used as an ingredient of a soft drink. Numerous references to the cola nut and to cola syrup and extract and their use in beverages, called cola drinks, appeared throughout the following years in dictionaries, encyclopedias, pharmaceutical magazines, trade journals and government publications. During the same period the word was adopted as part of the trade name of a large number of competing beverages. The result is that today the phrase "cola drinks" indicates to the general public beverages which in taste and appearance resemble Coca-Cola. . . .

It must not be supposed that the Coca-Cola Company has not fought vigorously to protect its valuable right from invasion. Suits against competitors have averaged one a week during the last thirty years. Many of these competitors have been guilty of fraud and unfair competition, and all of them, it is safe to say, have sought to participate in the profits which experience had shown could be derived from making a drink like Coca-Cola. . . .

None of these reported decisions goes further than the decision of this court in *Coca-Cola Co. v. Old Dominion Beverage Corp.*, involving the use of the name "Taka Cola," and the unreported decision of the present writer in *Coca-Cola Co. v. Philips Bros.* in the District Court of Maryland, involving the word "Champion-Cola." In both cases the names were regarded as so close to the name "Coca-Cola" as to be likely to result in the confusion of the goods. In both there was unfair competition in the simulation of the color scheme, of the script of the Coca-Cola Company, or in the confusing display of the competing name. . . .

No reported case has come to our attention which distinctly holds that the word "cola" cannot be used as part of a name of a beverage provided that the whole name is not confusingly similar to Coca-Cola. It is urged, however, that we should make such a decision in this case for the reasons, which found favor in the District Court, that no such thing as a cola beverage in the present sense of the term, was known or spoken of prior to the advent of Coca-Cola in 1886, and that the Coca-Cola Company has always asserted its claim to the exclusive use of the term. In our opinion, these considerations, even if sustained by the evidence, are not controlling in the face of the fact that the word "cola" does not today indicate the plaintiff's product but a class of drinks to which the goods of the defendants and many other competitors belong. The applicable rule, supported by authority, is thus stated in the Restatement of Torts: "§ 735. (1) A designation which is initially a trade-mark or trade name ceases to be such when it comes to be generally understood as a generic or descriptive designation for the type of goods, services or business in connection with which it is used." Comment (a) to the foregoing sub-section (1) reads as follows: "Significance of change in meaning. When one has a monopoly of the initial distribution of a specific article over a period of time, and especially if the descriptive name for the article is one difficult to pronounce or remember, there is a likelihood that the designation which he adopts as his trade-mark for the article will be incorporated into the language as the usual generic designation for an article of that type. When that happens, the designation becomes merely descriptive of the goods and no longer identifies a particular brand or performs any of the functions of a trademark or trade name. Moreover, the designation must then be used by others if there is to be any effective competition in the sale of the goods. It is immaterial that the person first adopting the designation made every reasonable effort to avoid this result or that the designation was coined

by him and derived meaning only from his use. The designation may be used by others, subject to the limitations of Sub-Section (2) and of Sec. 712 relating to fraudulent marketing."

We are, however, in accord with the conclusion of the District Court that the conduct of the defendants has been such as to justify a decree restricting their business activities in the future along certain lines. The evidence amply justifies the finding that distributors of their products in New England, New York and St. Louis, and to a less extent in Baltimore, have attempted to sell and have sold their syrup to customers, engaged in the fountain trade, with the understanding that the drink made therefrom should be sold as and for Coca-Cola. The officers of the defendant corporation had knowledge of these activities and participated therein. The sale of syrup to the fountain trade constituted about ten per cent of the total business of the defendant.

The evidence also justifies the finding that the bottled beverage made by bottlers from defendant's concentrate was passed off as Coca-Cola in various bars and taverns. It is difficult to ascertain how wide-spread this practice has been, but there is some evidence that an officer of the corporation encouraged the practice. The defendants were also fully aware of the use of the infringing word "Lola-Kola" by bottlers, and indeed agreed to place this word on all packages of its concentrate sold to Lola Bottlers, Inc. Under these circumstances, it is a reasonable conclusion that the defendants have conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so.

The remedy for these illegal acts, which appears in the decree, is the issuance of an injunction against the defendants enjoining them from committing any acts calculated to cause any product other than the plaintiff's to be known or sold as "Coca-Cola" or "Koke," or any colorable imitation thereof. The defendants are also enjoined "(f) From giving to any part of their merchandise not sold by defendants, their agents or distributors, in bottles to consumers, a color imitating or resembling the color of plaintiff's product, if or when defendants know, or in the exercise of reasonable care should know, that the purchaser thereof intends to dispense such merchandise to the consumer other than in bottles, or intends to bottle the beverage made from such product and to use on the bottles, labels or caps some extrinsic, deceiving element that in conjunction with the color imitating plaintiff's color enables such purchaser to pass off his, her or their product for plaintiff's product." . . .

Notes and Questions

4.16. Both copyright and patent award rights to people who create information. Trademark law is different. After Defense Secretary Donald Rumsfeld used the phrase “shock and awe” to describe the initial bombing campaign of the Iraq War, the USPTO received dozens of trademark applications for the phrase SHOCK AND AWE, for goods ranging from video games to fireworks to eyewear. See Sabra Chartrand, *Trademarking “Shock and Awe”*, N.Y. TIMES, Apr. 21, 2003, <http://www.nytimes.com/2003/04/21/technology/21PATE.html>. None of these applicants created the phrase. What they hoped to create – and what trademark law protects – is the goodwill in consumers’ minds associating the phrase with their particular goods. Any user of a mark who succeeds in creating those associations obtains trademark rights against confusing uses of the mark. So trademark rights flow from use, and they endure as long as the use continues. Compare and contrast this basis of protection with the other bases we have studied – and keep it in mind. Rights based on use will be important in our discussion of natural resources.

4.17. The basic species of trademark infringement is confusion about source: the consumer buys the defendant’s product rather than the plaintiff’s in the mistaken belief that it *is* the plaintiff’s product. This form of confusion, known as *passing off*, is actionable even when the defendant scrupulously avoids using the plaintiff’s trademark but still manages to trick consumers about what they are buying. (Scene: Restaurant, interior, day. Patron: “I’ll have a Coke, please.” Waiter: “Here you go.” Waiter serves Patron a glass of MarBert the Distinctive Cola.) There is a close kinship between this theory of liability and the hypothetical, discussed in *Keeble v. Hickeringill*, of the schoolmaster who scares of his competitor’s students by shooting a gun in the air. Both are forms of *unfair competition*: stealing customers from a competitor with dishonest or dangerous business practices.

But trademark law today is not limited to passing off. Another species of trademark liability is *dilution*, in which the defendant allegedly harms the trademark itself.

First, there is concern that consumer search costs will rise if a trademark becomes associated with a variety of unrelated products. Suppose an upscale restaurant calls itself "Tiffany." There is little danger that the consuming public will think it's dealing with a branch of the Tiffany jewelry store if it patron-

izes this restaurant. But when consumers next see the name "Tiffany" they may think about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished. Consumers will have to think harder — incur as it were a higher imagination cost — to recognize the name as the name of the storeSo "blurring" is one form of dilution.

Now suppose that the "restaurant" that adopts the name "Tiffany" is actually a striptease joint. Again, and indeed even more certainly than in the previous case, consumers will not think the striptease joint under common ownership with the jewelry store. But because of the inveterate tendency of the human mind to proceed by association, every time they think of the word "Tiffany" their image of the fancy jewelry store will be tarnished by the association of the word with the strip joint. So "tarnishment" is a second form of dilution. Analytically it is a subset of blurring, since it reduces the distinctness of the trademark as a signifier of the trademarked product or service.

Ty, Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002). Are these forms of harm against which trademark law ought to guard? Or are they the result of taking the metaphor of a trademark as "property" too seriously?

4.18. Trademark law has a strong consumer-protection flavor. This gives it a close connection to false advertising law, but note that trademark law targets a particular species of misleading statements: those that involve misleading uses of trademarks. Unsurprisingly, then, trademark law has defenses for people who use trademarks in basically truthful ways. Comparative advertising, for example, allows a defendant to use the plaintiff's trademark rather than circumlocutions like "the other leading brand" in statements like "Four out of five taste-testers preferred Pepsi to Coke." And nominative fair use (not to be confused with the completely different defense of fair use in copyright) lets defendants describe their products in terms of the plaintiff's, as in "The best Toyota repair shop in the Tri-State Area." It also affects trademark law's exhaustion doctrine, because secondhand items bearing a trademark may well be meaningfully different than new items precisely because they are used. Would you buy a used golf ball? A used car? A used textbook? Used underwear? It is legal to sell such items with the original trademarks – provided their used status and

their current condition are accurately disclosed.



4.19. It is common for different kinds of intellectual property to apply to different aspects of the same thing. Take an iPhone. Apple has utility patents covering numerous aspects of how it works, such as the slide-to-unlock feature and shatterproof glass coatings. It has copyrights in the iOS software and icon designs. It has trademarks on IPHONE and the Apple logo. It has design patents in aspects of the iPhone's shape. Just as intellectual property rights can overlap or interfere with other property rights, different kinds of intellectual property rights can overlap or interfere. And just as first sale/exhaustion polices some of these boundaries, other doctrines help keep intellectual property systems from stepping on each other's toes. For example, "functional" material cannot be protected as a trademark. In *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001), MDI obtained a patent on a "dual-spring" design for road signs that helped keep them from tipping over on windy days. After the patent expired, a competitor, TraFFix, introduced its own dual-spring road signs. MDI sued for trademark infringement, claiming that the dual-spring design was a source-indicating feature, i.e., that consumers recognized that the dual springs indicated they were buying a MDI sign. No dice, said the Supreme Court. Even if consumers did associate the dual springs with MDI, giving it trademark rights in the design would improperly extend its patent rights past the end of their proper term. Competitors like TraFFix need to be free to copy any feature of the design that is "essential to the use or purpose of the article" or that "affects the cost or quality of the article." A similar doctrine excludes functional material from copyright protection. See 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . .").

4.4 Other Kinds of Intellectual Property

Cheney Bros. v. Doris Silk Co.
35 F.2d 279 (2nd Cir. 1929)

L. HAND, Circuit Judge:

The plaintiff, a corporation is a manufacturer of silks, which puts out each season many new patterns, designed to attract purchasers by their novelty and beauty. Most of these fail in that purpose, so that not much more than a fifth catch the public fancy. Moreover, they have only a short life, for the most part no more than a single season of eight or nine months. It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well, and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act (17 USCA § 1 et seq.), or at least so the authorities of the Copyright Office hold. So it is easy for any one to copy such as prove successful, and the plaintiff, which is put to much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains.

Taking advantage of this situation, the defendant copied one of the popular designs in the season beginning in October, 1928, and undercut the plaintiff's price. This is the injury of which it complains. The defendant, though it duplicated the design in question, denies that it knew it to be the plaintiff's, and there thus arises an issue which might be an answer to the motion. However, the parties wish a decision upon the equity of the bill, and, since it is within our power to dismiss it, we shall accept its allegation, and charge the defendant with knowledge.

The plaintiff asks for protection only during the season, and needs no more, for the designs are all ephemeral. It seeks in this way to disguise the extent of the proposed innovation, and to persuade us that, if we interfere only a little, the solecism, if there be one, may be pardonable. But the reasoning which would justify any interposition at all demands that it cover the whole extent of the injury. A man whose designs come to harvest in two years, or in five, has *prima facie* as good right to protection as one who deals only in annuals. Nor could we consistently stop at designs; processes, machines, and secrets have an equal claim. The upshot must be that, whenever any one has contrived any of these, others may be forbid-

den to copy it. That is not the law. In the absence of some recognized right at common law, or under the statutes—and the plaintiff claims neither—a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure.

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, we are not in any position to pass upon the questions involved, as Brandeis, J., observed in *International News Service v. Associated Press*. We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.

Notes and Questions

4.20. Not all information is subject to intellectual property protection. As *Cheney Bros.* illustrates, court will not simply fashion a remedy for the victim of copying by looking to a general right against imitation. Instead, they will give recovery when the victim can point to some specific and well-established body of intellectual property law giving rights over a particular kind of information. One consequence of this attitude, illustrated here, is that fashion designs are protected neither by federal statutory law or copyright law nor by state common law. And yet the fashion industry exists, and regularly produces new designs – and lots of them. Does this mean that intellectual property laws are unnecessary in general?

4.21. Indeed, part of the point of the case is the existence of federal copy-

right law provides a reason for state law *not* to apply. How would the goals of the copyright laws be undermined if states were to supply protection here? (The Copyright Act of 1976 is even more unequivocal on this point; it explicitly pre-empts “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.” 17 U.S.C. § 301(a).)

4.22. In recent years, Congress has considered a number of bills that would extend copyright-like protections (albeit with shorter terms) to fashion designs. Would these bills be good or bad for the fashion industry? For clothing buyers?

Chapter 5

Allocation

We may well conclude that certain types of resources should be subject to private ownership, and we may further conclude that such ownership ought to entail particular rights of owners. But this would not be sufficient to establish a system of property rights. We would still need to decide which things are owned by whom. Certainly, if one of the rights of owners is the right to alienate, then once something is legitimately owned by someone, that person can transfer rightful ownership to someone else. (We will study how such transfers can come about later in this book—indeed we will find that some transfers can confer the rights of ownership on a transferee even where the transferor's rights are not so clear-cut. We will also see that there are ways for things owned by one person to become owned by another person *other than* by voluntary transfer.)

But even assuming a current owner could trace their rights of ownership back through a series of successive voluntary transfers from rightful owners—a *chain of title*, as we will come to call it—the first link in that chain *must* be something other than a transfer from a prior rightful owner. What could this something be? How do things go from being unowned to being owned? Why might we recognize some rules for such initial allocations of resources over the available alternatives?

In this chapter, we will examine the most common justification for protecting someone's rights of ownership: *possession*. The common law holds that initial ownership of a heretofore unowned thing goes to the *first to possess* that thing—that first in time is first in right. But as we will see, this rule is not as straightforward as it may seem. To begin with, reasonable people may differ as to what constitutes “possession,” or what it means to be “first.” Our first few cases illustrating this problem deal with first possession of *chattels* (sometimes



Figure 5.1: Source: R.S. SURTEES, HAWBUCK GRANGE 197 (1885), British Library, <https://flic.kr/p/i38jT2>.

called “personal property” or “personalty”—basically any ownable thing that isn’t land or attached to land).

5.1 Initial Allocation of Chattels

Pierson v. Post
3 Cai. R. 175 (N.Y. Sup. Ct. 1805)

THIS was an action of trespass on the case commenced in a justice’s court, by the present defendant against the now plaintiff.

The declaration stated that *Post*, being in possession of certain dogs and hounds under his command, did, “upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox,” and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, *Pierson*, well knowing the fox was so hunted and pursued, did, in the sight of *Post*, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action

TOMPKINS, J. delivered the opinion of the court.

This cause comes before us on a return to a *certiorari* directed to one of the justices of *Queens* county.

The question submitted by the counsel in this cause for our determination is, whether *Lodowick Post*, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against *Pierson* for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. *Justinian's Institutes*, lib. 2. tit. 1. s. 13. and *Fleta*, lib. 3. c. 2. p. 175. adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by *Bracton*, lib. 2. c. 1. p. 8.

Puffendorf, lib. 4. c. 6. s. 2. and 10. defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and *Bynkershoek* is cited as coinciding in this definition. It is indeed with hesitation that *Puffendorf* affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave *Post* no legal right to the fox, but that he became the property of *Pierson*, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in *England*, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the *English* reporters.

Barbeyrac, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf's* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. *Barbeyrac* seems to have adopted, and had in view in his notes, the more accurate opinion of *Grotius*, with respect to occupancy. That celebrated author, lib. 2. c. 8. s. 3. p. 309. speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*"* But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*"† This qualification embraces the full extent of *Barbeyrac's* objection to *Puffendorf's* definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by *Barbeyrac* in his notes. The case now under consideration is one of mere pursuit, and presents no cir-

*Translation: "Some bodily possession is required for acquiring ownership; for that reason, wounding is not enough." —Eds.

†Translation: "But that possession can be not only by hand, but by instruments, such as traps, nets, and snares, where two things are present: first that this instrument itself be in our control, and then that the wild thing, being enclosed, cannot exit therefrom." —Eds.

cumstances or acts which can bring it within the definition of occupancy by *Puffendorf*, or *Grotius*, or the ideas of *Barbeyrac* upon that subject.

The case cited from 11 *Mod.* 74–130[‡] I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 *Salk.* 9. *Holt*, Ch. J. states, that the ducks were in the plaintiff's decoy pond, and *so in his possession*, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.[§]

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of *Pierson* towards *Post*, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J.

My opinion differs from that of the court.

Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone*, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a

[‡]This citation, and the following citation to *Salk.*, both refer to the case of *Keeble v. Hickeringill* presented later in this book. —Eds.

[§]Translation: "by reason of the soil." —Eds.

court thus constituted, the skin and carcass of poor *reynard*[¶] would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana*. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a “wild and noxious beast.” Both parties have regarded him, as the law of nations does a pirate, “*hostem humani generis,*”[¤] and although “*de mortuis nil nisi bonum,*”^{**} be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, “*sub jove frigido,*”^{††} or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, “with hounds and dogs to find, start, pursue, hunt, and chase,” these animals, and that, too, without any other motive than the preservation of *Roman* poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear

[¶]Reynard was a clever (and often duplicitous) fox character who featured in several well-known medieval European folk tales and literary works. The character's popularity gave rise to the modern French word for "fox": *renard*. —Eds.

[¤]Translation: “enemy of the human race.” —Eds.

^{**}Translation: “Of the dead say nothing but good.” —Eds.

^{††}Translation: “Under frigid Jove” (*i.e.*, under a cold sky). —Eds.

to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*;^{‡‡} and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of *Barbeyrac*, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with *large dogs and hounds*, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only*, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of *imperial stature*, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of *Barbeyrac*, that property in animals *feræ naturæ* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable prospect* (which certainly existed here) of taking, what he has *thus* discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of

^{‡‡} Translation: "times change." Part of a well-known Latin aphorism, *tempora mutantur, nos et mutamur in illis*: "times change, and we change with them." —Eds.

a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin*, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The *justice's* judgment ought, therefore, in my opinion, to be affirmed.

Judgment of reversal.

Notes and Questions

5.1. Justifying Allocations. Does awarding ownership of a previously un-owned chattel to the first possessor of that chattel strike you as a good rule? Consider some arguments that might be raised for or against it:

- Administrability: Is the rule easy to apply? Does it give clear and ready answers? Does it make judges' and litigants' jobs easier or harder? Does it minimize the cost and time involved in resolving disputes? Can it be applied without resort to ambiguous or hard-to-obtain evidence?
- Fairness: Does the rule comport with well-considered notions of fairness? Does it treat similarly situated people similarly? Does it favor some claimants over others based on criteria that seem irrelevant, arbitrary, or beyond the claimants' control?
- Morality: Does the rule reward moral behavior and punish—or at least refrain from rewarding—immoral behavior? (This assumes of course that we have a standard for moral and immoral behavior.)
- Reliance: Does the rule respect the reasonable expectations of those with an interest in contested resources? Does it result in a forfeiture of their investment of time, money, or effort premised on such expectations? Does it comport with tradition?
- Pragmatism: Does the rule roughly comport with the moral intuitions of those who are subject to it? Do we expect the rule to be obeyed?
- Ecology: Is the rule consistent with responsible stewardship of resources? Does it ensure that an exhaustible resource will remain available for the benefit of future generations?
- Incentives: Does the rule encourage or discourage the conversion of idle resources to productive use? Does it encourage excessive, duplicative, or wasteful efforts to exploit resources? Does it encourage or discourage

disputes or violence among rival claimants? Does it encourage would-be claimants to expend resources on protecting themselves *against other* would-be claimants, instead of on more productive pursuits? When weighing these incentives in the aggregate, is the rule *efficient*? That is, does it extract the greatest possible value from available resources at the lowest possible cost?

Which of these arguments strikes you as more or less important to the justification of a legal rule—particularly a rule of property law? Which of them were invoked by Justices Tompkins and Livingston in *Pierson*?

Even if we agree as to which of these arguments matter in disposing of a particular dispute, are we sure to agree whether a particular type of argument favors a particular party? For example, is Justice Livingston correct in claiming that the decision in Pierson's favor will provide insufficient incentive for hunters to capture foxes? Is Justice Tompkins correct in claiming that a decision in Post's favor would lead to increased disputes over the trophies of the chase? Does either opinion clearly establish which outcome would be the most fair? How could we know the answer to these questions?

5.2. **Alternatives to First Possession.** Is the rule of first possession the best available rule for allocating unowned resources? Consider some possible alternative allocation principles:

- Perhaps initial allocation should go to the first *claimant*—the first to explicitly assert a right of ownership (or manifest the intent to assert such a right, as by pursuit).
- Perhaps initial allocation should go to the *last possessor*—the person who gains and maintains possession against the efforts of all competitors.
- Perhaps possession is irrelevant: perhaps initial allocation should go to all interested claimants in equal shares.
- Perhaps the resource should be owned as a *commons*: it belongs to everybody jointly; everybody has an equal right to it and nobody has a superior right to anyone else.
- Perhaps the government ought to own everything and simply provide rights of possession and use by means of bureaucratic and political mechanisms. (Then again, perhaps this is exactly what the common law of *real* property does, as discussed below with respect to allocation of land.)
- Perhaps ownership should be determined by lot, at random.

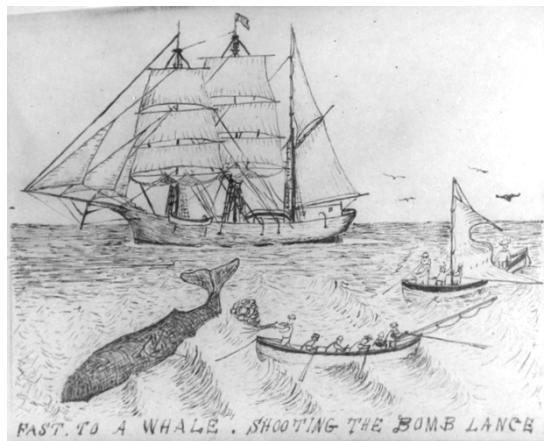


Figure 5.2: Source: “Fast to a whale, shooting the bomb lance.” New Bedford Free Public Library. *Digital Commonwealth*, <http://ark.digitalcommonwealth.org/ark:/50959/sb398z14j>.

How would each of these rules compare to the rule of first possession in terms of each of the justifications we have just reviewed for and against that rule? What do you think would be the *practical* result of choosing one of these alternative allocation regimes—i.e., how would people likely shape their behavior in response to these allocation rules?

5.3. Recall the first type of justification we discussed in Note 5.1 above: administrability. Do you think it will always be obvious that one claimant of a chattel has achieved possession and another has not? Consider the following case.

Ghen v. Rich
8 F. 159 (D. Mass. 1881)

NELSON, D.J.

This is a libel to recover the value of a fin-back whale. The libellant lives in Provincetown and the respondent in Wellfleet. The facts, as they appeared at the hearing, are as follows:

In the early spring months the easterly part of Massachusetts Bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue

them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case. The libellant has been engaged in this business for ten years past. On the morning of April 9, 1880, in Massachusetts Bay, near the end of Cape Cod, he shot and instantly killed with a bomb-lance the whale in question. It sunk immediately, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, 17 miles from the spot where it was killed. Instead of sending word to Provincetown, as is customary, Ellis advertised the whale for sale at auction, and sold it to the respondent, who shipped off the blubber and tried out the oil. The libellant heard of the finding of the whale on the morning of the 15th, and immediately sent one of his boat's crew to the place and claimed it. Neither the respondent nor Ellis knew the whale had been killed by the libellant, but they knew or might have known, if they had wished, that it had been shot and killed.

with a bomb-lance, by some person engaged in this species of business.

The libellant claims title to the whale under this usage. The respondent insists that this usage is invalid. It was decided by Judge Sprague, in *Taber v. Jenny*, 1 Sprague, 315, that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterwards found, still anchored, by another ship, there is no usage or principle of law by which the property of the original captors is diverted, even though the whale may have dragged from its anchorage. The learned judge says:

When the whale had been killed and taken possession of by the boat of the Hillman, (the first taker,) it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored, with unequivocal marks of appropriation.

In *Bartlett v. Budd*, 1 Low. 223, the facts were these: The first officer of the libellant's ship killed a whale in the Okhotsk sea, anchored it, attached a waif* to the body, and then left it and went ashore at some distance for the night. The next morning the boats of the respondent's ship found the whaleadrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached to it. Judge Lowell held that, as the libellants had killed and taken actual possession of the whale, the ownership vested in them. In his opinion the learned judge says:

A whale, being *ferae naturae*, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property.

He doubted whether a usage set up but not proved by the respondents, that a whale foundadrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that "there would be great difficulty in upholding a custom

*"The waif is a pennoned pole, two or three of which are carried by every boat; and which, when additional game is at hand, are inserted upright into the floating body of a dead whale, both to mark its place on the sea, and also as token of prior possession, should the boats of any other ship draw near." HERMAN MELVILLE, MOBY-DICK 368 (1922) [1892]. —Eds.

that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit." Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In *Swift v. Gifford*, 2 Low, 110, Judge Lowell decided that a custom among whalers in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in the Arctic Ocean, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and captured the whale, and the master of the respondent's ship claimed it on the spot. It was held by the learned judge that the whale belonged to the respondents. It was said by Judge Sprague, in *Bourne v. Ashley*, an unprinted case referred to by Judge Lowell in *Swift v. Gifford*, that the usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and he added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.

In *Swift v. Gifford*, Judge Lowell also said:

The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used, and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception.

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of

the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in *Taber v. Jenny* and *Bartlett v. Budd*. If the fisherman does all that is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the libellant.

The rule of damages is the market value of the oil obtained from the whale, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion. As the question is new and important, and the suit is contested on both sides, more for the purpose of having it settled than for the amount involved, I shall give no costs.

Decree for libellant for \$71.05, without costs.

Notes and Questions

5.4. Primary and Secondary Rules. Is the rule of *Ghen v. Rich* different from the rule of *Pierson v. Post*? If so, how? Are the justifications for the rule, or for the outcome, the same in each case? If not, how do they differ?

To answer this question, it may be helpful to distinguish between what leading legal philosopher H.L.A. Hart called *primary rules* and *secondary rules*. In Hart's account, *primary rules* are those that prescribe standards of conduct, and set forth consequences for failure to act accordingly. Statutes defining and setting forth punishments for crimes provide a straightforward example. *Secondary rules* are basically everything else, but in particular they include rules that give actors within the legal system the power to create, alter, or abolish their own primary rules. For example, contract law is largely a body of secondary rules: parties to a contract acting within those rules have the power to create legal rights and obligations that will bind them; the contract itself embodies the applicable primary rules. (For more on this distinction—and more of Hart's monumental contributions to jurisprudence—see H.L.A. HART, THE CONCEPT OF LAW.)

Based on this admittedly limited introduction to the concept, was the determinative legal rule in *Ghen v. Rich* a primary or a secondary rule? What about in *Pierson v. Post*?

5.5. **Whose Custom?** In *Aberdeen Arctic Co. v. Sutter*, 4 McQ. H.L. 355 (1862), the House of Lords heard the appeal of a case involving a hired Eskimo harpooner aboard an English whaling vessel in Cumberland Inlet, a traditional native fishing ground in what is now Canada. The harpooner, one Bullygar, struck a whale with a harpoon and line, at the end of which was attached an inflated sealskin, or “drog,” which the native fishermen had a custom of using to tire the harpooned animal and to make it easier to track while it swims below the surface. The whale dove immediately, so deep that Bullygar was forced to release his line, and it did not surface again until it had traveled several miles. Before Bullygar and his ship could retrieve it, another ship—the *Alibi*—came upon the wounded whale, killed it, and took it. Bullygar’s captain (Sutter) sued the owners of the *Alibi* for “compensation and damages” in the amount of £1,200.

The Law Lords found for the owners of the *Alibi*, recognizing a custom of English whalers in the shallower waters around Greenland. This custom was known as “fast and loose” (which does not—or did not—mean what you think it means). According to the “fast and loose” rule, the first ship to harpoon a whale has a right to the animal so long as the ship holds “fast” to its line, even if other ships participate in the ultimate killing and capture of the whale. But if the whale should break free—even if mortally wounded—or if the line should be intentionally cut or released—even for reasons of safety or necessity—the whale becomes “loose” and will become the property of the first ship to actually secure it. (See HERMAN MELVILLE, MOBY-DICK 372-75 (1922) [1892] (“Fast-Fish and Loose-Fish”).)

Sutter argued that Cumberland Inlet had long been governed by the custom of the Eskimo—which conferred ownership on the first person whose harpoon struck and remained in the animal with the drog attached—and that the English “fast and loose” rule should not apply. Lord Chancellor Westbury rejected the argument. He opined that Sutter had the burden of proving that English whaling ships entering this new fishing ground had agreed *not* to bring the “fast and loose” custom with them. Indeed, he openly doubted whether the drog fishing methods of the Eskimo—which they used primarily in seal hunting—were even capable of capturing a whale. Moreover, he suggested that even if the case were to be decided by the law of “occupancy” rather than the custom of English whalers, the result would be the same.

Is the rule of *Ghen v. Rich* the same as the rule of *Aberdeen Arctic Co. v. Sutter*? If different, which rule is better and why?

5.6. Imagine you are counsel to either Pierson or Rich, and your adversary makes you an offer of settlement: to sell the contested chattel and split the pro-

ceeds evenly. What would you advise your client to do? Consider the following case.

Popov v. Hayashi

2002 WL 31833731 (Cal. Sup. Ct. San Francisco Cty. Dec. 18, 2002)

MCCARTHY, J.

Facts

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance of the ball. It was worth a great deal of money¹ and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

. . . When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

¹It has been suggested that the ball might sell for something in excess of \$1,000,000.



Figure 5.3: Source: *Up For Grabs* (Crooked Hook Productions 2004)

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. [The evidence is insufficient] to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

. . . It is important to point out what the evidence did not and could not show. Neither the camera [of a local news team fortuitously recording the incident] nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain

control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

Legal Analysis

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another. . . . If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

. . . Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came in possession of the ball became its new owner.

. . . Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. Various courts have condemned the term as vague and meaningless.

This level of criticism is probably unwarranted.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

. . . We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession

is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world.²³ The question is whether he did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition[:] "A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor."²⁴

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.²⁵ Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.²⁷ Moreover, such efforts

²³Literally.

²⁴This definition is hereinafter referred to as Gray's Rule.

²⁵*Pierson v. Post*, 3 Caines R. (N.Y. 1805).

²⁷The degree of control necessary to establish possession varies from circumstance to circumstance. "The law . . . does not always require that one who discovers lost or abandoned property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable

must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.

This rule is applied in cases involving the hunting or fishing of wild animals²⁹ or the salvage of sunken vessels. The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.

In the salvage cases, an individual may take possession of a wreck by exerting as much control “as its nature and situation permit”. Inadequate efforts, however, will not support a claim of possession. Thus, a “sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party.”

These rules are contextual in nature. They are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The “nature and situation” of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap one’s arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray’s Rule is adopted as the definition of possession in this case.

The central [tenet] of Gray’s Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has

interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit.” *Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* 640 F.2d 560, 571 (5th Cir. 1981).

²⁹ . . . *Ghen v. Rich* 8 F. 159 (D. Mass. 1881); *Pierson v. Post* 3 Caines R. (N.Y. 1805) . . .

not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.³⁴

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen.

. . . The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can[.] An action for conversion may be brought where the plaintiff has title, possession or the right to possession.

. . . Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

. . . Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a

³⁴Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier, this is impossible.

legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. . . . Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, [but] the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

. . . The concept of equitable division has its roots in ancient Roman law. As Helmholz points out, it is useful in that it “provides an equitable way to resolve competing claims which are equally strong.” Moreover, “[i]t comports with what one instinctively feels to be fair”.

. . . The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

. . . Mr. Hayashi’s claim is compromised by Mr. Popov’s pre-possessory interest. Mr. Popov cannot demonstrate full control. . . . Their legal claims are of equal quality and they are equally entitled to the ball.

. . . The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff’s cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties



Figure 5.4: Source: Raphael, Judgment of Solomon. Vatican Museums.

Notes and Questions

5.7. Splitting the Baby. The cynical lawyer would call Judge McCarthy's ruling in *Popov v. Hayashi* a classic example of "splitting the baby." The implication is that ordering the division of the disputed chattel is wishy-washy, or a cop-out. This assumes that there is a "right" answer that will make one party perfectly happy and utterly disappoint the other, but for whatever reason the judge has decided to ignore that answer and instead issue a ruling that tries to give something to everybody and therefore satisfies nobody.¹

Is that a fair critique? Come to think of it, why don't we resolve *all* disputes over initial ownership of chattels this way? Should Pierson and Post have split the value of the fox pelt? Should Ghen and Rich (or perhaps Ellis) have shared the value of the whale oil? (Wouldn't they have done so under the custom supposedly enforced by the court in that case?) Are there good reasons *not* to compel competing claimants of a resource to *share*? What would your kindergarten teacher say?

Your casebook authors would never dare contradict your kindergarten teacher, but we might venture a few questions: How would you expect com-

¹In the Old Testament parable from which the idiom is derived, King Solomon supposedly used this device to suss out the true facts of the case he was called on to decide—that is, to identify the true mother of a disputed child. (He did not, in the event, actually split the baby.) (1 KINGS 3:16-28.) Why might a judge in a modern court of law issue a ruling that makes nobody happy? Why do you think Judge McCarthy did so in *Popov*?

peting claimants to a single, indivisible resource to behave under a rule that requires them to share that resource? How do adults who share a household usually share the resources of that household? Does it matter if the people sharing like or respect each other? How would you expect courts to resolve their disputes under a rule requiring sharing? What do you expect the reactions to such resolutions would be? What would be the effect on the value and productive use of such resources?

Finally, which of the justifications for allocation rules discussed in Note 5.1 on page 166 are implicated by these questions?

5.8. **Precedent.** In common-law systems, courts rely on *precedent*—earlier decided cases presenting similar facts and legal issues—to guide their decisions. Precedent may be either *binding authority*—if it issues from a court with direct appellate jurisdiction over the court deciding an identical issue—or *persuasive authority*—if it issues from a different court in an opinion the deciding court finds well-reasoned and analogous.

In *Popov* Judge McCarthy cited and relied on our two earlier chattels cases, *Pierson v. Post* and *Ghen v. Rich*, to justify his ruling. Do you agree with Judge McCarthy's interpretation of these precedents? Do you think he applied them correctly to the facts of the case before him? Do you think he should have relied on these two decisions as persuasive authority in the *Popov* case?

5.9. **Escape and Return.** The common law developed particular rules to deal with a captured wild animal that later escaped. In general, once such an animal is free of the control of its captor, that captor loses their property right in the animal—in becomes once again *ferae naturae*, and a new captor can become its owner by killing or capturing it, free of any claim by the original captor. If, however, the animal in question has *animus revertendi*—a natural tendency to return to its place of captivity (like, say, homing pigeons, hived bees, or trained hawks)—its temporary departure from the possession of the original owner does not diminish that owner's property right. See 2 WILLIAM BLACKSTONE, COMMENTARIES *392-93.

Might the rule of escape have any application to *Popov v. Hayashi*? Or are there other factors at work in the case that make the rule unhelpful?

5.10. **Postscript.** Recall Question 5.6 on page 173, above. Patrick Hayashi claims that before this case went to trial, he made a settlement offer to Alex Popov whereby the two men would essentially do what the court ended up ordering them to do—selling the ball and dividing the proceeds. Popov, confident in his right to sole ownership, allegedly countered with a lowball offer of \$5,000

in exchange for return of the ball.² This turned out to be . . . ill advised.

Despite speculation that Barry Bonds's record-setting home-run ball might sell for a million dollars or more, the controversy over its ownership appears to have negatively affected its market value. At auction, the ball sold for \$450,000.³ Split according to the court's order, that came out to \$225,000 for each party—not a bad haul. But don't forget: this case was bitterly litigated for over a year—including a trial that proceeded over several weeks—and that ain't cheap.

Patrick Hayashi's attorneys ultimately agreed to waive most of their fee following the resolution of the case, leaving him enough from the proceeds of the sale to cover the cost of his graduate education. He left San Francisco and began a happy new life and career in San Diego.⁴

Alex Popov was not so lucky. The day after the ball went under the auction hammer, Popov's attorney, Martin Triano, obtained a temporary restraining order freezing Popov's share of the proceeds.⁵ Mr. Triano claimed that Popov still owed him attorney's fees in the amount of \$473,500.⁶ Alex Popov eventually filed for bankruptcy,⁷ but not before suing his attorney for malpractice and fraud.⁸ The litigation between Messrs. Popov and Triano was last before a judge in September 2011, nearly 10 years after Popov had his fateful brush with a piece of sports (and legal) history. At that appearance, Mr. Popov was ordered to pay Mr. Triano an additional \$22,241 in legal fees arising from their decade of litigation against one another⁹—though one suspects Mr. Triano may have some difficulty collecting the award. (There is a lesson here for lawyers, not just litigants.)

²Jay Posner, *Possessing 73rd HR ball first made his life a hassle, then movie*, SAN DIEGO UNION-TRIBUNE (June 14, 2005), http://www.utsandiego.com/uniontrib/20050614/news_1s14bondball.html.

³Ira Berkow, *73rd Home Run Ball Sells for \$450,000*, N.Y. TIMES (June 26, 2003), <http://www.nytimes.com/2003/06/26/sports/baseball-73rd-home-run-ball-sells-for-450000.html>.

⁴Gwen Knapp, *Finally, in Bonds ball case, someone shows some class*, S.F. CHRON. (Dec. 30, 2003) at A1, <http://www.sfgate.com/sports/article/Finally-in-Bonds-ball-case-someone-shows-some-2507738.php>.

⁵In re Martin Triano, Case No. CPF 03 503194, Temporary Restraining Order, June 26, 2003 (Cal. Super. Ct. San. Francisco Cty.).

⁶*Id.*, Petition filed by Martin F. Triano (June 20, 2003); see also David Kravets, Attorney sues fan over Bonds ball case, USA Today (July 8, 2003), http://usatoday30.usatoday.com/sports/baseball/nl/giants/2003-07-08-bonds-ball-legal-fees_x.htm.

⁷Bankruptcy Petition #: 05-32929 (N.D. Cal. Sept. 6, 2005).

⁸Popov v. Triano, Case No. CGC 04 427956, Complaint, Jan. 12, 2004 (Cal. Super. Ct. San. Francisco Cty.).

⁹In re Martin Triano, Case No. CPF 03 503194, Minute Entry, Sept. 16, 2011 (Cal. Super. Ct. San. Francisco Cty.) (granting in part Triano's motion for attorney's fees, in the amount of \$22,241).

gants.)

To learn more about the saga of *Popov v. Hayashi*, and to see video of the infamous home run itself, we highly recommend the 2004 feature-length documentary *Up for Grabs*.

5.11. Review and Application. On September 21, 2008, José Molina hit what would be the last home run at the old Yankee Stadium (which was demolished following the end of the season to make way for a new, glitzier facility). The ball sailed into the left-field stands, and was stopped by a net hung over the seating area specifically for the purpose of protecting fans from incoming fly balls. Several fans attempted to reach through the net to grab the ball, and one—Steve Harshman—managed to get his hand around it. But the net was still between him and the ball. Harshman told reporters he had intended to rip the ball through the net, but was interrupted by staff at the stadium, who instructed him to release it while giving assurances that they would return it to him. Harshman followed the staff's instructions, and the ball rolled down the net and into an adjacent seating area, where Bronx schoolteacher Paul Russo caught it. Yankee Stadium staff immediately confronted Russo and instructed him to turn over the ball. Russo complied, he claimed, because he thought the staff was offering to secure the ball on his behalf. Instead, to Mr. Russo's surprise and chagrin, they delivered the ball to Mr. Harshman.¹⁰

Imagine Mr. Russo sues Mr. Harshman for return of the last home-run ball hit at the House that Ruth Built. What result? Would it matter if Yankee Stadium had a long-established policy of having its staff deliver game-play balls to fans who grasp them through protective netting on condition that the fan release the ball when instructed? Would it matter *why* the organization implemented such a policy?

5.12. First Possession? Really? We have now examined three different cases that purport to resolve a property dispute between an earlier pursuer and a later captor by reference to the rule of first possession. But each of them appears to come out a different way. *Pierson* awards the chattel (or its value) to the captor; *Ghen* to the pursuer; *Popov* to both in equal shares. Are these three cases really applying the same rule? If so, what nuances should we add to the maxims “first in time is first in right” or “title goes to the first possessor” in order to explain the outcomes of these three cases and help us to resolve factually similar cases we may encounter in the future? And if not, what are the *multiple*

¹⁰James Barron, *At the Stadium, Possession Is Some Tenth of the Law*, N.Y. TIMES (Sept. 24, 2008) at B3, <http://www.nytimes.com/2008/09/24/nyregion/24ball.html>.



Figure 5.5: Source: Bayeux Tapestry. Left: Harold the King Is Slain. Right: William the Conqueror seated, center.

rules or considerations that govern the initial allocation of rights in chattels? Either way, how should we justify our rule(s)?

5.2 Allocation of Land

[A]ll the land in the kingdom is supposed to be holden, me-
diately or immediately, of the king; who is stiled the lord
paramount, or above all.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *59 (1765).

Unlike foxes, whales, and baseballs, *real property*—that is, land and structures and other improvements attached to land—isn’t subject to the physical control of an individual in the same way chattels are. So what might be the legal basis for allocating private rights in real property?

Claims to ownership of land in England trace back as much as a thousand years. In 1066, William the Bastard, Duke of Normandy, invaded England and defeated the Anglo-Saxon King Harold at the battle of Hastings—as immortalized in the Bayeux Tapestry. William—now William the Conqueror—promptly set about parcelling out rights to possess land in his new kingdom. William allocated these rights according to his political and military needs: affirming

the rights of Anglo-Saxon landholders who supported him, while expropriating the land of his opponents and reallocating it to his loyal Norman nobles. These nobles received their rights of *tenure* (from the Latin word *tenere* and Norman French word *tenir*, “to hold”) under obligations of *fealty* (from the Norman French *fedélité* or *fealté*, meaning fidelity or loyalty); the land each nobleman held was referred to as his *fé*, (variations: *fief*, *fee*, *feud*). Hence the name historians have applied to the resulting social system: *feudalism*. Feudal obligations typically included payment of taxes in cash or kind and rendering of services (primarily military services) to the *tenant’s* (holder’s) lord and king. This system of feudal grants of possessory and usufructuary rights from the crown evolved over the centuries into the modern system of land ownership—a historical process we will revisit later in Chapter 11.

Can there be any justification for the allocation of rights in land beyond the whims of a long-dead warlord and his cronies? In early modern England this was not merely an academic question. Huge changes in the legal regime governing rights to land were underway: lands in England long held as “commons” were being progressively “enclosed” (i.e., appropriated) by noble families for their private use, the personal loyalty relationships underlying feudal land tenure were being supplanted by a more self-consciously economic approach to land rights, and the colonization of the Americas brought European settlers into contact—and often conflict—with native Americans. In this period of rapid change, Britain’s leading thinkers turned to the problem of justifying private property rights in land.

Thomas Hobbes, *Leviathan*

pp. 188-190 (Oxford 1909) [1651]

The NUTRITION of a Common-wealth consisteth, in the *Plenty*, and *Distribution of Materials* conducing to Life: In *Concoction*, or *Preparation*; and (when concocted) in the *Conveyance* of it, by convenient conduits, to the Publique use.

. . . The Distribution of the Materials of this Nourishment, is the constitution of *Mine*, and *Thine*, and *His*, that is to say, in one word *Propriety*; and belongeth in all kinds of Common-wealth to the Sovereign Power. For where there is no Common-wealth, there is, (as hath been already shewn) a perpetuall warre of every man against his neighbour; And therefore every thing is his that getteth it, and keepeth it by force; which is neither

Propriety nor *Community*; but *Uncertainty*. . . . Seeing therefore the Introduction of *Propriety* is an effect of Common-wealth; which can do nothing but by the Person that Represents it, it is the act onely of the Sovereign; and consisteth in the Lawes, which none can make that have not the Sovereign Power. And this they well knew of old, who called that *Nόμος*, (that is to say, *Distribution*,) which we call Law; and defined Justice, by *distributing* to every man *his own*.

. . . In this Distribution, the First Law, is for Division of the Land it selfe: wherein the Sovereign assigneth to every man a portion, according as he, and not according as any Subject, or any number of them, shall judge agreeable to Equity, and the Common Good. . . . And though a People coming into possession of a land by warre, do not alwaies exterminate the antient Inhabitants . . . but leave to many, or most, or all of them their Estates; yet it is manifest they hold them afterwards, as of the Victors distribution; as the people of *England* held all theirs of *William the Conquerour*.

William Blackstone, *Commentaries on the Laws of England*

Vol. 2, p. 2 (1765)

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to main-

tain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them.

John Locke, *Second Treatise of Civil Government*
Ch. 5 (1690)

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. No body can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him

But the chief matter of property being now not the fruits of the earth, and the beasts that subsist on it, but the earth itself; as that which takes in and carries with it all the rest; I think it is plain, that property in that

too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common. Nor will it invalidate his right, to say every body else has an equal title to it; and therefore he cannot appropriate, he cannot inclose, without the consent of all his fellow-commoners, all mankind. God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e. improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use

God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour: if he did, it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his industry could reach to.

. . . To which let me add, that he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common. And therefore he that incloses land, and has a greater plenty of the conveniences of life from ten acres, than he could have from an hundred left to nature, may truly be said to give ninety acres to mankind: for his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common. I

have here rated the improved land very low, in making its product but as ten to one, when it is much nearer an hundred to one: for I ask, whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life, as ten acres of equally fertile land do in Devonshire, where they are well cultivated?

. . . Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it upon what was common, which remained a long while the far greater part, and is yet more than mankind makes use of. Men, at first, for the most part, contented themselves with what unassisted nature offered to their necessities: and though afterwards, in some parts of the world, (where the increase of people and stock, with the use of money, had made land scarce, and so of some value) the several communities settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began; and the leagues that have been made between several states and kingdoms, either expressly or tacitly disowning all claim and right to the land in the others possession, have, by common consent, given up their pretences to their natural common right, which originally they had to those countries, and so have, by positive agreement, settled a property amongst themselves, in distinct parts and parcels of the earth . . .

. . . Thus in the beginning all the world was America . . .

Herman Melville, *Moby-Dick*

p. 375 (1922) [1892]

What was America in 1492 but a Loose-Fish, in which Columbus struck the Spanish standard by way of waifing it for his royal master and mistress? What was Poland to the Czar? What Greece to the Turk? What India to England? What at last will Mexico be to the United States? All Loose-Fish.

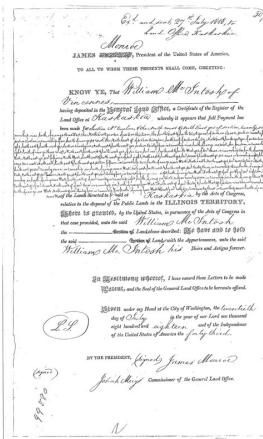


Figure 5.6: Federal Land Patent to William McIntosh

Johnson v. M'Intosh*
21 U.S. 543 (1823)

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States [dated July 20, 1818]. It came up on a case stated, upon which there was a judgment below for the defendant. . . .

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, there-

*The symbol in McIntosh's name is not an apostrophe but a "turned comma," or a left single quotation mark. Printers often used the symbol as a stand-in for a superscript letter c. See Michael G. Collins, *M'Culloch and the Turned Comma*, 12 Green Bag 2d 265 (2009). —Eds.

fore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

. . . No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. . . . Thus has our whole country been granted by the crown while in the occupation of the Indians. These [royal] grants purport to convey the soil as well as the right of dominion to the grantees. . . . In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. . . . It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

. . . Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the

exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

. . . In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made

by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c. "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

. . . The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

. . . Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mis-

sissippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

. . . Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and

exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

. . . After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court

of Illinois.

Judgment affirmed, with costs.

Mabo v. Queensland (No. 2) [“Mabo’s Case”]

High Court of Australia, (1992) 175 C.L.R. 1

BRENNAN J.

The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of 9 square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. . . . The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. . . . The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a strong sense of identity with their Islands. The plaintiffs are members of the Meriam people. In this case, the legal rights of the members of the Meriam people to the land of the Murray Islands are in question.

. . . It may be assumed that on 1 August 1879 the Meriam people knew nothing of the events in Westminster and in Brisbane that effected the annexation of the Murray Islands and their incorporation into Queensland and that, had the Meriam people been told of the Proclamation [of annexation] made in Brisbane on 21 July 1879, they would not have appreciated its significance. The legal consequences of these events are in issue in this case. Oversimplified, the chief question in this case is whether these transactions had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands. The defendant submits that that was the legal consequence of the Letters Patent and of the events which brought them into effect. If that submission be right, the Queen took the land occupied by Meriam people on 1 August 1879 without their knowing of the expropriation; they were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.

. . . In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions

of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies It is not possible, *a priori*, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

. . . International law [at the time of colonization of Australia by Britain] recognized conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty Various justifications for the acquisition of sovereignty over the territory of "backward peoples" were advanced. The benefits of Christianity and European civilization had been seen as a sufficient justification from mediaeval times. Another justification for the application of the theory of *terra nullius* to inhabited territory—a justification first advanced by Vattel at the end of the 18th century—was that new territories could be claimed by occupation if the land were uncultivated, for Europeans had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants.

. . . The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. . . . It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization

of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. It was such a rule which evoked from Deane J.[, in] Gerhardy v. Brown (1985) 159 CLR 70, at p. 149[,] the criticism that—

“the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in Johnson v. McIntosh, accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the ‘original inhabitants’ should be recognized as having ‘a legal as well as just claim’ to retain the occupancy of their traditional lands”.

However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. . . .

The land law of England is based on the doctrine of tenure. In English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term “tenure” is used to signify the relationship between tenant and lord, not the relationship between tenant and land When the Crown acquired territory outside England which was to be subject to the common law, there was a natural assumption that the doctrine of tenure should be the basis of the land law. Perhaps the assumption did not have to be made

By attributing to the Crown a radical title* to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown’s demesne. . . . But it is not a corollary of the Crown’s acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. . . . Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land)

*“Radical title” is a subtle and unsettled concept; it may refer here to the common-law principle that the government—i.e., the crown—is the ultimate source of property rights in land within the territory subject to its jurisdiction. —Eds.

and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.

... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners. . . . Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. . . . Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown.

... Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been

indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power. . . . However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose—at least for a time—and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. . . . [W]here the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[The Court declared that the Murray Islands are not crown lands, that the Meriam people were entitled to “possession, occupation, use and enjoyment” of the island of Mer (excluding certain parcels leased or physically used by the Australian, provincial, or local governments), and that the Meriam people’s right to Mer is subject to the power of the Queensland government to extinguish it by law.]

MASON C.J. and McHUGH J.

We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

In the result, six [out of seven] members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in ac-

cordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, . . . neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.

We are authorized to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.

[Opinions of Toohey and Gaudron JJ. and Dawson J. omitted.]

Notes and Questions

5.13. A system of land ownership founded on violent conquest strikes us as arbitrary and unjustifiable today. Both cases you read seem to reflect this view in their rhetoric. But do they implement such a view in their dispositions of the claims before them? Or do they follow Blackstone's advice to "obey the laws when made, without scrutinizing too nicely into the reasons of making them"?

Chief Justice Marshall seems almost embarrassed to confirm the "extravagant . . . pretension" that European discovery and conquest is not only a legitimate source of land titles in the United States, but the *only* legitimate source of such titles. But he does so anyway. Why?

Justice Brennan is even more forceful, finding the European doctrine of acquisition by discovery "an unjust and discriminatory doctrine of that kind can no longer be accepted." But is the rule he announces any different than the rule of *Johnson v. M'Intosh*? If so, how?

Can we think of a better justification for allocating ownership of land? What allocation rule would result from such a better justification? If we could come up with a better justified principle for allocating initial ownership of land than violent conquest, could we simply implement a system based on that principle

tomorrow? If not, what has become of Judge McCarthy's defiant assertion in *Popov v. Hayashi* that “[w]e are a nation governed by law, not by brute force”? Is there something different about land that makes allocation by “brute force” more acceptable?

5.14. Wrong + Time = Right? Perhaps the distinction between *Popov v. Hayashi* and *Johnson v. M'Intosh* has to do with how much time has passed since the violent dispossession of the aggrieved plaintiff. Does the fact that a thousand years have passed since William the Conqueror make his expropriation of land from the Anglo-Saxons any less unjust? What about the five hundred years since European discovery of the Americas? The two hundred years since the British colonization of Australia? If the United States invaded a foreign country—say, somewhere in the Middle East—tomorrow, and purported to sell to an American corporation legal title to land in that country that was in possession of natives claiming ownership under the laws of the conquered nation, would you expect the dispossessed natives to have a legal remedy? In what court?

Note that the major split between the Justices in *Mabo* was not over the existence of native title, but on its scope. Three (of seven) Justices would have held that “If common law native title is wrongfully extinguished by the Crown, . . . compensatory damages can be recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions,” and that extinguishment by inconsistent grant in the absence of an Act of Parliament is wrongful. Opinion of Toohey and Gaudron JJ., ¶ 64-65. We will consider how the passage of time can affect an owner’s ability to assert their rights in our units on Found and Stolen Property and on Adverse Possession.

5.15. Historical Injustices and Reparations. Should injuries to persons long dead, inflicted by persons long dead, be remediable? Are the descendants of the wronged individuals the proper recipients of such a remedy? Should the descendants of the inflictors of the injury be held liable?

In the United States, these are recurring issues that arise in discussions of the dispossession and genocide of Native Americans and the enslavement of kidnapped Africans and their descendants. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/> (citing early American examples of reparations of former slaves, cataloguing the continued injuries inflicted on African-Americans by the discrimination they face in American society, and laying out the case for a more comprehensive reparations program). Reparations are also the subject of serious philosophical, political, and

legal discussion. Consider the following excerpt from Carol Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1906-07 (2006) (footnotes omitted):

Property, as an institution, requires stability in people’s expectations about their own and other people’s claims. This is why property law has several claims-clearing devices that substitute Owner #2 for Owner #1 when the claims of Owner #1 have not been sufficiently publicized, and when most people think that Owner #2 is the true owner even though she is not. Adverse possession is a classic example of this sort of claims-clearing device.[†] Unfortunately, Owner #2’s claims may have arisen in dubious circumstances or even through force or fraud, and that fact can undermine confidence in the entire institution. Contemporary Russia is a case in point, where major capitalist figures are widely regarded as the beneficiaries of insider favoritism and horrifically shady practices. Should their great wealth be recognized, simply for the sake of getting on with things and letting a modern economy unroll? Or would some kind of redistribution actually lead to greater stability?

Historic injustices create another source of unease: Palestinians vis-à-vis Israelis, former East European landowners vis-à-vis the newcomers under Soviet rule, numerous indigenous groups vis-à-vis the settler societies that displaced them, descendants of slaves vis-à-vis the descendants of slave-owners. Settling all those scores could be hugely disruptive, and the passage of time itself makes proposed settlements morally ambiguous, because the original victims and perpetrators often are no longer on the scene. Why charge A in favor of B, when neither A nor B were personally involved in the past injustice? Moreover, settlements could leave open the origins of the displaced persons’ own prior claims, as in the case of former aristocrats’ plantations in East Germany. Just whom did their ancestors displace, far back in the Middle Ages? And so on back in time.

The age-old acquisition problem is not very salient to most property regimes, however, even though it bubbles hotly at the center in some locales. Issues of this kind usually become peripheral because we basically follow Blackstone’s advice: we for-

[†]We will discuss adverse possession in Chapter 8. —Eds.

get about the questionable origins of title. . . . By forgetting about origins we can keep on acquiring, investing, trading, and generally making ourselves wealthier. The larger public good of stable claims normally outweighs the private lapses that were entailed in some of those claims. But not surprisingly, on occasion the situation is reversed: unjust acquisitions may seem so gross as to eat away even the middle ground morality that makes property regimes possible. If you think that all those who succeed are thieves, why not be a thief yourself? That rhetorical question turns tit-for-tat practitioners into larcenists. Under such circumstances, public morality—even in quest of stability for property—could require some kind of restitutive gesture, or at least some acknowledgment of past injustice.

For further philosophical treatments of reparations and responsibility for ancient wrongs, see George Sher, *Transgenerational Compensation*, 33 PHILOS. & PUB. AFF. 181 (2005) (attempting to justify reparations); Christopher W. Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 AM. PHILOS. Q. 175 (1984) (casting doubt on the moral argument for reparations); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (addressing both philosophical and legal issues in reparations programs).

5.16. Is the United States' dispossession of Native Americans really a "historical" injustice? Professor Joseph Singer has long faulted the American legal system for its continued mistreatment of Native Americans:

[T]itle to land in the United States rests on the forced taking of land from first possessors—the very opposite of respect for first possession. Conquest is a mode of original acquisition that we cannot sweep under the rug by pretending that it accords with any recognizable principle of justice. And conquest, unfortunately, is where American history starts—as does the title to almost every parcel of land in the United States. This is a highly inconvenient (not to say stunningly demoralizing) fact, not least of all to the Indian nations that continue to inhabit the North American continent

Many of us protect ourselves from having to think too deeply about conquest by distancing ourselves from it. . . . If we can relegate conquest to the distant past, we can concentrate instead on

the fact that the United States was founded on respect for property rights. We do not acquire property by conquest today.

This comforting story is misleading at best and false at worst. We cannot comfort ourselves with the idea that conquest became a thing of the past with the American Revolution, independence from Great Britain, and the adoption of the U.S. Constitution.

Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 766-67 (2011) (reproduced with permission of the author). As Professor Singer explains, *id.* at 767-68, most of the federal government's dispossession of Native American land occurred during the 19th century. During the early 20th century—while the Supreme Court was gaining a reputation for striking down state economic legislation in the name of protecting freedom of contract and private property (the so-called "*Lochner era*")¹¹—the United States forcibly took two-thirds of the remaining lands of the Indian nations. The Supreme Court held in 1955 that Alaska natives possessed merely a license to live on the land—revocable permission from whites to occupy Alaskan territory. As recently as 2009, the Supreme Court held that the Navajo Nation had no right to sue the federal government for damages where the Secretary of the Interior was alleged to have colluded with a mining company to undercompensate the tribe for mining rights on lands held under "joint title" between the Navajo and the United States (by law, the Secretary must approve any leases of tribal land for mining purposes). *United States v. Navajo Nation*, 556 U.S. 287 (2009). As Professor Singer reminds us, the conquest is not over.

5.3 *Ratione Soli* and Fugitive Resources: When Chattels Meet Land

5.3.1 Wild Animals on Owned Land

Keeble v. Hickerling

(1707) 103 Eng. Rep. 1127, 11 East 574 (Q.B.)

¹¹*Lochner v. New York*, 198 U.S. 45 (1905).

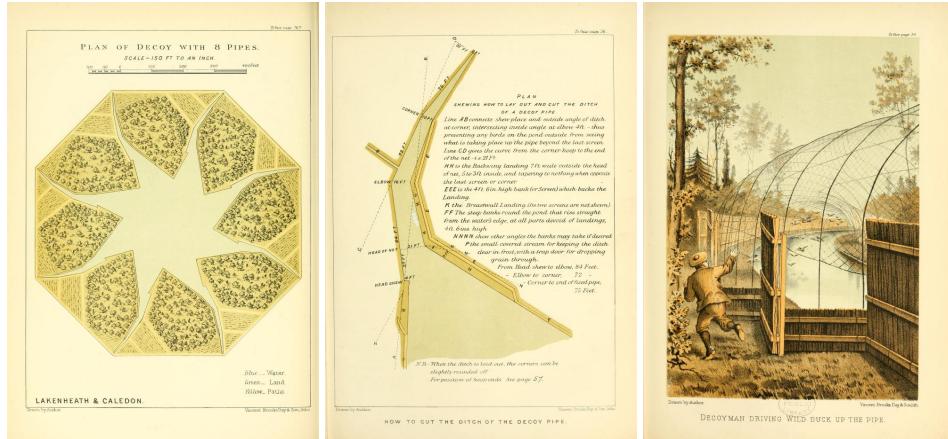


Figure 5.7: Source: RALPH PAYNE-GALLWEY, THE BOOK OF DUCK DECOYS 34, 36, 166 (1886), <https://archive.org/details/bookofduckdecoysx00payn>.

Action upon the case. Plaintiff declares that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, [where he maintained] a decoy pond, to which divers wildfowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them: the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond: and on the 11th and 12th days of November the defendant, with design to damnify the plaintiff, and fright away the wildfowl, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages.

HOLT C.J.

I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or

making a decoy is lawful. 2dly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. . . . Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. . . .

[W]here a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. . . .

There was an objection that did occur to me, though I do not remember it to be made at the Bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. . . . Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. . . . The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill, that he uses thereby. . . . And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expence of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason is that this action is not brought to recover damage for the loss of the fowl, but for the disturbance.

Notes and Questions

5.17. What was *Keeble* suing Hickeringill for, and why did he prevail? Was his claim a property claim? (A related question: what is an “[a]ction on the case”? Did you look it up?) If a property claim, what was the *res*—the thing that *Keeble* claimed as his property? If not a property claim, what might this case be doing in your Property casebook?

5.18. Whether *Keeble* is a property case or not, where did the 20£ damages measure come from?

5.19. You may recall that *Keeble* was discussed by Justice Tompkins in *Pierson v. Post*, though not by name. (See page 163 note ‡, *supra*.) Justice Tompkins referred to different **reports** of the case than the one you read. The existence of multiple, sometimes conflicting, reports is fairly common for earlier English cases and even for some early American cases. In earlier days, judges would announce their opinions from the bench, and **reporters**—usually entrepreneurial lawyers—would take notes of these opinions (often along with the arguments of counsel), collect them, and publish them as a reference for the bar. These days judges issue written opinions, which are collected and published in “official” reporters as written. But for earlier cases, the content of a precedential authority depended on the transcription of the reporter, and reporters could be unreliable. The Modern King’s Bench (“Mod.”) and Salkeld (“Salk.”) reports cited by Justice Tompkins are today believed to be less reliable than the East report you just read, which the reporter claimed to have based on a copy of Lord Chief Justice Holt’s own manuscript. Unfortunately for Justice Tompkins, the East report of *Keeble* was not published until 1815 (ten years after *Pierson*). Had this report been available to the New York Supreme Court in 1805, do you think *Pierson* would have come out differently?

A Note on *Ratione Soli*

Lord Holt, who decided *Keeble*, is also a key—if perhaps slightly confusing—expositor of the related and peculiarly English doctrine of *ratione soli* (Latin for “by reason of the soil”), also referred to in *Pierson v. Post*. **Ratione soli** is the principle that the right to take possession of wild animals belongs to the owner of the land where the animal may be found; thus title to any animals captured or killed on owned land automatically vests in the landowner. The English rule is in stark opposition to the civil (i.e., Roman) law rule, reflected in the Institutes of

Justinian,¹² which is that the captor of a wild animal acquires property rights in the animal wherever captured, though he may be liable in trespass to the owner of the real property on which the animal was pursued or taken. This distinction affects not only the right to possession of the animal itself, but also the measure of damages, because the damages from the trespass may be less than the value of the animal.

A strong principle of *ratione soli* was consolidated in mid-19th century England as part of the class wars between the landed gentry—who passionately defended game hunting as an exclusive sport for the aristocracy—and the upwardly-mobile merchant classes and more desperate farmers and poachers—who saw game as a token of luxury and a means of sustenance, respectively. See generally Chester Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240 (1933). The aristocrats won a decisive victory in a suit by a game merchant against certain servants of the Marquis of Exeter, who had forcibly seized several dozen rabbits purchased by the merchant for resale, on grounds that they had been poached from the Marquis's lands. *Blades v. Higgs*, (1865) 11 Eng. Rep. 1474, 11 H.L.Cas. 621. The Law Lords ruled that wild animals are the property of the owner of the land on which they are taken, and that the Marquis's servants were therefore within their rights in repossessing the rabbits.

Ratione soli was initially rejected by the newly independent American states, in favor of a rule of **free taking**. This made some sense in the America of John Locke's imagination: a vast, naturally bountiful, largely undeveloped, and sparsely populated continent. Moreover, "[i]n the New World, game was no sporting matter, but rather a source of food and clothing." Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976). Thus, for the first century of the new Republic's life, landowners for the most part enjoyed no special privileges to wild animals on their otherwise idle land; hunters were presumed to be free to enter or cross unenclosed and undeveloped land in pursuit of game, even where that land was privately owned. Landowners could defeat this presumption by posting notices of their intent to exclude hunters at the

¹² J. INST. 2.1.12. The *Institutes* are a portion of the massive codification of Roman law under Byzantine (Roman) Emperor Justinian I: the *Corpus Iuris Civilis*. The *Corpus*, in turn, is an important predecessor of most modern civil law systems, which prevail in Continental European nations and many of their former colonies. Unlike common-law systems, which prevail in England and most of its former colonies (including the United States, with the exception of Louisiana), legal authority in civil law systems derives not from caselaw, but from comprehensive statutory codes. A primary distinction between common law and civil law systems is the sharply diminished role of precedent in civil law adjudication. (Recall note 5.8 on page 182, *supra*.)

boundaries of their property, but in practice posting was uncommon and generally ineffective for large holdings in the wilds of the frontier. *Id.* at 712-14.

Over time, even the vast American continent saw its natural resources threatened with depletion by overexploitation, and its lands subject to increased development that conflicted with the free taking regime. Nevertheless, while a small number of American cases adopted *ratione soli* (see, e.g., *Rexroth v. Coon*, 23 A. 37 (R.I. 1885) (bees); *Schulte v. Warren*, 75 N.E. 783 (Ill. 1905) (fish)), the rule never took hold here as it did in England. Today, wild animals are subject to a variety of state and federal regulations that fairly comprehensively govern whether, when, and under what circumstances they may be hunted or captured, on the theory that wildlife is a common resource to be managed by the government for the benefit of the people. See generally Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVIRON. L. 673 (2005). But a majority of states still allow licensed hunters to take or pursue game on unenclosed private land unless the landowner has posted against hunting or trespassing. Mark R. Sigman, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L. J. 549, 558-68 (2004).

One possible virtue of the doctrine of *ratione soli* is the same as the virtue of the punitive damages award in *Jacque v. Steenberg Homes*: it may marginally discourage trespasses on land by those who would trespass for the purpose of capturing wild animals. But at what cost? And do we really need *ratione soli* when, as *Jacque* makes clear, punitive damages are already available against trespassers? Or when, as *Keeble* makes clear, there are other legal remedies available against those who interfere with landowners' efforts to exploit wild animals on their land? Is there any other principled justification for either *ratione soli* or free taking, or are the rules merely sops to particular political interests? In light of all this history, what do you think *ought* to be the legal rights of landowners with respect to wild animals that happen to be on their land? Why? Is there any reason landowners should have a superior claim to anyone else?

5.3.2 Other Fugitive Resources: Water, Oil, and Gas

We have studied a fair number of cases about property rights in wild animals. By now you may be asking yourself: who cares? This is, after all, an area of legal doctrine that you will almost certainly never encounter in your future career as a lawyer. Are we wasting your time?

Obviously we don't think so. We would offer two related reasons for studying this area of law:

First: The study of these cases has introduced you to some accessible illustrations of how we might *justify* rules for allocating control over scarce resources among competing claimants. We have already seen several justifications for the rules we have studied—moral reasons, economic reasons, reasons grounded in administrability and in other pragmatic concerns. (See note 5.1, page 166.) These are the types of justifications that move courts and policymakers, and they are the kinds of justifications that lawyers must invoke in crafting legal arguments and explaining legal rules to their clients.

Second: It is sometimes said that “the law is a seamless web.” One influential interpretation of this principle, offered by legal philosopher Ronald Dworkin, is that common-law judges must attempt to decide cases by reference to “a scheme of abstract and concrete principles that provides a coherent justification for all common law precedent.” Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975). That is to say that a legal system’s rules should not only be *justified* according to discernable principles, they should be *coherent*: the principles that justify an outcome in one area of law should apply consistently to other areas of law to the extent possible. Thus, when deciding novel cases, common-law judges will have to infer what principles are consistent with—or *fit*—the entire corpus of cases that have been decided before, decide which among those principles best *justifies* the cases, and use that principle as a guide in deciding the novel case.

At a more practical level, lawyers typically reason about novel cases by *analogy* to past cases in the same general doctrinal field. The common-law treatment of precedent, discussed above on page 182, note 5.8, is a special case of this more general principle. Thus, even though we don’t see many cases involving disputes over wild animals anymore, past judicial resolutions of those disputes will inform how we decide disputes over other resources that are similar in some way. We have seen this type of reasoning by analogy already, in *Popov v. Hayashi*: a baseball is not a wild animal, but Judge McCarthy thought cases about wild animals provided instruction for the dispute before him. (Query: Why might he have thought so?) With respect to the intersection of land and chattels, we can similarly see *Keeble* and the doctrines of *ratione soli* and free taking as reflecting principles applicable to **fugitive resources**: chattels that can move of their own accord from place to place, sometimes taking them onto owned land. There are plenty of valuable resources that share this quality, and many of them are the subject of heated legal disputes even today. We will focus here

on two: water and oil.

Water is essential to life, but it can also be put to a variety of other practical uses: irrigating farmland, extracting minerals from mines and oil or gas from wells, powering dams and mills, cooling industrial equipment, and as an input to manufacturing, for example. Fresh water from rainfall and snowmelt may flow over the surface of land, either free-flowing (particularly during heavy rains or spring thaws) or in defined channels as streams and lakes. Rain and snowmelt can also seep down and be absorbed by the earth as subsurface groundwater or deep aquifers. In either case, water has a fundamental physical connection to land, but it also moves freely over, under, and across land. (Sound familiar?)

Both surface and subsurface waters are renewable; they are replenished by precipitation. But they're still scarce. This scarcity comes in two basic forms, which map to the economic categories of **stocks** and **flows**. Depletion of a groundwater source at a rate exceeding its natural replenishment will eventually exhaust the stock—or finite total *amount*—of water at that source. A stream flows at a particular (though perhaps variable) rate, but that rate is primarily determined by ecological rather than human processes, so adding more users or more intense uses may not threaten *future* flows but does reduce the share of the flow available to each at any given time. Given these forms of scarcity, competition over water resources is inevitable, and property law may be called on to regulate that competition.

Complicating the matter, the rate of renewal of water stocks and the magnitude of water flows vary from time to time and place to place: Hawaii gets a lot more rain than Nevada, and California got a lot more rain in 1983 than it did in 2013. Reflecting this natural diversity, the American states have devised two broad categories of common-law responses to the challenge of managing conflicts over access to water, epitomized by the two cases below. The first response, **riparian rights**, dominates in the wetter, eastern states, and was firmly established by our first case, *Tyler v. Wilkinson*. The second response, **prior appropriation**, prevails in the more arid western states, and is sometimes referred to as the “Colorado Rule” given its historic association with our second case, *Coffin v. Left Hand Ditch Co.* Both cases deal with rights to flows, in particular the flow of a river. As you read these cases, try to understand how the two systems differ, and what might explain or justify the difference.

Tyler v. Wilkinson
24 F. Cas. 472, 4 Mason 397 (D.R.I. 1827)

STORY, Circuit Justice.

[The Pawtucket River forms part of the boundary between Rhode Island and Massachusetts. Plaintiffs owned several mills on the Massachusetts side of the river. For over a century, mills on both sides of the river had been powered by the flow of the Pawtucket as directed by a dam (the “lower dam”). Defendants owned several mills upstream of the plaintiffs on the Rhode Island side of the river and on a man-made canal called Sergeant’s Trench, which bypassed the lower dam on the western bank. Defendants erected a new dam (the “upper dam”) to direct the flow of water toward their mills, interfering with the ability of plaintiffs to rely on the flow of the Pawtucket to the lower dam to power the plaintiffs’ mills. Plaintiffs sued for a declaration that by “ancient usage” they had a superior claim to the waters of the Pawtucket over the defendants, whom the plaintiffs alleged were entitled only to “wastewater,” or so much of the flow as was not needed by the plaintiffs. Supreme Court Justice Joseph Story, riding circuit, heard the dispute and rendered the following opinion.]

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I

speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. . . . The maxim is applied, "*Sic utere tuo, ut non alienum laedas.*"

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they have no title to the flow of the stream beyond the water actually and legally appropriated to the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as

riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights, to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. There is no doubt, that in point of law or fact, there may be a right to water of a very limited nature, and subservient to the more general right of the riparian proprietors. . . . But the presumption of an absolute and controlling power over the whole flow, a continuing power of exclusive appropriation from time to time, in the riparian proprietor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions. The general presumption appears to me to be that which is laid down by Mr. Justice Abbott in *Saunders v. Newman*, 1 Barn. & Ald. 258: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right, that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill (i.e. by requiring more water), the case would be different."

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

. . . My opinion accordingly is, that the trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water. But the trench owners have no right

to increase that flow; and whatever may be the mills or uses, to which they may apply it, they are limited to the accustomed quantity, and may not exceed it . . . [I]f there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights . . . and that the plaintiffs to this extent are entitled to have their general right established, and an injunction granted.

It is impracticable for the court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity with the suggestions in the opinion of the court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

. . . The decree of the court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c. Decree accordingly.

Coffin v. Left Hand Ditch Co.

6 Colo. 443 (1882)

HELM, J.

Appellee, who was plaintiff below, claimed to be the owner of certain water by virtue of an appropriation thereof from the south fork of the St. Vrain creek. It appears that such water, after its diversion, is carried by means of a ditch to the James creek, and thence along the bed of the same to Left Hand creek, where it is again diverted by lateral ditches and used to irrigate lands adjacent to the last named stream. Appellants are the owners of lands lying on the margin and in the neighborhood of the St. Vrain below the mouth of said south fork thereof, and naturally irrigated therefrom.

In 1879 there was not a sufficient quantity of water in the St. Vrain to supply the ditch of appellee and also irrigate the said lands of appellant. A portion of appellee's dam was torn out, and its diversion of water thereby seriously interfered with by appellants. The action is brought for damages arising from the trespass, and for injunctive relief to prevent repetitions thereof in the future. . . . [T]rial was had before a jury . . . , and verdict and judgment given for appellee. Such recovery was confined, however, to damages for injury to the dam alone, and did not extend to those, if any there were, resulting from the loss of water.

. . . It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

. . . We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

. . . It is urged, however, that even if the doctrine of priority or superiority of right by priority of appropriation be conceded, appellee in this case is not benefited thereby. Appellants claim that they have a better right to the water because their lands lie along the margin and in the neighborhood of the St. Vrain. They assert that, as against them, appellee's diversion of said water to irrigate lands adjacent to Left Hand creek, though prior in time, is unlawful.

In the absence of legislation to the contrary, we think that the right

to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed. And the disastrous consequences of our adoption of the rule contended for, forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one.

The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil. And it would be an ungenerous and inequitable rule that would deprive one of its benefit simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. It might be utterly impossible, owing to the topography of the country, to get water upon his farm from the adjacent stream; or if possible, it might be impracticable on account of the distance from the point where the diversion must take place and the attendant expense; or the quantity of water in such stream might be entirely insufficient to supply his wants. It sometimes happens that the most fertile soil is found along the margin or in the neighborhood of the small rivulet, and sandy and barren land beside the larger stream. To apply the rule contended for would prevent the useful and profitable cultivation of the productive soil, and sanction the waste of water upon the more sterile lands. It would have enabled a party to locate upon a stream in 1875, and destroy the value of thousands of acres, and the improvements thereon, in adjoining valleys, possessed and cultivated for the preceding decade. Under the principle contended for, a party owning land ten miles from the stream, but in the valley thereof, might deprive a prior appropriator of the water diverted therefrom whose lands are within a thousand yards, but just beyond an intervening divide.

. . . The judgment of the court below will be affirmed.

Notes and Questions

5.20. Different Strokes for Different Folks. Why is the rule for control and use of surface waters different in the Eastern United States than it is in the West? Why is it different for water in New England than it is for wild animals in (old) England? Is the “priority of appropriation” rule in Colorado the same as the “free taking” rule for game in the early American frontier? If not, how and why does it differ?

One of the important skills of lawyers (and legal scholars) is to identify

distinctions among seemingly analogous fact patterns that could account for courts' selection of the rules they apply to those facts. So: can we identify some distinctions in the facts of these two cases that might account for the difference between, say, the eastern (riparian) rule and the western (priority of appropriation) rule for water? (Did Justice Helm identify any such distinctions in *Coffin*?)

We might examine at least three different grounds for distinguishing these types of cases from one another. First, the characteristics of the *resource itself* may be different. That may be a relevant basis for distinguishing wild animals from water; as we will see it may also be a basis for distinguishing both of those resources from oil and gas. Second, the characteristics of the *society* in which the resource is being exploited may be different. As we have already noted, the interior of the American continent in the 18th century was a very different place than the English countryside—in terms of its population density and in terms of the level of development and exploitation of existing natural resources. And as the *Coffin* court noted, the quality and distribution of arable soil in the mountain west makes irrigation an “imperative necessity” to agriculture in a way “unknown to” the riparian east. Third, the particular uses of the resource may differ from one social context to another. For example, in New England, where surface water is plentiful, streams were mainly used *non-consumptively* to power industrial plants in the 19th century; in Colorado, where water is scarce, streams were used primarily for consumptive purposes—mining, farming, and drinking. See Carol M. Rose, *Energy And Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEG. STUD. 261, 290-93 (1990). Any of these types of distinctions could justify a change in legal rules from one case to another. Which—if any—do you think best explain the difference between *Tyler* and *Coffin*?

5.21. Stock Resources. *Tyler* and *Coffin* deal with allocation of the right to a share of the flow of a natural watercourse. But much water use depends not on surface waters, but on groundwater, extracted by means of wells and pumps. Such groundwater can behave more like a stock resource than a flow resource; excessive extraction by any one claimant *today* threatens the availability of the resource for *all* claimants *in the future*. Indeed, extraction of groundwater—and even collection of precipitation—can alter the flows of surface channels, threatening the rights of remote riparians or prior appropriators. For this reason, some states—particularly in the more arid Western United States—have enacted comprehensive statutory codes and administrative regulations allocating water rights. California’s system is among the most complex, layering early common-law riparian rights with later common-law prior appropriation rights and a subsequent statutory code administered by a powerful adminis-

trative agency with significant discretion to alter and limit water uses to respond to changing conditions. The state's regulatory reach is profound; in May of 2015 the Water Board responded to serious drought conditions by adopting emergency regulations requiring residents to refrain from most outdoor uses of water and requiring businesses to reduce their potable water usage by 25%, all on pain of a fine of \$500 per day. STATE WATER RESOURCES CONTROL BD. RES. NO. 2015-0032: TO ADOPT AN EMERGENCY REGULATION FOR STATEWIDE WATER CONSERVATION (May 5, 2015), http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/rs2015_0032_with_adopted_regs.pdf.

5.22. Non-Renewable Fugitive Resources. For our next category of fugitive resource—oil and gas—stock depletion is the standard state of affairs, exacerbated by the fact that oil stocks do not replenish themselves the way water stocks do. As you read, consider how this characteristic of fossil fuels affect the justifications for allocating them to one claimant or another.

Briggs v. Southwestern Energy Production Company
224 A.3d 334 (Pa. 2020)

Chief Justice SAYLOR.

In this appeal by allowance, we consider whether the rule of capture immunizes an energy developer from liability in trespass, where the developer uses hydraulic fracturing on the property it owns or leases, and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land.

I. Background

A. The Rule of Capture

Oil and gas are minerals, and while in place they are considered part of the land. They differ from coal and other substances with a fixed situs in that they are fugacious in nature—meaning they tend to seep or flow across property lines beneath the surface of the earth. Such underground movement is known as “drainage.” Drainage stems from a physical property of fluids in that they naturally move across a pressure gradient from high to low pressure. Indeed, the extraction of oil or gas by drilling is based, at least in part, on creating a low-pressure pathway from the mineral's subterranean location to the earth's surface.

Oil and gas have thus been described as having a “fugitive and wandering existence,” *Brown v. Vandergrift*, 80 Pa. 142, 147 (Pa. 1875), and have been compared to wild animals which move about from one property to another. See *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 130 Pa. 235, 249, 18 A. 724, 725 (1889) (“In common with animals, and unlike other minerals, [oil, gas, and water] have the power and the tendency to escape without the volition of the owner.”). Accordingly, such minerals are subject to the rule of capture, which is

[a] fundamental principle of oil-and-gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass

BLACK’S LAW DICTIONARY 1358 (8th ed. 2004); accord *Brown v. Spilman*, 155 U.S. 665, 669-70 (1895).¹ A corollary to this rule is that an aggrieved property owner’s remedy for the loss, through drainage, of subsurface oil or gas has traditionally been to offset the effects of the developer’s well by drilling his or her own well, often termed an “offset well.” See *Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 365, 65 A. 801, 803 (1907) (“What then can the neighbor do? Nothing; only go and do likewise.”).

The reference to “the lands of another” in the above quote does not suggest a developer may invade the subsurface area of a neighboring property by drilling at an angle rather than vertically (referred to as slant drilling or slant wells), or by drilling horizontally beneath the surface. This is because the title holder of a parcel of land generally owns everything directly beneath the surface. Rather, and as suggested by the “no trespass” predicate, it refers to the potential for oil and gas to migrate from the plaintiff’s property to the developer’s land when extracted from a common pool or reservoir spanning both parcels.

B. Hydraulic fracturing

One of the central questions in this matter involves how these principles apply where hydraulic fracturing is used to extract oil or gas from subsurface geological formations. According to the federal government, hydraulic fracturing is used in “unconventional” gas production. “Unconventional” reservoirs can cost-effectively produce gas only by using a special stimulation technique, like hydraulic fracturing This is often

¹The term “capture” is also drawn from an analogy to wild animals. At common law, a person could acquire title to such an animal by reducing it to possession.

because the gas is highly dispersed in the rock, rather than occurring in a concentrated underground location. United States Environmental Protection Agency (the “EPA”), *The Process of Unconventional Natural Gas Production*, <https://www.epa.gov/uog/process-unconventional-natural-gas-production> (viewed Oct. 22, 2019). In terms of how the technique works, the EPA continues:

Fractures are created by pumping large quantities of fluids at high pressure down a wellbore and into the target rock formation. Hydraulic fracturing fluid commonly consists of water, proppant and chemical additives that open and enlarge fractures within the rock formation. These fractures can extend several hundred feet away from the wellbore. The proppants—sand, ceramic pellets or other small incompressible particles—hold open the newly created fractures.

Id.

After injection, fluid is withdrawn from the well while leaving the proppants in place to hold the fissures open. This enhances the drainage of oil or gas into the wellbore where it can be captured.

C. Factual and Procedural History of This Case

(i) Introduction

The parties presently favor essentially the same rule of law: they both, in substance, argue that the traditional rule of capture should apply, subject to the common-law standard for trespass of real property based on physical intrusion onto another’s land. Each party, moreover, depicts the other as erroneously suggesting that an exception to this framework should pertain where hydraulic fracturing is used to obtain oil or natural gas. In particular, the plaintiffs suggest that Southwestern wishes to convert the rule of capture into a precept whereby energy developers may physically invade the property of others to capture natural gas so long as they are using hydraulic fracturing. For its part, Southwestern portrays the plaintiffs and the Superior Court decision from which it appeals as positing that the rule of capture simply does not apply when hydraulic fracturing is used for energy development on one’s own land.

(ii) Undisputed Facts

Adam, Paula, Joshua, and Sarah Briggs (“Plaintiffs”) own a parcel of real estate consisting of approximately eleven acres in Harford Township, Susquehanna County. During all relevant times, Plaintiffs have not leased their property to any entity for natural gas production. Plaintiffs’ property is adjacent to a tract of land leased by Appellant Southwestern Energy Production Company for natural gas extraction (the “Production Parcel”). Southwestern maintains wellbores on the Production Parcel and has used hydraulic fracturing to boost natural gas extraction from the Marcelus Shale formation through those wellbores.

(iii) Proceedings Before the Court of Common Pleas

In November 2015, Plaintiffs commenced an action against Southwestern in which they stated two causes of action, trespass and conversion. In Count I (the trespass claim), Plaintiffs averred that Southwestern’s actions constituted a trespass which deprived Plaintiffs of the value of the “natural gas extracted from under their land[.]” In Count II (the conversion claim), Plaintiffs alleged that, through its drilling activities, Southwestern had deprived Plaintiffs of their possession and use of the natural gas and converted it to Southwestern’s use. Notably, Plaintiffs did not expressly allege that Southwestern’s activities had caused a physical intrusion into Plaintiffs’ property.

Southwestern filed a responsive pleading denying it had extracted gas from Plaintiffs’ land and denying it had trespassed upon Plaintiffs’ property or converted their natural gas. Southwestern specifically denied it had drilled underneath Plaintiffs’ property and stated, further, that it had “only drilled for oil, gas or minerals from under properties for which [Southwestern] has leases.”

After the parties engaged in discovery, Southwestern filed a motion for summary judgment and a supporting brief in which it argued that it did not physically invade Plaintiffs’ property and, to the extent that it had recovered any gas through drainage from that property to the Production Parcel, again, it was entitled to judgment as a matter of law under the rule of capture. Plaintiffs . . . filed their own motion for partial summary judgment as to liability, asserting that courts should not apply the rule of capture in circumstances where gas has been captured through the use of hydraulic fracturing.

By order and opinion, the common pleas court granted Southwestern's motion for summary judgment, and denied Plaintiffs' motion for partial summary judgment Plaintiffs filed a notice of appeal, . . . in which they raised a single issue: whether the trial court erred in determining that the rule of capture precluded liability under theories of trespass and conversion, where Southwestern had used hydraulic fracturing to obtain natural gas which originated under Plaintiffs' land.

(iv) Proceedings Before the Superior Court

A two-judge panel of the Superior Court reversed in a published decision. . . . The court noted, however, that the record did not indicate whether Southwestern's operations had resulted in a subsurface intrusion into Plaintiffs' property, going so far as to express that “[t]here does not appear to be *any evidence, or even an estimate*, as to how far the subsurface fractures extend from each of the wellbore [sic] on Southwestern's lease.” . . . Accordingly, the panel reversed the trial court's order and remanded for additional factual development.

. . . [T]he Superior Court panel's analysis can reasonably be viewed as embodying two distinct, but interrelated, holdings: first, that whenever “artificial means,” such as hydraulic fracturing, are used to stimulate the flow of underground resources, the rule of capture does not apply because drainage does not occur through the operation of “natural agencies,” and second, that in this particular case summary judgment was premature in light of certain unspecified allegations relating to cross-boundary intrusions into Plaintiffs' land.

II. Preliminary Discussion

A. Trespass

In Pennsylvania, a trespass occurs when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake. This conception of trespass is not disputed by the parties. Nevertheless, meaningful appellate review at this stage is not straightforward for multiple reasons.

B. Pleading Deficiencies, Decisional Irregularities, and Issue Limitation

. . . Plaintiffs did not assert . . . in their pleadings . . . that Southwestern had effectuated a physical intrusion onto (or into) their property. The

Superior Court panel recognized this aspect of Plaintiffs' litigation position, but raised and resolved, *sua sponte*, an issue based on the opposite premise, that Plaintiffs *had* alleged a physical intrusion. Then, stating that there was no record evidence that such an intrusion had taken place, and without referencing any specific aspect of the pleadings, the panel indicated that the Complaint's allegations were alone sufficient to raise a genuine issue of fact so as to preclude summary judgment.

This is in some tension with the governing summary-judgment standard which generally centers on whether the adverse party has produced enough evidence to raise a question of material fact as to each element of the claim.

... [M]oreover, Southwestern articulated the issue for this Court's consideration in terms of whether the rule of capture should be applied in the same manner it has always been applied: to allow for the capture of oil and gas which merely drains from an adjacent property after the completion of a well using hydraulic fracturing *solely within the developer's property*. This is an issue, again, on which the parties do not presently diverge: they both answer in the affirmative. Their disagreement is limited to whether any physical intrusion has taken place—a question that is not fairly subsumed within the issue framed for our review.

III. Analysis

The issue as stated by Southwestern should nonetheless be resolved for purposes of this dispute—and to provide guidance to the bench and bar—because at least part of the Superior Court's opinion can reasonably be construed as setting forth a *per se* rule foreclosing application of the rule of capture in hydraulic fracturing scenarios, and that rule rests on faulty assumptions. In particular, and most saliently, the panel appears to have indicated that one litmus for whether the rule of capture applies is whether the defendant's gas extraction methodology relies only on the natural drainage of oil or gas within a conventional pool or reservoir, or whether instead those methods utilize some means of artificial stimulation to induce drainage.

The Superior Court's position in this respect logically rests on one of two grounds: (a) the act of artificially stimulating the cross-boundary flow through the use of hydraulic fracturing solely on the developer's property in and of itself renders the rule of capture inapplicable; or (b) as Plaintiffs argue, any time natural gas migrates across property lines resulting,

directly or indirectly, from hydraulic fracturing, a physical intrusion into the plaintiff's property must necessarily have taken place.

As to the first proposition, all drilling for subsurface fugacious minerals involves the artificial stimulation of the flow of that substance. The mere act of drilling interferes with nature and stimulates the flow of the minerals toward artificially-created low pressure areas, most notably, the wellbore. This Court has held that the rule of capture applies although the driller uses further artificial means, such as a pump, to enhance production from a source common to it and the plaintiff—so long as no physical invasion of the plaintiff's land occurs. *See Jones*, 194 Pa. at 384, 44 A. at 1075 (indicating that, absent physical intrusion, a developer may use “all the skill and invention of which a man is capable” to appropriate resources from under his own property). There is no reason why this precept should apply any differently to hydraulic fracturing conducted solely within the driller's property.

. . . Accordingly, we reject as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs entirely within the developer's property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing, or that such drainage stems from less “natural” means than conventional drainage.

The second predicate—that drainage from under a plaintiff's parcel can only occur if the driller first physically invades that property—does not lend itself to a purely legal resolution. . . . By design, hydraulic fracturing creates fissures in rock strata which store hydrocarbons within their porous structure. On the state of the present record, this alone does not establish that a physical intrusion into a neighboring property is necessary for such action to result in drainage from that property. We cannot rule out, for example, that a fissure created through the injection of hydraulic fluid entirely within the developer's property may create a sufficient pressure gradient to induce the drainage of hydrocarbons from the relevant stratum of rock underneath an adjacent parcel even absent physical intrusion. Nor can we discount the possibility that a fissure created within the developer's property may communicate with other, pre-existing fissures that reach across property lines. Whether these, or any other non-invasive means of drainage occasioned by hydraulic fracturing, are physically possible in a given case is a factual question to be established through expert evidence.

The Superior Court panel appears to have assumed, if implicitly, that such occurrences were impossible—but, again, there is no basis in the record for such an assumption. In all events, a plaintiff asserting a cause of action “must be able to prove all the elements of his case by proper evidentiary standards.” *Papieves v. Lawrence*, 437 Pa. 373, 379, 263 A.2d 118, 121 (1970). Thus, to the extent this lawsuit goes forward on Plaintiffs’ new, physical-intrusion theory, Plaintiffs will bear the burden of demonstrating that such an intrusion took place.

We have not overlooked Southwestern’s argument that trespass should not be viewed as occurring miles beneath the surface of the earth. As Southwestern observes, in some jurisdictions traditional concepts of physical trespass have been relaxed where activities take place miles below the surface and the plaintiff is not deprived of the use and enjoyment of the land. Southwestern posits that this is analogous to the principle that trespass does not arise high above the surface. See *Causby*, 328 U.S. at 260-61. It emphasizes that other socially useful endeavors—such as carbon sequestration projects, energy storage wells, and waste disposal sites—could be jeopardized if the rule against trespass were to be enforced in an unduly stringent manner where deep subsurface activities are concerned.

Without speaking to the merit of such a claim, we note that this Court is limited to the issue as it was framed in the petition for allowance of appeal, and Southwestern has not articulated any reason an exception should be made in the present dispute. Thus, to the extent Southwestern argues it should be permitted to escape liability even if it is ultimately found to have effectuated a physical intrusion into Plaintiff’s subsurface property, its claim in this regard has not been preserved for review by this Court.

This brings us to the question of whether the lawsuit can, indeed, progress on a theory of trespass by physical intrusion, and by extension, to the question of the appropriate mandate from this Court. Ordinarily, and for the reasons explained, we would deem any such contention to be absent from the litigation, as it does not appear to have been mentioned in Plaintiffs’ pleadings or argued as a basis to deny Southwestern’s motion for summary judgment. The Superior Court, however, evidently believed there was some legitimate basis to dispose of the appeal on the presupposition that Southwestern was alleged to have physically invaded Plaintiffs’ subsurface property with hydraulic fracturing liquid and proppants; and, as noted, Southwestern has not challenged the intermediate court’s action in this respect.

That being the case, . . . we find that the appropriate action at this juncture is to vacate the Superior Court's order and remand for reconsideration in light of the guidance provided in this opinion, and the certified record on appeal

Justice DOUGHERTY[, concurring in part and dissenting in part:]

I join the majority's holding that the rule of capture remains effective in Pennsylvania to protect a developer from trespass liability where there has been no physical invasion of another's property. In so holding, the majority correctly recognizes that if there is such a physical invasion the rule of capture will **not** insulate a developer engaged in hydraulic fracturing from trespass liability. As I agree with both propositions, I also agree the matter should be remanded for further proceedings involving a specific inquiry into a physical invasion. I respectfully dissent, however, from the notion that this question must be determined by the Superior Court on the present record Given the state of the record, which was apparently not complete at the time the trial court erroneously entered summary judgment, I would remand the matter to that court for further proceedings, including the completion of discovery on the factual question of physical invasion, and trial thereon as necessary.

Notes and Questions

5.23. Questions of Fact; Questions of Law. Do Chief Justice Saylor and Justice Dougherty disagree on the content of the legal rules in Pennsylvania regarding the ownership of oil and gas? Do they disagree on the law of trespass as it applies to mineral extraction? If the answer to both these questions is no, what is their disagreement about?

In considering these questions, ask yourself what *actually happened* to the Briggsses and their land in this case. Are you confident you can answer that question? If not, it may be difficult to say whether they should prevail on their trespass or conversion claims. This is not because the legal rule is unclear; rather it is because it may be unclear whether the rule is satisfied *given the facts in the record*. This distinction between *legal* issues and *factual* issues is central to the practice of law, and you will surely learn more about it in your civil procedure class. How does the court's resolution of the *legal* issues in the case affect the *factual questions* that the parties must answer in litigation? How should they go about answering those questions? What is likely to happen to the Briggsses'

claim on remand, and what would have happened if Justice Dougherty's opinion had instead carried a majority of the court? (Hint: The answer to this last question has less to do with the law of property and more to do with the law of civil procedure.)

5.24. I Drink Your Milkshake.¹³ *Briggs* reaffirms a principle of long standing in oil and gas law. Imagine Alice and Bob are neighboring landowners in an oil-rich region. Alice drills an oil well at an angle, such that the wellhead is on Alice's land, but the bottom of the wellbore, from which the pipe draws oil, is under Bob's land. Bob sues Alice to enjoin the continued operation of the well and to recover the value of the oil already extracted. Under the rule of capture and the definition of trespass as discussed in *Briggs*, what result and why? See 1 SUMMERS OIL AND GAS § 2:3 (3d ed.) ("[I]f a well deviates from the vertical and produces oil or gas from under the surface of another landowner, that is a trespass for which the adjacent owner is entitled to damages, an accounting and injunction."). Why might it be acceptable to use a well on your land to draw the oil from under your neighbor's land, but not to drill the bottom of your well under the surface owned by your neighbor to extract the very same oil? Does the distinction have any practical effect? Does the advent of fracking technology change your answer?

5.25. Incentives Again. Given that any landowner can lawfully extract all the oil and gas under not only her land, but potentially under the land of any neighboring landowners who occupy the surface over the same geologic formation, what incentive does each landowner over a large formation have with respect to that underlying oil and gas? In early-20th-century California, we found out.

Figure 5.8 is an image of Signal Hill, California, one of the richest oil fields ever discovered, around the peak of its productivity in 1923. Why do you think there are so many oil derricks in such close proximity to each other? Do you think this quantity and density of wells are necessary to extract the oil underground? If not, isn't this duplication of investment and effort *wasteful*? Couldn't the oil be just as easily extracted with one (or at least far fewer) wells? If so, why did the people of Signal Hill build so many? Could property law be playing a role?

5.26. The Tragedy of the Commons. The race to drill in Signal Hill evokes one of the key set-pieces invoked by economists to justify private property rights: the **tragedy of the commons**, famously described in an essay of the

¹³THERE WILL BE BLOOD (Paramount Vantage/Miramax Films 2007).



Figure 5.8: Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, <http://www.loc.gov/pictures/resource/pan.6a17401/>.

same name:

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . . As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" . . . [T]he herdsman receives all the proceeds from the sale of the additional animal . . . Since, however, the effects of overgrazing are shared by all the herdsman, . . . any particular decision-making herdsman [bears] only a fraction of [the negative effects of his additional animal]. . . . [T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.

Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

The negative effects of each additional animal, which are suffered by all the common owners collectively, are what economists refer to as an **externality**. Some of the things we do with the resources we control can make *others* better or worse off. If I divert a stream to my mine, your crops may wither; if I plant a rosebush in my garden, you may enjoy the smell of my flowers on your way to work each day. The key point to keep in mind about these externalities caused

by my conduct is that *I care about them less than you do*. I am better off if the stream I diverted makes my mine more productive; the fact that the diversion causes your crops to die doesn't affect me directly, or perhaps at all.

Externalities can lead to the kind of misallocation of investment and effort we see in Signal Hill or the overcrowded pasture: in deciding whether to engage in an activity, I am unlikely to take sufficient account of the effects of my activity on others. This, in turn, can lead to bad *aggregate outcomes*: I may impose large costs on all my neighbors by engaging in an activity that is of only moderate benefit to me, or I may refrain from an activity that would confer large benefits on many people at only moderate cost to myself. The trouble is that I have no *incentive* to weigh the cost of your dying crops, your starving animals, or your dried-up well.

The economist's solution to this problem is to *internalize the externalities* that result from resource use. That is, to find some way to make the effects of a person's actions hit that person in the pocketbook, for good or for ill. One way to internalize the externalities that generate the tragedy of the commons is to convert the commons to private ownership. Knowing that pasturing too many animals today would leave nothing for his animals to eat tomorrow, a rational *owner* of the pasture would calibrate the number of animals he keeps to maximize their number today while ensuring a stable supply of fodder into the future. Indeed, Professor Harold Demsetz famously argued that property rights arise precisely when the benefits of exploiting a scarce resource have increased in value (due to increasing demand or decreasing supply) to the point where the right to control that value would be a sufficient incentive to undertake the costs of responsibly managing the resource (i.e., where an owner would be willing to internalize the externalities of using the resource). See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

So goes the theory, at any rate. But this theory leaves open a host of practical questions, primarily about *allocation* of these theoretically attractive private property rights. Does it make the most sense to have one owner of the whole pasture? Should the pasture be divided into parcels, and if so, how many and how should they be assigned? What if dividing the pasture into smaller parcels leaves each owner with insufficient space to pasture animals? If there is just one owner, how are we supposed to choose the lucky winner? And once the winner is chosen, what is everyone else supposed to do? Finally, who has the authority to decide all these questions?

We can apply these questions to our oil and gas example. If you were trying to avoid overexploitation of the oil field at Signal Hill in 1923, would you assign

private property rights over the entire oil field? How? To whom? Is there an alternative to private property rights that can avoid inefficient overexploitation? Might the experience of other societies whose territory includes valuable fossil fuel reserves be instructive? See Helge Ryggvik, *A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals*, 89 Bus. Hist. Rev. 3 (2015).

5.27. Hardin's Problematic Legacy. Garrett Hardin's metaphor of the overburdened pasture was one piece of a broader worldview expressed in his writings that strikes many today as deeply problematic. Like many mid-20th-century residents of rich countries, Hardin was concerned about a supposed "population bomb": a postwar trend of higher population growth in poorer countries relative to richer countries. Some predicted that this population growth would generate levels of consumption that would overburden the earth's resources (particularly its capacity to produce food), leading to exhaustion of those resources and widespread pollution, famine, and poverty.

Hardin's reaction to those predictions was to see developing nations as adversaries in a global competition for resources, and to urge national and even ethnic solidarity within rich countries to resist the developing world's demands for access to those resources. Though few read the full essay today, *The Tragedy of the Commons* is ultimately an argument in favor of compulsory restraints on procreation. Its final sections equate "breeding" with bank robbery, and conclude: "The only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed, and that very soon." Hardin, *supra*, at 1248. Hardin thought rich countries should refuse to grant foreign aid, limit immigration from poor countries, impose compulsory measures to reduce fertility rates, and harden their hearts against any moral pangs arising from the resulting suffering of the world's poor—policies that went hand-in-hand with his view of resource competition as the struggle of rich societies against poor societies for survival. In his own words:

Metaphorically each rich nation can be seen as a lifeboat full of comparatively rich people. In the ocean outside each lifeboat swim the poor of the world, who would like to get in, or at least to share some of the wealth. What should the lifeboat passengers do? . . . Suppose we decide to preserve our small safety factor and admit no more to the lifeboat. Our survival is then possible although we shall have to be constantly on guard against boarding parties.

Garrett Hardin, *Lifeboat Ethics*, PSYCHOLOGY TODAY (Sept. 1974), <https://perma.cc/MXU5-F436>.

Today, many critics note that Hardin's arguments smack of eugenics and imperialism. In his non-academic writings, Hardin was outspoken in his opposition to ethnic diversity and his support of restricting non-European immigration to the United States, and the Southern Poverty Law Center identifies him as a white nationalist extremist. Southern Poverty Law Center, *Extremist Files: Garrett Hardin*, <https://perma.cc/S4J5-EL5J>. One critic rejects Hardin's argument about the tragedy of the commons as a product of his chauvinist politics: “[R]acist, eugenicist, nativist and Islamophobe . . . [h]is writings and political activism helped inspire the anti-immigrant hatred spilling across America today.... Hardin wasn't making an informed scientific case. Instead, he was using concerns about environmental scarcity to justify racial discrimination.” Matto Mildenberger, *The Tragedy of The Tragedy of the Commons*, SCIENTIFIC AMERICAN: VOICES (April 23, 2019), <https://perma.cc/WJ49-H463?type=image>.

Does the fact that Hardin held deplorable social and political views detract from the force of his arguments about resource management? Your answer may depend on whether you believe the two are related—whether his solutions to the problem of stewarding the Earth's scarce resources were really just a means to the particular (and contestable) ends contemplated by his political views. There is a plausible argument that they were: that his theoretical model of overconsumption in a commons is an abstraction of his concern that growing resource consumption by developing Latin American, Asian, and African societies posed a threat to the ability of rich European and North American societies to maintain the far higher per capita levels of consumption they enjoy. In this view, Hardin's proposed solution—giving some privileged consumers the power to exclude others—seems conveniently designed to justify rich countries' privileged consumption levels. The very term “population bomb,” popularized in a bestselling book published in the same year as *The Tragedy of the Commons* (PAUL R. EHRLICH, THE POPULATION BOMB (1968)), reflects a view of the developing world as a deadly threat, and implies that the solution lies, not in reduced consumption by rich countries, or in reallocation of resources more generally, but in limiting the number of competitors for scarce resources.

This view has had serious world-historical consequences. Over the second half of the 20th century, population control was enthusiastically promoted by Western countries, by philanthropic organizations such as the Rockefeller Foundation and the Ford Foundation, and by the United Nations. The governments of developing countries such as India and China—often with the support and

financial encouragement of Western-led institutions such as the World Bank—implemented decades-long programs of incentivized or compulsory sterilization and abortion—with mixed results, and at great cost. See generally MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* (2008).

But as it turned out, Hardin and the other doomsayers were wrong in their predictions of global famine and resource collapse. Technological advances in food production and pollution control, as well as social and political changes such as conservation programs, democratization, and reductions in armed conflict, ultimately put the lie to many of their direst predictions. Food insecurity and extreme poverty have steadily *declined* worldwide since the 1960s. Population growth rates have also steadily declined worldwide, notably in inverse correlation with increases in income and in women's educational attainment. But even today, similar fears and analogous political concerns pervade debates over problems of great importance—particularly climate change—in which resource allocation and stewardship play a crucial role.

5.28. **The Comedy of the Commons.** Whether or not one finds Hardin's arguments morally repugnant, his analyses have also been criticized as bad social science. It turns out that the free-for-all common pasture of Hardin's essay lacks a historical antecedent: medieval English commons were actually a form of community resource management based on ancient rules and customs that served to preserve the commons for future generations. See Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49 (1985). And such community management arrangements are not unusual.

Some of the most groundbreaking work in economics in the past half-century—such as the Nobel Prize-winning work of Dr. Elinor Ostrom—has demonstrated how community resource management actually works surprisingly well in contexts as diverse as Swiss mountain farms, Filipino irrigation canals, and Turkish fisheries. See generally ELINOR OSTROM, *GOVERNING THE COMMONS* (1990). Indeed, some resources—infrastructure such as roads and waterways, recreational facilities such as parks and beaches, and social spaces such as public squares—may have characteristics of a “comic” commons in that the more people use them, the more valuable they become (at least within a finite community). See generally, e.g., Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). We will revisit these ideas when we encounter the public trust doctrine in Chapter 13.7.

Given the practical problems of allocation raised by efforts to privatize re-

sources, and the availability of alternative management schemes for at least some such resources, we might well question whether the absence of property rights over scarce resources necessarily results in tragedy. In any case, we ought to be skeptical of the argument that the tragedy of the commons must affect all resources, in all societies, at all times.

5.29. Are the doctrines we have studied regarding allocation of fugitive resources property-based or commons-based? Take, for example, the riparian doctrine of reasonable use: can riparian owners take as much of the waters flowing past their land as they want, whenever they wish? Is there any middle ground between the “sole and despotic dominion” of Blackstone’s private property and the tragic spiraling waste of Hardin’s unregulated pasture? If so, how does the law decide who gets what?

What about the prior appropriation rule governing water rights in western states? Is it an instance of law stepping in to prevent a tragedy of the commons? That is certainly one conventional interpretation of the rule. But Professor David Schorr recently argued that early settlers in Colorado had informally worked out relatively egalitarian water allocation arrangements, which the *Coffin* court was merely protecting against destabilizing intrusions by new arrivals and powerful corporate interests. See generally DAVID SCHORR, THE COLORADO DOCTRINE (2012). Which makes more sense to you: that the *Coffin* court was setting economic policy to avoid overuse of scarce water, or that it was protecting the past investments and future expectations of the state’s most established citizens? If you were a newly arrived farmer in Colorado when *Coffin* was announced, how would you react to the opinion?

Part II

Possession

Chapter 6

Property Torts and Crimes

6.1 Real Property

The name of the most familiar tort protecting real property, **trespass**, was originally the name of an entire family of actions that first emerged in the 12th and 13th centuries. A plaintiff would commence his case by going to the royal Chancery and purchasing a writ commanding the defendant to come before the courts and explain why he had done such-and-such a thing against the plaintiff's rights. The Latin phrases used by the Chancery clerks who filled out the writs—and which the royal courts insisted on when hearing a case—came to define individual forms of action.

One of the earliest such formulaic phrases, and one with one of the longest careers in the common law, was trespass *quare clausum fregit* (literally, “why he broke the close,” and often abbreviated to “trespass q.c.f.”). The gist of the action was that the defendant, wrongfully, with force and arms (in Latin, *vi et armis*) and against the King’s peace, had broken into the plaintiff’s enclosed lands and caused injury. As in a trespass action for intentional battery, a plaintiff bringing an action for trespass q.c.f. could obtain money damages to the extent of his injuries. Trespass q.c.f. was the natural cause of action for damaging the plaintiff’s crops or destroying his buildings.

Another early formula, trespass *de ejectione firmae* (literally, “of ejection from his term,” and often simply “**ejectment**”), protected a lessee against being wrongfully evicted from his lands by an intruder. To the extent that the medieval legal mind made such a distinction, ejectment protected not against injury as such but against dispossession; by the sixteenth century, the common-

law courts would put a victorious plaintiff back in possession. This development made ejectment a potentially attractive way to litigate competing claims to land—in modern terms, to “try title.” Among other things, ejectment (like the other trespass writs) led to a trial before a jury; a defendant sued under an older “writ of right” could elect trial by battle. There was only one problem: ejectment was only available to lessees. The result was one of the great legal fictions of the common law: the fictitious lessee.

When two parties wished to try the title to a piece of land, one of them leased it to an imaginary person (John Doe) and the other similarly leased to another (William Styles). One lessee ejects the other (this will be all fiction), and in order to try the rights of the lessees the court has to enter into the question of the rights of the lessors.

THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 374 (5th ed. 1956). This fictional use of ejectment crossed the Atlantic and survived in the captions of famous cases like *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1823) and *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). There were no actual lessees in these cases; they were simply fictitious parties required by the formula of ejectment.

Today, the distinctions between trespass (q.c.f.) and ejectment are far less significant but not gone entirely. Courts can generally reach any legal issues necessary to resolve a case, regardless of the plaintiff's initial choice of cause of action, and they have far more freedom to select appropriate legal and equitable remedies, such as money damages for injuries to land or lost income from being out of possession, injunctions to order a defendant to cease trespassing or execute a conveyance to the plaintiff, or declaratory judgments about the state of title.

One remaining hole in the common-law system was that both trespass and ejectment required some interference with possession, but there are many cases of disputed title in which the parties are civilized enough not to be constantly elbowing each other off the land. The action to **quiet title** provides a remedy here; it is brought by a plaintiff objecting that another's claims amount to a “cloud” on her title. Other claimants must either defend and prove their competing title or be estopped from asserting them. Quiet title, for example, is typically the appropriate cause of action to establish that one has acquired title to land through adverse possession, or that an easement has been abandoned

through non-use, or that a deed sitting in the land records is void as a forgery. Although frequently quiet title actions are brought *in personam* against specific claimants, state statutes can authorize *in rem* quiet title actions that extinguish the rights of all parties, known and unknown, unless they appear to defend their claims. See *Arndt v. Griggs*, 134 U.S. 316, 327 (1890) (“[A] State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication . . .”). Particularly in view of the long-standing “situs rule” giving state courts exclusive jurisdiction over land located within their states, the *in rem* quiet title action probably survives the Supreme Court’s 20th-century Due Process revolution.

Originally, the assize of **nuisance** protected plaintiffs’ rights to use land they did not themselves own (such as a right to pasture cows on another’s land, much like a modern easement) or to be free from some specific harms caused by a neighbor (such as straying cows). In the fourteenth century, plaintiffs began to be able to use writs of trespass to allege a nuisance without needing to plead that the defendant had acted *vi et armis*, and this new formula developed into a general action for what we would today recognize as nuisances: unreasonable interferences with the use and enjoyment of land. (Nuisance was thus an “action on the case”; it belonged to the same branch of non-forcible trespasses as the one from which the modern tort of negligence developed.) In keeping with its origins in actions “on the case,” nuisance has become an extremely versatile cause of action, encompassing a variety of injuries to interests in real property and a variety of potential remedies for those injuries.

Trespass is also a crime, but it is a surprisingly mild one. Vermont’s basic trespass offense is typical:

A person shall be imprisoned for not more than three months or fined not more than \$500.00, or both, if, without legal authority or the consent of the person in lawful possession, he or she enters or remains on any land or in any place as to which notice against trespass is given by:

- (A) actual communication by the person in lawful possession or his or her agent or by a law enforcement officer acting on behalf of such person or his or her agent;
- (B) signs or placards so designed and situated as to give reasonable notice . . .

VT. STAT. tit. 13, § 3705. Many states’ laws contain exceptions relaxing the notice

requirement in specified cases where the lack of permission ought to be obvious in context. See, e.g., MD. CODE ANN., CRIM. LAW § 6-408 (making trespass a crime even without specific notice not to enter if the trespass is committed “for the purpose of invading the privacy of an occupant of a building or enclosure located on the property by looking into a window, door, or other opening.”).

Given the harshness of civil trespass remedies, as in *Jacque*, what explains the leniency of criminal trespass law? In many states, this mild baseline is supplemented with more severe penalties for certain sorts of trespasses. New York, for example, treats criminal trespass (ordinarily a violation) as a class B misdemeanor when it involves entry onto fenced land, a school or children’s overnight camp, a public housing project, or a railroad yard. N.Y. PENAL L. § 140.10. Are these principled attempts to distinguish among trespasses, or special favors for particular landowners?

6.2 Personal Property

One of the early variants of writs for forcible trespasses, *trespass de bonis asportatis* (literally, “of taking away goods,” and often abbreviated to “trespass d.b.a.”) was available when the defendant carried away the plaintiff’s property, and its remedy was damages. But beyond this simple core, the personal property actions were a confused mess that defies easy description and took many centuries to clean up. The hard part was to determine just what kinds of facts ought to entitle a plaintiff to recover when he could not allege a taking from his possession, perhaps because he had voluntarily parted with possession (e.g. in a bailment) or perhaps because the defendant had not taken them (e.g. for found property).

One approach was the older writ of detinue, which was available against a bailee who “detained” the goods from the plaintiff. The courts extended detinue so that it ran against other parties (at first the executor of the estate of a deceased bailee, and then anyone) as long as there had been an initial bailment. But since a defendant could defeat detinue by disproving the allegations in the writ, detinue was really only safe when the plaintiff could trace with confidence the chain from his hands to the defendant’s. As a result, detinue “on a bailment” was gradually supplanted by detinue “*sur trover*” (literally, “upon finding”): the plaintiff alleged that he had lost the property and the defendant had found it but refused to return it. The defendant could show that he had the property rightfully (e.g. through a sale tracing back to the plaintiff), but other-

wise “lost and found” was a conveniently broad formula that could cover actual cases of missing property, bailments gone wrong, and even cases of suspected theft. All the plaintiff needed to show was that the property was his and that the defendant now had it. Even so, *detinue* in its trover variation still was frequently unsatisfactory:

A *praecipe* action [the general name of a category of writs including *detinue*] was barred by performance, even imperfect performance, and so in *detinue* damages could not be awarded if the goods were restored. The bailee who starved a horse to death, or who rode it further than agreed, or who returned other goods in a damaged state, was not liable in *detinue*. The plaintiff in *detinue* could not count on a bailment or loss of the thing demanded if it was no longer the same thing as he had bailed or lost, as where it had been made part of something else or fashioned into something new. And on the same principle, it was arguable that he could not allege a detaining of something which no longer existed at all.

J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 394 (4th ed. 2007).

The solution lay, yet again, in trespass. The road to reform is paved with legal fictions. The royal courts had no difficulty treating outright theft as satisfying the requirement of trespass d.b.a. that the taking be forcible. But plaintiffs soon started pleading claims of trespass d.b.a. for injuries to horses against defendants named Smith, and claims for the forcible chopping up of lumber against defendants described as carpenters. These were garden-variety contract actions (for defectively shoeing a horse or for botching a construction job)—or would have been, if the common law had had an effective form of action for breach of contract. It didn’t, and so plaintiffs who could stretched the facts to fit within trespass d.b.a. The royal courts solved this particular problem around 1350 by abandoning the need to plead *vi et armis* in trespass, as long as the plaintiff could set forth in more detail the special facts entitling him to recover. This was the origin of actions on the case, mentioned above; it had the effect of kickstarting a burst of creative experimentation with new variation of trespass.

One approach, reflecting bailments’ place on the border between property and contract, was to plead that the defendant had negligently or deceitfully violated a promise to keep the goods safe. Another was to plead that a bailee had intentionally converted goods to his own use—as with a bailee who drinks a bottle of wine or spends the silver coins in a strongbox. This latter idea had staying

power; by the 16th century, trespass on the case for conversion was regularly used against bailees. Then history repeated itself: just as detinue was extended from bailees to third parties by alleging the fictitious finding called trover, so was conversion. A plaintiff could even plead that he had “lost” his ship and that the defendant had “found” it in London. The final stage in conversion’s triumph was to treat a wrongful withholding itself—the old “detinue”—as a form of conversion to the defendant’s own use. And with that, the modern tort of **conversion** or **trover** took shape: the plaintiff claimed that the property was his and that the defendant had treated it as his own. The defendant might still have the property, or might not; the property might still exist, or it might have been destroyed; what mattered was the defendant’s use in a manner inconsistent with the plaintiff’s ownership resulting in the plaintiff’s dispossession. As the Restatement puts it, “Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” RESTatement (SECOND) OF TORTS § 222A (1965).

What if the defendant merely damages the plaintiff’s property, or interferes with its use, but stops short of converting it—as by breaking the headlights on the plaintiff’s car, or taking it for a forty-eight-hour joyride? Conversion traditionally did not quite work here; instead the plaintiff’s remedy lay in **trespass to chattels**, which evolved from the original action for trespass d.b.a. Its use in a case of forcible misuse (like smashing headlights or temporary taking) was straightforward enough. Over time, courts extended its use to other cases involving indirect or non-forcible harms. But unlike with trespass to land—which as *Jacque* shows is actionable even without harm to the property—the Restatement says that trespass to chattels requires that the defendant deprive the plaintiff of possession, impair the value of the property, or deprive the plaintiff of its use. RESTatement (SECOND) OF TORTS § 218. See also *Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003) (no trespass to chattels for sending emails addressed to Intel employees to Intel computers over Intel’s objections).

A final member of the property torts family is **replevin**. Initially, it was a purely feudal form of action. If a tenant failed to perform the feudal services due to his lord, the lord could “distain” the tenant’s personal property by taking possession of it. The tenant’s remedy for a wrongful distain was replevin: by posting a bond of twice the value of the property, the tenant was entitled to possession immediately while the suit over the underlying dispute proceeded. As the feudal character dropped out of the landlord-tenant relationship, replevin became a general-purpose action to recover possession of property wrongfully

withheld. Its immediate-recovery remedy made it attractive to plaintiffs who just wanted their stuff back, particularly in the United States. (“Mattie Ross: The saddle is not for sale. I will keep it. Lawyer Dagget will prove ownership of the gray horse. He will come after you with a writ of replevin.” *TRUE GRIT* (Paramount Pictures 2010)). Today in some states it remains at least the name of the action to recover possession, although it has often been superseded by procedures to recover possession in state civil procedure codes.

Criminal law also protects personal property ownership and possession. The menu of common-law personal property crimes bore the same confused stamp of history as the menu of personal property torts. Larceny required a felonious carrying away from possession; over time, both the carrying away and the possession became thin shadows of their former selves, but not quite fictional. Larceny by trick, at least in theory, plugged the gap for owners who parted with possession voluntarily under the influence of fraudsters’ lies; embezzlement covered faithless bailees and employees who abused their positions of trust to steal from the cash register, literally or metaphorically. Robbery was theft achieved by a threat of violence. Looking back on the fine distinctions courts contrived to distinguish these various crimes (e.g., in *Bazely’s Case*, (1799) 168 Eng. Rep. 517 (Cent. Cr. Ct.), the court held it was embezzlement for a teller to put money in a bank drawer and then put it in his pocket, but not embezzlement for the teller to put the money in his pocket directly), it is hard not to concur with historian S.F.C. Milsom’s assessment: “The miserable history of crime in England can shortly be told. Nothing worth-while was created.” S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 353 (1969). Many states, influenced by the Model Penal Code, have tried to reform their theft statutes to create a single, integrated law of theft. See generally STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 4 (2012) (arguing that “theft law reformers threw out the baby with the bathwater”). But hard problems remain, such as defining the kinds of property that can be “stolen” at all—e.g., is it theft to sneak into a movie without paying or to download that movie on BitTorrent, or is “theft” simply the wrong word to describe conduct that deprives no one else of their possession and enjoyment?

6.3 The Major Common-Law Property Torts: A Summary

Preferred Remedy	Type of Property:	
	Real Property	Personal Property
Damages	Trespass	Conversion (or Trover); Trespass to Chattels
Possession	Ejectment	Replevin
Declaration of Rights	Quiet Title	

Chapter 7

Found and Stolen Property

Finders keepers, losers weepers?

Armory v. Delamirie
(1722) 1 Strange 505, 93 Eng. Rep. 664 (K.B.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.
2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.
3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Notes and Questions

7.1. One way of describing the holding of *Armory* is that it sets out the rights of **finders**. Suppose that the “rightful owner” of the jewel, Lord Hobnob, had shown up in the shop while the chimney-sweep and the apprentice were arguing over the jewel. Who would have been entitled to the jewel? If the chimney-sweep is not the “rightful owner,” why does he still win the case? What kind of interest does he have in the jewel?

7.2. A second way of describing the holding of *Armory* is that it illustrates **relativity of title**. As between the plaintiff and the defendant, the party with the relatively better claim to title wins, even if their title is in some sense defective in an absolute sense. Relativity of title is intimately connected to the idea of “chains of title”: competing claimants to a piece of property each do their best to trace their claims back to a rightful source. What is the source of the chimney-sweep’s claim to the jewel? And the jeweler’s? Does this explain the outcome of the case? What result if the jeweler had proven that he had signed a contract to purchase the jewel from Lord Hobnob but that Lord Hobnob had lost the jewel before delivering it?

7.3. A third way of describing the holding of *Armory* is that it rejects the jeweler’s attempt to assert a *jus tertii* (Latin for “right of a third party”) defense. The defendant cannot defeat the plaintiff’s otherwise-valid claim to the jewel by arguing that a third party—Lord Hobnob—has an even better claim. Put differently, we might say that “as against a wrongdoer, possession is title.” *Jeffries v. Great W. Ry. Co.*, (1856) 119 Eng. Rep. 680, 681 (Q.B.). Does this narrowing of focus to the parties before the court make sense?

Here is one way to think about it. Suppose that Lord Hobnob shows up in court while *Armory* is being argued and explains that the jewel slipped from his finger while he was strolling in Lincoln’s Inn Fields. Who is entitled to the jewel? What if Lord Hobnob shows up and explains that he tossed the jewel aside in the mud, saying “I have become tired of this bauble; it bores me and I no longer wish to have it.” What if he explains that he handed it to the chimney-sweep, saying “I wish you to have this jewel; may it serve you better than it has me.” But recall that in the actual case, Lord Hobnob was nowhere to be found; no one even knew his identity. Does it matter to the outcome of *Armory v. Delamirie* how the jewel passed from Lord Hobnob’s hands to the chimney-sweep’s?

If you are still not convinced, consider this. If the jeweler could set up Lord Hobnob’s title to show that the chimney-sweep’s title was defective, would the chimney-sweep be entitled to present evidence that Lord Hobnob’s title was

defective, say because Lord Hobnob stole the jewel from a visiting Frenchman in 1693? Cutting off inquiry into third parties' claims also helps cut off inquiry into old claims. Can you see why this might be an appealing choice for a system of property law?

7.4. We are not quite done with Lord Hobnob. Consider the remedy the plaintiff obtains: an award of the value of the jewel, rather than the jewel itself. This is in effect a forced sale of the jewel, which the defendant can keep after paying the plaintiff's damage award. Now who owns the jewel? What if Lord Hobnob shows up now? Can he also bring trover, and if so, will the jeweler be forced to pay out a second time? In fact, why is Paul de Lamerie, the goldsmith whose name the court mangles, on the hook for his apprentice's wrongdoing? What if the apprentice pocketed the jewel and never turned it over to the master?

7.5. About that damage award. Why is the jury instructed to presume that the jewel was "of the finest water?" (i.e. highest quality)?

Other Variations on *Armory*

Just how far does the holding of *Armory v. Delamirie* ("That the finder of [property], though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner") go? Consider three nineteenth-century cases about lost lumber. Are they required by *Armory*? Consistent with *Armory*? Consistent with each other? Which is most persuasive?

In *Clark v. Maloney*, 3 Del. 68 (1840), the plaintiff found ten logs floating in a bay after a storm. He tied them up in the mouth of a creek, but they (apparently) got free again and the defendants (apparently) found them floating up the creek. *Held*, the plaintiffs were entitled to the logs:

Possession is certainly *prima facie* evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner*. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that

the logs were found by them adrift in Misbillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

In *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), the defendants took ninety-three logs from the plaintiff's mill. The defendants claimed that the plaintiff had cut the logs on their land, but the plaintiff replied (and a jury agreed) that he had actually cut the logs by trespassing on the land of a third party. *Held:* the plaintiff was entitled to the logs:

Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other

rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Anderson states what is overwhelmingly the majority rule. Seven years after *Anderson*, North Carolina took the opposite course. In *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), two different people held what appeared to be state grants to the same tract of land, and the plaintiff cut timber on the land with the wrong one's permission. While the logs were floating in a river, the defendants—unconnected with either of the purported landowners—took them away and sold them. *Held:* the defendants were entitled to the logs (internal quotation marks omitted):

In some of the English books, and in some of the Reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Armory v. Delamirie*. There a chimney sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner, because of having it in possession, unless the true owner should become known. That owner was not known, and it was properly decided that trover would lie in favor of the finder against the defendant, to whom he had handed it for inspection, and who refused to restore it. But the court said the case would have been very different if the owner had been known.

Is this an accurate reading of *Armory*? The court also expressed concern about the defendant's potential liability to the true owner:

It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession.... But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant, and force him to pay the value the second time, and the fact that he paid it in a former suit would be no defense.

Consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant.

Is the fear of double liability sufficient reason to allow the defendant to escape liability entirely? Based on a review of the court records in the case, John V. Orth writes that the true owner in *Russell v. Hill* was “no bodiless abstraction but had in fact a name and identity: [Fabius Haywood] Busbee, one of the state’s leading lawyers, a man well known to every member of the supreme court that decided the case.” John V. Orth, *Russell v. Hill* (N.C. 1899): *Misunderstood Lessons*, 73 N.C. L. REV. 2031, 2034 (1995). Does this help explain *Russell*?

Professor Orth, arguing for a middle ground between *Anderson* and *Russell*, argues that *Armory* should protect only prior possessors who took the property in good faith: “A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell*, in other words, deserved a new trial at which to show, not his title, but his *bona fides*.” *Id.* at 2060. Is this a better rule?

McAvoy v. Medina
93 Mass. (11 Allen) 548 (1866)

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

[I]t appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant’s shop, saw and took up a pocket-book which was lying upon a table there, and said, “See what I have found.” The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, “I found it right there.” The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. . . .

DEWEY, J.

It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Notes and Questions

7.6. In *Lawrence v. State*, on which *McAvoy* relies, the customer did come back for his lost pocketbook containing \$480 in bank notes, which he had left on a table while the barber went out to make change. To quote the court: "The barber left the shop to get the bill changed, and, a fight occurring in the streets, the [customer's] attention was arrested thereat and he left the shop, his pocket-book lying on the table." When he returned, the barber "denied all knowledge of

the pocket-book” but then “expended [the bank notes] in the purchase of confections, etc.” A criminal prosecution for grand larceny followed, and the barber argued that the pocketbook had been lost because larceny only applies when the defendant takes property from the possession of the victim. The court held that because the pocketbook on a table was merely **mislaid**, rather than “lost,” it was still within the customer’s “constructive possession.” First of all, is this plausible? And second, is this a good fit for the facts of *McAvoy*?

7.7. By way of contrast, in *Bridges v. Hawkesworth*, which *McAvoy* distinguishes, the plaintiff found a small parcel on the floor of the defendant’s shop and immediately showed it to the defendant’s employee. The parcel contained bank notes; the plaintiff “requested the defendant to deliver them to the owner.” Three years later, with no owner having returned, the court held the plaintiff as finder was entitled to the notes. “If the notes had been accidentally kicked into the street, and then found by someone passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been dropped in his shop? . . . Certainly not. The notes were never in the custody of the defendant, nor within the protection of his house before they were found, as they would have had they been intentionally deposited there, and the defendant has come under no responsibility.” First, what do you make of the *Bridges* court’s argument that the shopkeeper’s entitlement to the notes should turn on whether he would have been held responsible to the true owner for losing them? And second, is this any better a fit for the facts of *McAvoy*?

7.8. What do you make of the argument that awarding the pocket-book to the shopkeeper is “one better adapted to secure the rights of the true owner?”

7.9. In addition to lost and mislaid property, there is also abandoned property: property which the owner has voluntarily relinquished with no intent to reclaim. Since abandoned property is again unowned, the usual rules of first possession apply. (As you have seen, these rules themselves are not as simple as “first possessor wins.”). How easy is it to tell the three apart? Why?

7.10. In *Benjamin v. Lindner Aviation*, 534 N.W.2d 400 (Iowa 1995) in which an airplane inspector found \$18,000 in cash inside the wing of an airplane in 1992 while the plane was parked in his employer’s hangar for maintenance. The money, which consisted primarily of \$20 bills dating to the 1950s and 1960s, was in two four-inch packets wrapped in handkerchiefs and tied with string and then wrapped again in aluminum foil. The packets were inserted behind a panel on the underside of the plane’s wing; the panel was secured with rusty screws that had not been removed in several years. The inspector, the employer, and the bank that owned the plane (after repossessing it from a prior owner who

had defaulted on a loan) all made claims to the money. Was it lost, mislaid, or abandoned, and who was entitled to it?

7.11. Another category sometimes mentioned in the found-property caselaw is treasure trove: money, gold, or silver intentionally placed underground, which is found long enough later that it is likely the owner is dead or will never return for it. At common law in England, treasure trove belonged to the King. Most American states now treat treasure trove like any other found property. Is this a sensible rejection of an archaic and pointless quirk of the common-law, or was there something to the doctrine?

7.12. In *Hannah v. Peel*, [1945] K.B. 509, the British government requisitioned Gwernhaylod House in 1940 for use during World War II and paid the owner, Major Hugh Edward Ethelston Peel £250 per year. The house had been conveyed to Major Peel in 1938 but it was unoccupied from then until when it was requisitioned. Duncan Hannah, a lance-corporal with the Royal Artillery, was stationed in the house and was adjusting a blackout curtain in August 1940 when he found something loose in a crevice on top of the window-frame. It turned out to be a brooch covered in cobwebs and dirt; he informed his commanding officer and then turned it over to the police. Two years later, the police gave it to Major Peel, who sold it for £66. Lance-Corporal Hannah sued and was awarded the value of the brooch. The court discussed numerous cases, including *Bridges v. Hawkesworth* and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, which awarded two rings found by a workman embedded in the mud at the bottom of a pool to the company that owned the land. From them, it extracted a rule that “a man possesses everything which is attached to or under his land.” Since Major Peel “was never physically in possession of these premises” and hence had no “prior possession” of the brooch, Lance-Corporal Hannah was entitled to it as a finder. Is this possession-based approach a better way of analyzing found-property cases than the categorical lost-vs-mislaid American approach exemplified by *McAvoy*? Or is *Hannah* an oddball outlier driven by the court’s desire to do right by a wartime serviceman “whose conduct was commendable and meritorious,” especially as against an absentee landlord from the local gentry?

O'Keeffe v. Snyder
416 A.2d 862 (N.J. 1980)

The opinion of the Court was delivered by POLLOCK, J.

This is an appeal from an order of the Appellate Division granting summary judgment to plaintiff, Georgia O'Keeffe, against defendant, Barry Snyder, d/b/a Princeton Gallery of Fine Art, for replevin of three small pictures painted by O'Keeffe. In her complaint, filed in March, 1976, O'Keeffe alleged she was the owner of the paintings and that they were stolen from a New York art gallery in 1946. Snyder asserted he was a purchaser for value of the paintings, he had title by adverse possession, and O'Keeffe's action was barred by the expiration of the six-year period of limitations provided by N.J.S.A. 2A:14-1 pertaining to an action in replevin. Snyder impleaded third party defendant, Ulrich A. Frank, from whom Snyder purchased the paintings in 1975 for \$35,000.

The trial court granted summary judgment for Snyder on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft. The Appellate Division reversed and entered judgment for O'Keeffe. A majority of that court concluded that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. Consequently, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.

The dissenting judge stated that the appropriate measurement of the period of limitation was not by analogy to adverse possession, but by application of the "discovery rule" pertaining to some statutes of limitation. He concluded that the six-year period of limitations commenced when O'Keeffe knew or should have known who unlawfully possessed the paintings, and that the matter should be remanded to determine if and when that event had occurred.

We granted certification . . .

I

The record, limited to pleadings, affidavits, answers to interrogatories, and depositions, is fraught with factual conflict. Apart from the creation of the paintings by O'Keeffe and their discovery in Snyder's gallery in 1976, the parties agree on little else.

O'Keeffe contended the paintings were stolen in 1946 from a gallery, An

American Place. The gallery was operated by her late husband, the famous photographer Alfred Stieglitz.

An American Place was a cooperative undertaking of O'Keeffe and some other American artists In 1946, Stieglitz arranged an exhibit which included an O'Keeffe painting, identified as *Cliffs*. According to O'Keeffe, one day in March, 1946, she and Stieglitz discovered *Cliffs* was missing from the wall of the exhibit. O'Keeffe estimates the value of the painting at the time of the alleged theft to have been about \$150.

About two weeks later, O'Keeffe noticed that two other paintings, *Seaweed* and *Fragments*, were missing from a storage room at An American Place. She did not tell anyone, even Stieglitz, about the missing paintings, since she did not want to upset him.

Before the date when O'Keeffe discovered the disappearance of *Seaweed*, she had already sold it (apparently for a string of amber beads) to a Mrs. Weiner, now deceased. Following the grant of the motion for summary judgment by the trial court in favor of Snyder, O'Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning to O'Keeffe their interest in the sale.

O'Keeffe testified on depositions that at about the same time as the disappearance of her paintings, 12 or 13 miniature paintings by Marin also were stolen from An American Place. According to O'Keeffe, a man named Estrick took the Marin paintings and "maybe a few other things." Estrick distributed the Marin paintings to members of the theater world who, when confronted by Stieglitz, returned them. However, neither Stieglitz nor O'Keeffe confronted Estrick with the loss of any of the O'Keeffe paintings.

There was no evidence of a break and entry at An American Place on the dates when O'Keeffe discovered the disappearance of her paintings. Neither Stieglitz nor O'Keeffe reported them missing to the New York Police Department or any other law enforcement agency. Apparently the paintings were uninsured, and O'Keeffe did not seek reimbursement from an insurance company. Similarly, neither O'Keeffe nor Stieglitz advertised the loss of the paintings in *Art News* or any other publication. Nonetheless, they discussed it with associates in the art world and later O'Keeffe mentioned the loss to the director of the Art Institute of Chicago, but she did not ask him to do anything because "it wouldn't have been my way." O'Keeffe does not contend that Frank or Snyder had actual knowledge of the alleged theft.

Stieglitz died in the summer of 1946, and O'Keeffe explains she did not pursue her efforts to locate the paintings because she was settling his estate. In 1947, she retained the services of Doris Bry to help settle the estate. Bry urged O'Keeffe to report the loss of the paintings, but O'Keeffe declined because "they never got anything back by reporting it." Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. The record does not indicate whether such a registry existed at the time the paintings disappeared.

In September, 1975, O'Keeffe learned that the paintings were in the Andrew Crispo Gallery in New York on consignment from Bernard Danenberg Galleries. On February 11, 1976, O'Keeffe discovered that Ulrich A. Frank had sold the paintings to Barry Snyder, d/b/a Princeton Gallery of Fine Art. She demanded their return and, following Snyder's refusal, instituted this action for replevin.

Frank traces his possession of the paintings to his father, Dr. Frank, who died in 1968. He claims there is a family relationship by marriage between his family and the Stieglitz family, a contention that O'Keeffe disputes. Frank does not know how his father acquired the paintings, but he recalls seeing them in his father's apartment in New Hampshire as early as 1941-1943, a period that precedes the alleged theft. Consequently, Frank's factual contentions are inconsistent with O'Keeffe's allegation of theft. Until 1965, Dr. Frank occasionally lent the paintings to Ulrich Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Ulrich Frank, who kept them in his residences in Yardley, Pennsylvania and Princeton, New Jersey. In 1968, he exhibited anonymously Cliffs and Fragments in a one day art show in the Jewish Community Center in Trenton. All of these events precede O'Keeffe's listing of the paintings as stolen with the Art Dealers Association of America, Inc. in 1972.

Frank claims continuous possession of the paintings through his father for over thirty years and admits selling the paintings to Snyder. Snyder and Frank do not trace their provenance, or history of possession of the paintings, back to O'Keeffe.

As indicated, Snyder moved for summary judgment on the theory that O'Keeffe's action was barred by the statute of limitations and title had vested in Frank by adverse possession. For purposes of his motion, Snyder conceded that the paintings had been stolen. On her cross motion, O'Keeffe urged that the paintings were stolen, the statute of limitations

had not run, and title to the paintings remained in her.

II

[The court held that there was a genuine factual dispute whether the paintings had been stolen.]

III

On the limited record before us, we cannot determine now who has title to the paintings. That determination will depend on the evidence adduced at trial. Nonetheless, we believe it may aid the trial court and the parties to resolve questions of law that may become relevant at trial.

Our decision begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft. Proof of theft would advance O'Keeffe's right to possession of the paintings absent other considerations such as expiration of the statute of limitations.

On this appeal, the critical legal question is when O'Keeffe's cause of action accrued. The fulcrum on which the outcome turns is the statute of limitations in N.J.S.A. 2A:14-1, which provides that an action for replevin of goods or chattels must be commenced within six years after the accrual of the cause of action. . . .

Since the alleged theft occurred in New York, a preliminary question is whether the statute of limitations of New York or New Jersey applies. The New York statute, N.Y. Civ. Prac. Law § 214 (McKinney), has been interpreted so that the statute of limitations on a cause of action for replevin does not begin to run until after refusal upon demand for the return of the goods. Here, O'Keeffe demanded return of the paintings in February, 1976. If the New York statute applied, her action would have been commenced within the period of limitations.

The traditional rule to determine which of two statutes of limitations is applicable is that the statute of the forum governs unless the limitation is a condition of the cause of action. However, this Court has discarded the mechanical rule that the statute of limitations of the forum must be employed in every suit on a foreign cause of action. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 140-141 (1973). Heavner set out five requirements for barring an action by applying a statute of limitations other than the appropriate New Jersey statute: (1) the cause of action arose in the other state; (2) the parties are all present in and amenable to jurisdiction in the other state;

(3) New Jersey has no substantial interest in the matter; (4) the substantive law of the other jurisdiction is applicable, and (5) the limitations' period of the other jurisdiction has expired at the time of the commencement of the suit in New Jersey. The Heavner rule provides a limited and special exception to the general rule that the rule of the forum determines the applicable period of limitations. In the present case, none of the parties resides in New York and the paintings are located in New Jersey. On the facts before us, it would appear that the appropriate statute of limitations is the law of the forum, N.J.S.A. 2A:14-1. On remand, the trial court may reconsider this issue if the parties present other relevant facts.

IV

On the assumption that New Jersey law will apply, we shall consider significant questions raised about the interpretation of N.J.S.A. 2A:14-1. The purpose of a statute of limitations is to stimulate to activity and punish negligence and promote repose by giving security and stability to human affairs. A statute of limitations achieves those purposes by barring a cause of action after the statutory period. In certain instances, this Court has ruled that the literal language of a statute of limitations should yield to other considerations.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law.

This Court first announced the discovery rule in *Fernandi*, supra, 35 N.J. at 434. In *Fernandi*, a wing nut was left in a patient's abdomen following surgery and was not discovered for three years. The majority held that fairness and justice mandated that the statute of limitations should not have commenced running until the plaintiff knew or had reason to know of the presence of the foreign object in her body. . . .

Similarly, we conclude that the discovery rule applies to an action for replevin of a painting under N.J.S.A. 2A:14-1. O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of

the possessor of the paintings. . . .

In determining whether O'Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O'Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

V

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. R. Brown, *The Law of Personal Property* (3d ed. 1975), § 4.1 at 33 (Brown). Adverse possession does not create title by prescription apart from the statute of limitations.

To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous. . . .

[T]here is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. . . . For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes. . . .

The problem is serious. According to an affidavit submitted in this matter by the president of the International Foundation for Art Research, there has been an "explosion in art thefts" and there is a "worldwide phe-

nomenon of art theft which has reached epidemic proportions".

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.

For example, under the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.

Properly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin. In determining whether the discovery rule should apply, a court should identify, evaluate, and weigh the equitable claims of all parties. If a chattel is concealed from the true owner, fairness compels tolling the statute during the period of concealment. That conclusion is consistent with tolling the statute of limitations in a medical malpractice action where the physician is guilty of fraudulent concealment.

It is consistent also with the law of replevin as it has developed apart from the discovery rule. In an action for replevin, the period of limita-

tions ordinarily will run against the owner of lost or stolen property from the time of the wrongful taking, absent fraud or concealment. Where the chattel is fraudulently concealed, the general rule is that the statute is tolled

The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. . . .

By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.

Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations.

VI

Read literally, the effect of the expiration of the statute of limitations under N.J.S.A. 2A:14-1 is to bar an action such as replevin. The statute does not speak of divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title. Nonetheless, the effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and

common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor. . . .

Before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. The only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 321 (1890) (Ames). As Dean Ames wrote: "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand." *Id.* at 319.

Recognizing a metaphysical notion of title in the owner would be of little benefit to him or her and would create potential problems for the possessor and third parties. The expiration of the six-year period of N.J.S.A. 2A:14-1 should vest title as effectively under the discovery rule as under the doctrine of adverse possession. . . .

VII

We next consider the effect of transfers of a chattel from one possessor to another during the period of limitation under the discovery rule. Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner.

Professor Ballantine explains:

Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last. [H. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 158

(1919)] . . .

For the purpose of evaluating the due diligence of an owner, the disposition of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.

We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. . . .

Treating subsequent transfers as separate acts of conversion could lead to absurd results. As explained by Dean Ames:

. . . If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the disposed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself,—a conclusion as shocking in point of justice as it would be anomalous in law. [Ames, *supra* at 323, footnotes omitted]

It is more sensible to recognize that on expiration of the period of limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer. . . .

We reverse the judgment of the Appellate Division in favor of O'Keeffe and remand the matter for trial in accordance with this opinion.

Notes and Questions

7.13. What did O'Keeffe do to locate the paintings? At least according to the court, what more could she have done? What more should she have done? What

did the Franks and Snyder do to make their possession of the paintings clear? What more could they have done? What more should they have done? Did the court properly balance the parties' interests? Did it give the right incentives to future parties in their positions?

7.14. The court argues that switching from adverse possession to the discovery rule "shifts the emphasis from the conduct of the possessor to the conduct of the owner." Is this a good description of the difference between the two tests? Is the court's explanation of its reasons for the change persuasive?

7.15. Notice O'Keeffe's discussion of the choice-of-law problem. O'Keeffe's suit was timely under the New York statute of limitations but may not have been under New Jersey's. In theory, choice of law is simple for property: the law of the property's "situs" (i.e. location) controls.¹ The rule is easy enough to apply to real property, although even there hard cases are possible.² But personal property can move around, generating contacts with multiple states. Suppose the contacts had been flipped, so that the painting was stolen in New Jersey but was currently in New York. Should New York law have applied? Another possible rule is that the law of the place where the property is now applies. What incentives would that rule create? How about a rule selecting the law of the place where the property was at the time of the relevant events? (Wait. What are the "relevant events" in a replevin case involving the statute of limitations?) Another layer of difficulty in choice of law comes from the characterization problem: is the validity of a mortgage securing a loan with an illegally high rate of interest a "property" issue (governed by the situs rule) or a "contract" issue (governed by the place the contract was made or the place of residence of the parties)? The characterization question puts O'Keeffe's use of medical-malpractice tort principles in a replevin case in a new light, doesn't it?

¹Relatedly, courts have *in rem* jurisdiction over property located within their state's borders, and the traditional rule has been that courts have no jurisdiction at all over real property outside their state's borders. Why might these rules have developed? Do they seem likely to simplify litigation or complicate it?

²See, e.g., *Durfee v. Duke*, 375 U.S. 106 (1963), in which the Missouri River, which forms the boundary between Nebraska and Missouri, had shifted its channel from the east of the land in question to the west of it. If the river had shifted suddenly (by "avulsion"), the boundary stayed where it was and the land was legally in Nebraska. But if the river had shifted course slowly (by "accretion"), the boundary moved with the river and the land was in Missouri. Since the plaintiff claimed title under a Nebraska foreclosure proceeding and the defendant claimed title under a Missouri swamp land patent, the case turned on which state the land was in.

The New York Mess

As noted in *O'Keeffe*, New York has a three-year statute of limitations for personal-property actions, and traditionally applied a demand-and-refusal rule to start the statute running. Two further doctrines complicate the picture. One is that the demand-and-refusal rule only applies against good faith purchasers; the limitations period in a suit against a thief starts at the time of the theft. (Do you see how this result, illogical as it may sound, follows from the logic that the good faith purchaser is not considered a wrongdoer until she refuses a demand for return of the property?) The other is that an owner who unreasonably delays making a demand for the return of property, at least where she knows the identity of the possessor, may find her suit barred by the equitable doctrine of laches.

In *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), a landscape by Claude Monet owned by Gerda DeWeerth disappeared from a castle in Southern Germany where American soldiers were quartered during World War II. It turned up on the art market in the mid-1950s and was eventually sold by a New York gallery to Edith Baldinger, who kept it in her apartment in New York. In 1981, DeWeerth's nephew tracked the painting to the gallery's sale to Baldinger and made a demand for its return which was refused. The Second Circuit, sitting in diversity, held that New York "would impose a duty of reasonable diligence in attempting to locate stolen property," not just a duty to demand its return in a reasonable time after the property is located:

For if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred. . . . In this case, plaintiff's proposed exception to the rule would rob it of all of its salutary effect: The thief would be immune from suit after three years, while the good-faith purchaser would remain exposed as long as his identity did not fortuitously come to the property owner's attention. A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary hardship to the good-faith purchaser, the party intended to be protected. . . . A rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to stolen art. Much art is kept in private collections, unad-

vertised and unavailable to the public. An owner seeking to recover such property will almost never learn of its whereabouts by chance. Yet the location of stolen art may frequently be discovered through investigation.

The court concluded that DeWeerth's efforts were "minimal" before her nephew took up the case in 1981, so Baldinger kept the Monet.

That was 1987. Shortly thereafter, the same issue came up through the New York state court system. In *Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991), a painting by Marc Chagall was stolen from the Guggenheim Museum by a mailroom employee in the 1960s. The Lubells bought the painting from a reputable dealer in 1967; the museum demanded it back in 1986. The court rejected O'Keeffe, repudiated DeWeerth's interpretation of New York law, and reaffirmed the New York demand-and-refusal rule. It specifically rejected the discovery rule with its requirement of reasonable diligence by the owner:

Our case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property. . . . Further, the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence. Here, the parties hotly contest whether publicizing the theft would have turned up the gouache. According to the museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the museum also argues that publicity often pushes a missing painting further underground. In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art, it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin. All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that

it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner.

Further, our decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.

Armed with the New York Court of Appeals's holding in *Guggenheim*, Gerda DeWeerth filed a Rule 60(b) motion for relief from judgment, arguing that the decision against her rested on a misinterpretation of New York law and that she should not have been subjected to a diligent-search requirement. The District Court agreed with her, but the Second Circuit reversed in *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994), emphasizing the need for finality in litigation:

We conclude that the prior *DeWeerth* panel conscientiously satisfied its duty to predict how New York courts would decide the due diligence question, and that *Erie* and its progeny require no more than this. The fact that the New York Court of Appeals subsequently reached a contrary conclusion in *Guggenheim* does not constitute an "extraordinary circumstance" that would justify reopening this case in order to achieve a similar result.

Finally, consider *SongByrd Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000), another diversity case under New York law. Henry Byrd, who recorded under the name "Professor Longhair," was a celebrated jazz musician. He went to Woodstock, New York for a studio recording session for Bearsville Records in the 1970s. The session was considered unsatisfactory at the time, so the tapes were

never released. Instead, Arthur Davis, the record-store owner who discovered Byrd, sent the tapes to Bearsville “as demonstration tapes only, without any intent for either Albert Grossman or Bearsville Records Inc. to possess these aforementioned tapes as owner.” Byrd’s attorney wrote two letters to Bearsville requesting the return of the tapes in 1975, but there was no evidence in the record that the letters were even received. Byrd died in 1980, and after Bearsville’s founder died in 1985, his estate licensed the recordings to two record companies. One of the resulting albums won Byrd a (posthumous) Grammy for Best Traditional Blues Album of 1987. SongByrd, the successor-in-interest to Byrd’s rights, sued in 1995. The Second Circuit held that the conversion claim was barred, because the defendant “began using the master tapes as its own when it licensed portions of them to Rounder in 1986.”

The conversion alleged by SongByrd occurred no later than that date. The demand-and-refusal rule, which functioned to delay accrual of the claim in [*Guggenheim*] . . . for the benefit of the true owner, normally provides some benefit to the good-faith possessor by precipitating its awareness that continued possession will be regarded as wrongful by the true owner. New York has not required a demand and refusal for the accrual of a conversion claim against a possessor who openly deals with the property as its own.

As an alternative basis for its holding, the court added that the plaintiff had unreasonably delayed making its demand.

Even if a demand were required for accrual of SongByrd’s claim, [*Guggenheim*] instructs that a plaintiff may not unreasonably delay in making a demand for property whose location is known. Byrd, either independently or through his agents, had known since the 1970s that the master tapes were in Grossman’s possession, and the unanswered letters to Grossman in 1975 for return of the master tapes probably sufficed to alert him to Grossman’s disregard of his ownership claim, thereby rendering any demand thereafter unreasonably delayed. In any event, his successors’ delay in not making a demand in 1987, when Bearsville’s licensing of the master tapes became well known in the music world as a result of the Grammy Award for Byrd’s recordings, was clearly unreasonable.

After *DeWeerth*, *Guggenheim*, and *SongByrd*, does New York have a coherent approach to the statute of limitations in personal property cases? Does it depend whether the case is brought in state or federal court? Has New York done better or worse than New Jersey at balancing the competing interests at stake?

Chapter 8

Adverse Possession

Few doctrines taught in the first year of law school make a worse first impression than adverse possession. **Adverse possession** enables a non-owner to gain title to land (or personal property, but we will focus here on land) after the expiration of the statute of limitations for the owner to recover possession. That sounds bad, and the thought of “squatters” becoming owners gets its share of bad press. But historically the doctrine has performed, and continues to serve, important functions.

The basic requirements, if not their wording and application, are common from state to state. As one treatise summarizes, an adverse possessor must prove possession that is:

- hostile (perhaps under a claim of right);
- exclusive;
- open and notorious;
- actual; and
- continuous for the requisite statutory period.

16 POWELL ON REAL PROPERTY § 91.01. States routinely add to the list. California law, for example, requires that

the claimant must prove: (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3)

possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.

Main St. Plaza v. Cartwright & Main, LLC, 124 Cal. Rptr. 3d 170, 178 (Cal. App. 2011) (citations and quotations omitted).

8.1 Adverse Possession Rationales

But why allow adverse possession? One court summarized the doctrine's history and purposes as follows:

. . . a brief history of adverse possession may be of assistance. After first using an amalgamation of Roman and Germanic doctrine, our English predecessors in common law later settled upon statutes of limitation to effect adverse possession. See Axel Teisen, *Contributions of the Comparative Law Bureau*, 3 A.B.A. J. 97, 126, 127, 134 (1917). In practice, the statutes eliminated a rightful owner's ability to regain possession after the passing of a certain number of years, thereby vesting de facto title in the adverse possessor. For example, a 1623 statute of King James I restricted the right of entry to recover possession of land to a period of twenty years. Essentially, in England, the “[o]riginal policy supporting the development of adverse possession reflected society's unwillingness to take away a ‘right’ which an adverse possessor thought he had. Similarly, society felt the loss of an unknown right by the title owner was minimal.” William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 83 (1996). . . .

In the United States, although the 1623 statute of King James I “came some years after the settling of Jamestown (the usual date fixed as the crystalizing of the common law in America), its fiat is generally accepted as [our] common law. Hence ‘adverse possession’ for 20 years under the common law in this country passes title to the adverse possessor with certain stated

qualifications.” 10 *Thompson on Real Property* § 87.01 at 75. Today, all fifty states have some statutory form of adverse possession

. . . . Courts and commentators generally ascribe to “four traditional justifications or clusters of justifications which support transferring the entitlement to the [adverse possessor] after the statute of limitations runs: the problem of lost evidence, the desirability of quieting titles, the interest in discouraging sleeping owners, and the reliance interests of [adverse possessors] and interested third persons.” Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. Rev. 1122, 1133 (1984). Effectively, our society has made a policy determination that “all things should be used according to their nature and purpose” and when an individual uses and preserves property “for a certain length of time, [he] has done a work beneficial to the community.” Teisen, 3 A.B.A. J. at 127. For his efforts, “his reward is the conferring upon him of the title to the thing used.” *Id.* Esteemed jurist Oliver Wendell Holmes, Jr. went a step further than Teisen, basing our society’s tolerance of adverse possession on the ideal that “[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.” *O Centro Espírita Beneficente União do Vegetal v. Ashcroft*, 389 F.3d 973, 1016 (10th Cir. 2004) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)).

Regardless of how deeply the doctrine is engrained in our history, however, courts have questioned “whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society.” *Finley*, 160 Cal. Rptr. at 427. Commentators have also opined that, along with the articulated benefits of adverse possession, numerous disadvantages exist including the “infringement of a landowner’s rights, a decrease in value of the servient estate, and the encouraged [over]exploitation and [over]development of land. In addition, they . . . [include] the generation of animos-

ity between neighbors, a source of damages to land or loss of land ownership, and the creation of uncertainty for the landowner.”* Ackerman, 31 Land & Water L. Rev. at 92. In reality, “[a]dverse possession ‘[i]s nothing more than a person taking someone else’s private property for his own private use.’ It is hard to imagine a notion more in contravention of the ideals set forth in the U.S. Constitution protecting life, liberty and property.” Ackerman, 31 Land & Water L. Rev. at 94-95 (quoting 2 C.J.S. Adverse Possession § 2 (1972)).

Although this Court duly recognizes its role as the judicial arm of government tasked with applying the law, rather than making law, it is not without an eyebrow raised at the ancient roots and arcane rationale of adverse possession that we apply the doctrine to this modern property dispute.

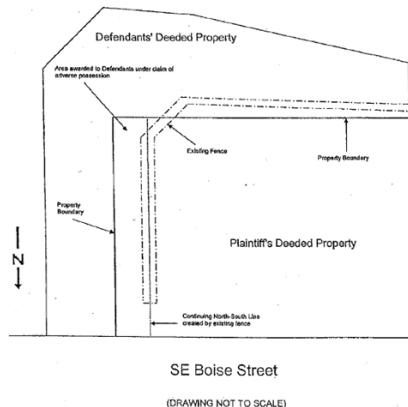
Cahill v. Morrow, 11 A.3d 82, 86-88 (R.I. 2011). Do you share the court’s skepticism? Consider the rationales discussed above against the following case.

Tieu v. Morgan
265 P.3d 98 (Or. Ct. App. 2011)

HADLOCK, J.

The parties dispute ownership of a strip of land that runs parallel to defendants’ driveway. Plaintiff, who owns residential property adjoining that strip of land, filed suit seeking (1) a declaration that he owns the disputed strip and (2) an injunction prohibiting defendants from trespassing on that property. Defendants counterclaimed, asserting that they acquired the disputed strip through adverse possession, and subsequently moved for summary judgment on that counterclaim. The trial court granted defendants’ motion and entered a judgment declaring that defendants had acquired the strip through adverse possession. Plaintiff appeals, and we affirm. . . .

*The modifications to the quotation from Ackerman are ours, not the court’s. —Eds.



The two parcels subject to this appeal are adjoining residential tax lots in a Portland subdivision. Tax lot 3100 is rectangular, with its north side fronting Southeast Boise Street. Tax lot 3200 is a flag lot that is situated largely south of lot 3100; its driveway (the "flagpole") runs north from the main portion of the lot (the "flag") to Southeast Boise Street, parallel to the eastern edge of lot 3100. The disputed three-foot-wide strip lies between lot 3200's driveway and lot 3100. Defendants own lot 3200. Plaintiff owns lot 3100 and also is the record owner of the disputed strip.

A north-south stretch of fence on plaintiff's property runs along the western boundary of the disputed strip, parallel to defendants' driveway. The fence starts roughly halfway down the driveway from Southeast Boise Street, running south, then turns 45 degrees to the southwest, cutting off the southeast corner of lot 3100, then makes another 45-degree turn before continuing west, roughly following the east-west boundary between lots 3100 and 3200. The diagonal portion of the fence that cuts the corner of lot 3100 includes a gate wide enough to accommodate a boat trailer. As noted, the disputed three-foot-wide strip lies between defendants' driveway and the north-south fence on lot 3100; its practical effect is to widen the "flagpole" portion of lot 3200.

The fencing that separates the two properties has existed for decades. As of 1984, the two lots were owned by Robert Stevens, who installed most of the fencing that year, including about half of the north-south stretch located west of lot 3200's driveway. In 1994, Robert Stevens sold lot 3200 to his son, James Stevens, believing that the deed he conveyed to James included all property on the east side of a north-south line defined by that portion of the fence, *i.e.*, the disputed strip. Although he never specifically

discussed the issue with his father, James also believed that his purchase of the flag lot included the disputed strip along his driveway. James explained that he had “no reason to know—to think [that the fence] would be in the wrong location.”

During the four years that James owned the flag lot, he granted Robert permission to occasionally use James’s driveway and the disputed strip, so that Robert could drive a large vehicle and boat trailer through the diagonal gate into Robert’s back yard. In 1996, James installed a sewer line in the center of the disputed strip, running all the way from Southeast Boise Street to the house on lot 3200. When James later put lot 3200 on the market, he advertised it as having a “fully fenced yard,” based on his belief that his ownership included the disputed strip.

James sold lot 3200 to defendants in 1998. The lot was not surveyed in conjunction with that sale; nor did the parties to the sale discuss the lot’s recorded boundaries, review paperwork or maps, or perform any investigation specifically related to that subject.

Defendants have made use of the disputed strip since they purchased lot 3200. Defendant Francine Morgan runs a daycare business from her home, and parents regularly use the disputed strip when dropping off and picking up their children. In 1999, defendants extended the fence paralleling the strip north by roughly 40 feet, choosing not to extend the fence all the way to Southeast Boise Street after Robert suggested that they leave that area unfenced to accommodate maneuvering large vehicles in and out of their driveways. Defendants have laid gravel and bark dust on the disputed strip a number of times and have maintained the fence by replacing posts and fence boards. While Robert still owned lot 3100, he specifically asked defendants’ permission each time he wanted to use the disputed strip to access or move his boat, and defendants granted that permission.

Plaintiff bought lot 3100 from Robert in early 2006. Before purchasing the property, plaintiff had it surveyed and learned that the north-south fence was not located on the deeded boundary between lots 3100 and 3200. A survey pin marking the recorded boundary was placed at that time. Plaintiff claims that he told defendant Francine Morgan soon after the survey was completed that he planned to move the fence to the deeded property line within two years. According to plaintiff, Francine neither disputed plaintiff’s right to move the fence nor claimed ownership of land between the survey marker and the fence. Defendants deny that such a conversation occurred.

In 2008, plaintiff attempted to remove the north-south portion of the fence. After defendants protested, plaintiff initiated this action, seeking a declaration that he owned the disputed strip. As noted, defendants asserted in a counterclaim that they had acquired the strip through adverse possession. The trial court ultimately granted summary judgment to defendants, ruling that the undisputed facts established that defendants had acquired the disputed strip through adverse possession. . . .

ORS 105.620 codifies the common-law elements of adverse possession, requiring a claimant to prove by clear and convincing evidence that the claimant or the claimant's predecessors in interest maintained actual, open, notorious, exclusive, hostile, and continuous possession of the property for ten years. In addition to those common-law elements, the statute also requires the claimant to have had an honest belief of actual ownership when he or she entered into possession of the property.

Plaintiff makes arguments related to each of the statutory elements, first claiming that defendants did not establish actual, open, notorious, exclusive, or continuous possession of the entire disputed strip. We recently summarized what proof is required to satisfy those elements of an adverse-possession claim:

The element of actual use is satisfied if a claimant established a use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited. To establish a use that is open and notorious, plaintiffs must prove that their possession is of such a character as to afford the owner the means of knowing it, and of the claim. The exclusivity of the use also depends on how a reasonable owner would or would not share the property with others in like circumstances. A use is continuous if it is constant and not intermittent. The required constancy of use, again, is determined by the kind of use that would be expected of such land.

Stiles v. Godsey, 233 Or. App. 119, 126, 225 P.3d 81 (2009) (internal quotations and citations omitted).

Here, the land in question is a three-foot-wide strip, covered mostly with gravel or bark dust, adjacent to a narrow driveway. Defendants and their predecessor have used the strip as an extension of that driveway since 1994, both to accommodate wide vehicles and to provide additional loading room for defendant Francine Morgan's daycare clients. That use

is consistent with ownership and with the land's character. Moreover, that use was "open" and "notorious," particularly when considered together with James's act of locating his sewer line on the strip and, later, defendants' maintenance of and improvements to the fence. Finally, defendants and their predecessor used the strip continuously from 1994 (when James bought the lot) to at least 2006 (when plaintiff bought lot 3100 from Robert), *i.e.*, for longer than the statutory 10-year adverse-possession period. Thus, the undisputed facts establish defendants' actual, open, notorious, exclusive, and continuous use of the property.

Plaintiff's contrary argument rests on the fact that the disputed strip is not completely separated from his residential lot by a fence; he emphasizes that the fence at issue does not extend all the way to Southeast Boise Street, but starts partway down the driveway. . . . Here, even though the fence does not extend to the street, it adequately defines the entire disputed strip, indicating that it is separate from the land that abuts it to the west.

Plaintiff also contends that defendants' use of the disputed strip was not "exclusive" because Robert sometimes used the property even after the fence was built. But adverse-possession claimants are allowed the freedom to allow others to occasionally use their property, in the manner that neighbors are wont to do, without thereby abandoning their claim. In this case, Robert asked permission of defendants and their predecessors each time that he used the disputed strip; that permissive use was consistent with defendants' ownership of the land and does not defeat their claim to it.

We also reject plaintiff's argument that defendants' use of the disputed strip was not "hostile" because, he claims, defendants had a conscious doubt regarding the property line. Under ORS 105.620(2)(a), a claimant "maintains 'hostile possession' of property if the possession is under claim of right or with color of title." A "claim of right" may be established through proof of an honest but mistaken belief of ownership, resulting, for example, from a mistake as to the correct location of a boundary. The mistaken belief must be a "pure" mistake, however, and not one based upon "conscious doubt" about the true boundary. Furthermore, ORS 105.620(1)(b) requires that the claimants (or their predecessors) have had an "honest belief" of actual ownership that (1) continued through the vesting period, (2) had an objective basis, and (3) was reasonable under the circumstances.

In *Mid-Valley Resources, Inc. v. Engelson*, 170 Or. App. 255 (2000), we con-

cluded that the defendants had failed to establish pure mistake about the location of a boundary line because one of the defendants had a conscious doubt on that subject. That *Mid-Valley* defendant had testified that she had not known where the property line was when she was a child, and she still did not know at the time of trial whether a particular fence was located on that boundary. That defendant's uncertainty about the property line's location defeated the defendants' adverse-possession claim.

Here, by contrast, the undisputed evidence clearly establishes that defendants and their predecessor, James, always believed that the fence marked the north-south line between lots 3200 and 3100. James assumed when he bought lot 3200 in 1994 that the fence was on the property line, and he perpetuated that belief in defendants by telling them, when they bought the property, that it was "fully fenced." Robert, then the record owner of the disputed strip, confirmed those mistaken beliefs when he did not object to installation of the sewer line, to defendants' use of the strip, or to defendants' extension of the fence. No evidence in the record supports plaintiff's assertion that defendants had a "conscious doubt" about whether the fence was actually located on the line separating their property from plaintiff's. Defendants did suggest in their depositions that they had not given much thought to the property line's location until the dispute arose with plaintiff. Read in context, however, those statements simply confirm defendants' *certainty* that the property line was the same as the fence line; the statements do not indicate that defendants had any conscious doubt as to the boundary's location.

Moreover, no evidence calls into question the reasonableness of defendants' belief that they owned the disputed strip. That strip of land is small in relation to the size of lots 3200 and 3100, it regularly has been used as an extension to the width of an existing driveway, it is well suited to that purpose, and it is partly fenced off from plaintiff's property. Under the circumstances, defendants' belief that they owned the disputed strip was reasonable.

In sum, the undisputed evidence establishes clearly and convincingly that defendants and their predecessor, James, had an "honest belief" that the disputed strip was part of lot 3200 and that they continuously maintained actual, open, notorious, exclusive, and hostile possession of that strip for well over 10 years, from 1994 at least until plaintiff bought lot 3100

in 2006.⁶ We conclude that defendants' adverse-possession claim to the disputed strip vested in 2004, giving them title and extinguishing any claim that plaintiff might otherwise have had to that land.

Notes and Questions

8.1. Does the result in *Tieu* jibe with the rationales for adverse possession recited in the note preceding it? Which ones? *Cahill* suggests that these rationales are less relevant today than in the past. Do you agree? Should the defendants in *Tieu* have been without recourse?

8.2. *Tieu* involves an error in a conveyance. The parties' predecessors in interest thought they had bargained to transfer land that they didn't. This is a common source of adverse possession litigation. Other recurring fact patterns include mistaken deed descriptions, surveying errors, and accidental encroachments by neighbors. Adverse possession claims may also follow the souring of relationships, perhaps between cotenants or one involving permissive land use. None of these cases necessarily involve bad faith actors; although the doctrine may indeed be applied in favor of the mere trespasser, depending on the jurisdiction's interpretation of the state of mind required to satisfy the "hostility" element. We will discuss this issue further below.

8.3. Title based on adverse possession is as good as any. To think through the implications of that observation, imagine the following facts. Neighbor A mistakenly builds a fence on her neighbor's land and gains title to the enclosed land by adverse possession. Neighbor B then notices the encroachment and demands that A move the fence. She agrees, but changes her mind two years later and rebuilds it. B sues for trespass. Who wins?

8.4. **Open and notorious possession.** Whatever its merits, adverse possession is strong medicine. The doctrine therefore provides safeguards to prevent a title owner from losing her property without adequate notice by, for example, requiring that the possession be open and notorious—it has to be the kind of act that an owner would notice.

⁶We reject plaintiff's argument that defendants cannot satisfy the 10-year adverse-possession period by tacking their possession to that of James. An adverse-possession claimant may tack his possessory interests to those of a predecessor "if there is evidence that the predecessor intended to transfer whatever adverse possessory rights he or she may have acquired." *Fitts v. Case*, 243 Or. App. 543, 549, 267 P.3d 160 (2011). Here, James clearly intended his transfer of lot 3200 to defendants to include the disputed strip, given his belief that the fence marked the boundary line and his advertisement of lot 3200 as "fully fenced."

But even overt acts may not be obvious threats to ownership rights. A fence on someone else's property certainly seems open and notorious, but what if it is just an inch or two over the border? What about the three-foot incursion at issue in *Tieu*? What if it had been built while the plaintiff was in occupation of his lot? Do we expect owners to commission surveys anytime a neighbor builds near the property line?

For some courts, the answer is no. *Mannillo v. Gorski*, 255 A.2d 258, 264 (N.J. 1969), for example, holds that minor encroachments are not open and notorious without actual knowledge on the part of the title owner. But where would that leave an innocent encroacher, whose trespass may be costly to remedy? In *Mannillo*, the court balked at placing the trespasser, whose steps and concrete walk extended 15 inches into the plaintiffs' property, at her neighbor's mercy.

It is conceivable that the application of the foregoing rule may in some cases result in undue hardship to the adverse possessor who under an innocent and mistaken belief of title has undertaken an extensive improvement which to some extent encroaches on an adjoining property. In that event . . . equity may furnish relief. Then, if the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception. Of course, such a result should eventuate only under appropriate circumstances and where no serious damage would be done to the remaining land as, for instance, by rendering the balance of the parcel unusable or no longer capable of being built upon by reason of zoning or other restrictions.

*Id.*¹ Is this result—a forced transaction in which the innocent trespasser be-

¹As *Mannillo*'s resort to equity shows, adverse possession is not the only way to address boundary disputes. Other options include the equitable doctrine of acquiescence, see, e.g., *Hamlin v. Niedner*, 955 A.2d 251, 254 (Me. 2008) ("To prove that title or a boundary line is established by acquiescence, a plaintiff must prove four elements by clear and convincing evidence: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years[.]"); the doctrine of agreed bound-

comes the owner, but must pay—the best accommodation of the relevant interests? If the true owner wasn’t on notice of the incursion, why can she be forced to surrender her land, even for payment?

8.5. Adverse possession and the property owner. State-to-state variation about whether encroachments need to be obvious may reflect a deeper question about the purpose of adverse possession. Some authorities view the doctrine as having an object of punishing inattentive owners who sleep on their rights. If so, then perhaps it makes sense to require an incursion to be sufficiently obvious that a property owner would not need to conduct a survey to determine the existence of a violation.

But should sleeping owners be the target of the doctrine? Are property owners who fail to assert their rights also less likely to develop their property (or sell it to someone who will)? And if that is the underlying end, are there any problems with using adverse possession doctrine as a means to it?

8.6. Adverse possession as reward. The reciprocal view—that adverse possession exists to reward the possessors—has two flavors. One is externally focused. The possessor, by putting the land to productive use, “has done a work beneficial to the community.” Axel Teisen, 3 A.B.A. J. 97, 127 (1917). The other is more internal:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and try-

aries, *Finley v. Yuba Cnty. Water Dist.*, 160 Cal. Rptr. 423, 428 (Cal. App. 1979); estoppel, see, e.g., *Douglas v. Rowland*, 540 S.W.2d 252 (Tenn. App. 1976), and laches. See generally L. C. Warden, *Mandatory injunction to compel removal of encroachments by adjoining landowner*, 28 A.L.R.2d 679 (Originally published in 1953) (discussing factors influencing issuance of an injunction).

Laches raises a conceptual difficulty, as it seems to cover some of the same ground as adverse possession. Laches is an equitable defense analogous to the legal defense provided by a statute of limitations: if a plaintiff unreasonably delays in bringing suit and the defendant is prejudiced by the delay, laches will bar the suit as a matter of equity. But if an owner tries to recover land within the limitations period, doesn’t that imply that there has been no unreasonable delay? *Clanton v. Hathorn*, 600 So. 2d 963, 966 (Miss. 1992) (observing that the adverse possession statute “would seem to occupy the field”); *Kelly v. Valparaiso Realty Co.*, 197 So. 2d 35, 36 (Fla. Dist. Ct. App. 1967) (where adverse possession was unavailable due to failure to pay taxes on the land “we do not feel that equity can be invoked to circumvent the statutory law of adverse possession”); see generally 27A AM. JUR. 2D EQUITY § 163 (“Only rarely should laches bar a case before the statute of limitations has run.”). But see *Pufahl v. White*, No. 2050-S, 2002 WL 31357850, at *1 (Del. Ch. Oct. 9, 2002) (although laches claim cannot lead to title, the “laches defense may, however, be applicable to the plaintiffs’ request to enjoin the defendants to remove the encroachment”).

ing to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897). Do either of these views resonate? What does this rationale tell you about what the state of mind of the adverse possessor should be?

8.7. **Third-party interests.**

The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (footnotes omitted). By providing stability to existing property arrangements after the passage of time, adverse possession simplifies transactions by relieving purchasers and mortgagees of the risk that they are dealing with title founded on a long-ago mistake or trespass. The doctrine is a healing mechanism that realigns possession and paperwork when they've gotten too badly out of sync. The benefit extends to the legal system as well by relieving courts of the need to delve into the details of long-forgotten events.

8.8. **Adverse possession's information function.** Adverse possession also enables rights that exist as a matter of custom (e.g., "the Smiths always farm that strip of land") to receive legal status. A banker in a distant city may not understand (or trust) allocations based on local understandings, but that doesn't matter if the claims are translated into recordable title.² The land may now serve as the object of a sale or collateral for a loan for an expanded audience, enhancing its value. Adverse possession's role in converting informal understandings into formal rights illustrates law's ability to facilitate the aggregation and

²"Quiet title" suits perform this function. They are actions that establish the claimant's title to land and foreclose the ability of others to contest it. Although quiet title suits are not necessary to gain rights under adverse possession doctrine, they are very important to adverse possessors. Do you see why? If you cannot answer the question, ask yourself whether you would ever buy property from an adverse possessor.

dissemination of information across society. Can you think of others?

8.9. **Tacking.** What happens if a series of possessors occupy a property, but none of them are present long enough for the limitations period to run? *Tieu* notes in passing the concept of tacking, which enables a succession of adverse possessors to collectively satisfy the statutory period. The usual approach is to allow tacking so long as the successive possessors are in “privity”: a relationship in which the prior possessor knowingly and intentionally transfers whatever interest she holds to the subsequent possessor. See, e.g., *Stump v. Whibco*, 715 A.2d 1006 (N.J. Super. Ct. App. 1998) (“Tacking is generally permitted unless it is shown that the claimant’s predecessor in title did not intend to convey the disputed parcel.”) (citations and quotation omitted). So the clock continues to run if one possessor sells or leases the occupied land, but there is no privity if one trespasser wanders onto the lot after another leaves (or worse, dispossesses the earlier trespasser by force).

Recall the question of whether adverse possession doctrine is more properly focused on rewarding deserving possessors or punishing inattentive owners. Does the U.S. approach to tacking shed light on our answer? The English view is to allow tacking without privity. Cf. James Ames, *LECTURES ON LEGAL HISTORY* 197 (1913) (“English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide . . . not that the adverse possessor shall acquire title, but that the one who neglects for a given time to assert his right shall thereafter not enforce it.”).

8.10. **Adverse possession and the environment.** An underlying premise of the rationales discussed above is that land should be used. For an argument that this tilt makes adverse possession doctrine environmentally harmful, see John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (arguing that “American adverse possession law is fundamentally hostile to the private preservation of wild lands” and proposing exemption to doctrine for privately held wild lands).

8.2 “Hostility” and Intent

Adverse possession requires possession that is “hostile” and, often, “under a claim of right.” Hostility is not animosity. “Hostile possession can be understood as possession that is opposed and antagonistic to all other claims, and that conveys the clear message that the possessor intends to possess the land as his or her own.” 16 POWELL ON REAL PROPERTY § 91.01[2]. The requirement

thus prevents permissive occupancy from ripening into ownership; a lessor need not worry that the tenant will claim title by adverse possession. See, e.g., *Rise v. Steckel*, 652 P.2d 364, 372 (1982) (“[T]he ten-year statutory period for adverse possession did not begin to run until defendant asserted to plaintiff that he was possessing the property in his own right, rather than as a tenant at sufferance.”). A “claim of right,” sometimes called claim of title,³ means that the possessor is holding the property as an owner would. This could be seen as synonymous with the hostility requirement, but not all jurisdictions treat the concept this way. The Powell treatise states that the predominant view in the United States is that good faith is not required for adverse possession, 16 POWELL § 91.01[2], but as you may have already noticed in the *Tieu* case above, intent often matters.

Cahill v. Morrow
11 A.3d 82 (R.I. 2011)

INDEGLIA, J.

The property in dispute is located on Gooseberry Road in the Snug Harbor section of South Kingstown, Rhode Island. Identified as lot 19 on assessor’s plat 88-1, the land is sandwiched between lot 20, currently owned by Cahill, and lot 18, formerly coowned by members of the Morrow family. Morrow is the record owner of the subject property, lot 19.

In 1969, Morrow’s husband, George Morrow, purchased lot 19, and the same year George and his brothers jointly purchased lot 18. At the time of lot 19’s purchase, it was largely undeveloped, marked only by a preexisting clothesline, grass, and trees. Since that time, the Morrows have not improved or maintained lot 19, but have paid all property taxes assessed to it. As such, instead of vacationing on their lot 19, the Morrows annually spent two weeks in the summer at the cottages on the adjacent lot 18. During these vacations, the Morrow children and their cousins played on lot 19’s grassy area. Around 1985, the Morrows ceased summering on Gooseberry Road,³ but continued to return at least once a year to view the lot. Morrow stopped visiting lot 19 in October 2002, after her husband became ill, and she did not return again until July 2006.

In 1971, two years after George Morrow purchased lot 19, Cahill’s

³ Which is not the same thing as “color of title,” as discussed below.

³In 1991, George Morrow and his joint-owner brothers sold lot 18.

mother bought the land and house designated as lot 20 as a summer residence. Between 1971 and 1975, Cahill and her brother did some work on lot 19. They occasionally cut the grass, placed furniture, and planted trees and flowers on it.

Cahill's mother passed away in 1975, and in 1977, after purchasing her siblings' shares, Cahill became the sole record owner of the lot 20 property. Once she became lot 20's owner, Cahill began living in the house year-round. From that time through 1991, she and her boyfriend, James M. Cronin, testified that they continued to mow lot 19's grass on occasion. In addition, she hung clothing on the clothesline, attached flags to the clothesline pole, used the picnic table, positioned a bird bath and feeder, and planted more flowers and trees. Cahill placed Adirondack chairs on lot 19 and eventually replaced the clothesline and picnic table. In 1987, Cahill held the first annual "cousins' party" allowing her relatives free rein with respect to her property and lot 19 for playing, sitting, and car parking. She also entertained friends and family on lot 19 during other summer days. Mary Frances McGinn, Cahill's cousin, likewise recalled that lot 19 was occupied by Cahill kindred during various family functions throughout this time period. Cahill admitted that she never objected to neighborhood children using lot 19, however.

During the period of 1991 through 1997, Cahill testified that she planted more flowers and trees, in addition to cutting the grass occasionally. Cahill also stored her gas grill and yard furniture on the lot and had her brother stack lobster pots for decorative purposes. In 1991 or 1992, she began hosting the annual "Cane Berry Blossom Festival," another outdoor event that used both her lot and lot 19 as the party venue. Like the other gatherings, the festival always took place on a day during a warm-weather month. In 1997 or 1998, she installed a wooden border around the flower beds.

On July 22, 1997, Cahill wrote to George Morrow expressing an interest in obtaining title to lot 19. In the 1997 letter, Cahill stated: "I am interested in learning if your narrow strip of property is available for sale. If so, I would be interested in discussing purchasing it from you." Cahill continued: "If there is a possibility that you would like to sell it, could you please either call me or send me a note?" Cahill did not receive a response.

In the "late 1990s," though Cahill is unclear whether this occurred before or after the 1997 letter, a nearby marina sought permission to construct and elevate its property. Cahill attended the related zoning board hearings and expressed her concerns about increased flooding on lot 19

due to the marina elevation. She succeeded in having the marina developer grade part of lot 19 to alleviate flooding. Additionally, Cahill instituted her own trench and culvert drainage measures to divert water off of lot 19 and then reseeded the graded area. By Cahill's own admission, however, her trenching and reseeding work occurred in 1999 or 2000.

Subsequent to 2001, the new owners of lot 18⁵ stored their boat on lot 19 and planted their own flowers and small trees on the property. In 2002, when the town (with approval from George Morrow) erected a stone wall and laid a sidewalk on the Gooseberry Road border of lot 19, Cahill loamed and planted grass on that portion of the lot. Also in 2002, Cahill asked Morrow's two sisters on separate occasions whether George Morrow would be interested in selling lot 19. The Morrows gave no response to her 2002 inquiries. In 2003, George Morrow passed away.

After making her third inquiry concerning the purchase of lot 19 in 2002, Cahill testified, she continued using the property in a fashion similar to her prior practice until December 2005, when she noticed heavy-machinery tire marks and test pits on the land. Thereafter, she retained counsel and authorized her attorney to send a letter on January 10, 2006 to Morrow indicating her adverse possession claim to a "20-foot strip of land on the northerly boundary" of lot 19. According to a survey of the disputed property, however, the width of lot 19 from the northerly boundary (adjacent to Cahill's property) to lot 18 is 49.97 feet and therefore, more than double what Cahill originally claimed in this letter. Nonetheless, on April 25, 2006, Cahill instituted a civil action requesting a declaration that based on her "uninterrupted, quiet, peaceful and actual seisin and possession" "for a period greater than 10 years," she was the true owner of lot 19 in its entirety. On July 25, 2007, the trial justice agreed that Cahill had proved adverse possession under G.L. 1956 § 34-7-1 and vested in her the fee simple title to lot 19. . . .

In Rhode Island, obtaining title by adverse possession requires actual, open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years.

Here, the trial justice recited the proper standard of proof for adverse possession and then found that Cahill had

"met her burden of establishing all of the elements of an ad-

⁵In approximately 2001, new owners purchased lot 18 from the Morrow brothers' successor.

verse possession claim to lot 19 by her and her mother's continuous and uninterrupted use of the parcel for well in excess of ten years. She maintained the property, planted and improved the property with shrubs, trees, and other plantings, sought drainage control measures, and used the property as if it were her own since 1971. She established that use not only by her own testimony, but as corroborated by other witnesses, photographs, and expert testimony relative to the interpretation of aerial photographs."

At trial, as here on appeal, Morrow argued that Cahill's offers to purchase the property invalidated her claim of right and the element of hostile possession. To dispose of that issue, the trial justice determined that "even assuming that [Cahill's] inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently Margaret [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." The trial justice relied upon our opinion in *Tavares*, 814 A.2d at 350, to support his conclusion. Recalling that this Court stated in *Tavares* that "even when the claimants know they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim [of] right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period," the trial justice found that Cahill's outward acknowledgement of Morrow's record title did not alone "negate her claim of right." He further found that "even if somehow the expression of interest in purchasing lot 19, made initially in 1997, stopped the running of the ten[-]year period under . . . § 34-7-1, the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971."

C.

On appeal, Morrow challenges the trial justice's legal conclusion that Cahill's offers to purchase lot 19 did not extinguish her claim of right, hostile possession, and ultimately, the vesting of her title by adverse possession. Morrow also contends that the trial justice erred in finding that Cahill's testimonial and demonstrative evidence was sufficient to prove adverse possession under the clear and convincing burden of proof standard. We agree that as a matter of law the trial justice failed to consider

the impact of Cahill's offers to purchase on the prior twenty-six years of her lot 19 use. As a result, we hold that this failure also affects his factual determinations.

1. 1997 Offer-to-Purchase Letter

In *Tavares*, this Court explained that “requir[ing] adverse possession under a claim of right is the same as requiring hostility, in that both terms simply indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner.” *Tavares*, 814 A.2d at 351 (quoting 16 Powell on Real Property, § 91.05[1] at 91-28 (2000)). “Thus, [we said] a claim of right may be proven through evidence of open, visible acts or declarations, accompanied by use of the property in an objectively observable manner that is inconsistent with the rights of the record owner.” Here, the first issue on appeal is how an offer to purchase has an impact on these elements. . . .

. . . . [I]n *Tavares*, 814 A.2d at 351, with regard to “establishing hostility and possession under a claim of right,” we explained that “the pertinent inquiry centers on the claimants’ *objective manifestations* of adverse use rather than on the claimants’ *knowledge* that they lacked colorable legal title.” (Emphases added.) Essentially, *Tavares* turned on the difference between the adverse possession claimant’s “knowledge” regarding the owner’s title and his “objective manifestations” thereof. In that case, the adverse-possession claimant surveyed his land and discovered “that he did not hold title to the parcels in question.” After such enlightenment, however, the claimant objectively manifested his claim of ownership to the parcels by “posting no-trespass signs, constructing stone walls, improving drainage, and wood cutting.” This Court explained that simply having knowledge that he was not the title owner of the parcels was not enough to destroy his claim of right given his objective, adverse manifestations otherwise. In fact, we went so far as to state that “even when claimants know that they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim of right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner’s rights for the requisite ten-year period.” This statement is legally correct considering that adverse possession does not require the claimant to make “a good faith mistake that he or she had legal title to the land.” 16 Powell on Real Property § 91.05[2] at 91-23. However, to the extent that *Tavares*’s reference to “black-hearted trespassers” suggests that this Court

endorses an invade-and-conquer mentality in modern property law, we dutifully excise that sentiment from our jurisprudence.

In the case before this Court, Cahill went beyond mere knowledge that she was not the record owner by sending the offer-to-purchase letter. As distinguished from the *Tavares* claimant who did not communicate his survey findings with anyone, Cahill's letter objectively declared the superiority of George Morrow's title to the record owner himself. *See also Shanks v. Collins*, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) ("A recognition by an adverse possessor that legal title lies in another serves to break the essential element of continuity of possession.").

In the face of this precedent, Cahill contends that the trial justice accurately applied the law by finding that an offer to purchase does not automatically negate a claim of right in the property. While we agree that this proposition is correct with respect to offers made in an effort to make peace in an ongoing dispute, we disagree that this proposition applies in situations, as here, where no preexisting ownership dispute is evident. . . . Her offer was not an olive branch meant to put an end to pending litigation with the Morrows. Rather, it was a clear declaration that Cahill "wanted title to the property" from the record owner. By doing so, she necessarily acknowledged that her interest in lot 19 was subservient to George Morrow's. . . .

Accordingly, the trial justice erred by considering any incidents of ownership exhibited by Cahill after the 1997 letter to George Morrow interrupted her claim. . . .

2. The Impact of Cahill's Offer to Purchase on her Pre-1997 Adverse-Possession Claim

Furthermore, we also conclude that the trial justice should not have assumed that even if Cahill's "inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." We agree that an offer to purchase does not automatically invalidate a claim already vested by statute, but we nonetheless hold that the objective manifestations that another has superior title, made after the statutory period and not made to settle an ongoing dispute, are poignantly relevant to the ultimate determination of claim of right and hostile possession during the statutory period. . . .

3. Questions of Fact Remain

Despite the significant deference afforded to the trial justice's findings of fact, such findings are not unassailable. Here, we find clear error in the trial justice's conclusion that "even if somehow the expression of interest in purchasing [lot] 19, made initially in 1997, stopped the running of the ten[-]year period . . . the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971." Given our opinion that some of Cahill's lot 19 activities cannot be considered because of the time frame of their occurrence, we disagree that the trial record can be classified as presenting "overwhelming" evidence of adverse possession.

. . . On remand, the trial justice is directed to limit his consideration to pre-1997 events and make specific determinations whether Cahill's intermittent flower and tree planting, flag flying, clothesline replacing, lawn chair and beach-paraphernalia storing, and annual party hosting are adequate. Furthermore, given our ruling today, the trial court must evaluate the nature of Cahill's and her predecessor's twenty-six-year acts of possession in the harsh light of the fact that Cahill openly manifested the existence of George Morrow's superior title on three occasions. . . .

FLAHERTY, J., dissenting.

. . . Simply put, I do not agree that the correspondence between plaintiff and defendant in which plaintiff offers to purchase defendant's interest in lot 19 is the smoking gun the majority perceives it to be. As is clear from a fair reading of plaintiff's testimony, she believed that she owned the property as a result of her longtime use of and dominion over it. But her testimony also demonstrates that she drew a crisp distinction between whatever ownership rights she may have acquired and record title, which she recognized continued to reside in the Morrows Even if that letter were as significant as the majority contends, there is no doubt that it was sent after the statutory period had run. It is beyond dispute that plaintiff's correspondence could not serve to divest her of title if she had already acquired it by adverse possession There certainly was credible evidence for the trial justice to find that plaintiff had used the property as her own for well over twenty years before she corresponded with Mr. Morrow in 1997. . . .

Dombkowski v. Ferland
893 A.2d 599 (Me. 2006)

DANA, J.

. . . Although “some courts and commentators fail to distinguish between the elements of *hostility* and *claim of right*, or simply consider *hostility* to be a subset of the *claim of right* requirement[,] see, e.g., *Johnson v. Stanley*, 96 N.C. App. 72, 384 S.E.2d 577, 579 (1989)[.] . . . under Maine law, the two elements are distinct.” *Striefel*, 1999 ME 111, P13 n.7, 733 A.2d at 991.

“‘Hostile’ simply means that the possessor does not have the true owner’s permission to be on the land, and has nothing to do with demonstrating a heated controversy or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.” *Id.* P13, 733 A.2d at 991 (quotation marks and citation omitted). “Permission negates the element of hostility, and precludes the acquisition of title by adverse possession.” *Id.* “‘Under a claim of right’ means that the claimant is in possession as owner, with intent to claim the land as [its] own, and not in recognition of or subordination to [the] record title owner.” *Id.* P14, 733 A.2d at 991 (quotation marks omitted).

Under Maine’s common law, as part of the claim of right element, we have historically examined the subjective intentions of the person claiming adverse possession. See *Preble v. Maine C. R. Co.*, 85 Me. 260, 264, 27 A. 149, 150 (1893). Under this approach, which is considered the minority rule in the country, “one who by mistake occupies . . . land not covered by his deed with no intention to claim title beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line.” *Preble*, 85 Me. at 264, 27 A. at 150; see also *McMullen*, 483 A.2d at 700 (“[If] the occupier intend[s] to hold the property only if he were in fact legally entitled to it[, the] occupation [is] ‘conditional’ and [cannot] form the basis of an adverse possession claim.”). The majority rule in the country is based on *French v. Pearce*, 8 Conn. 439 (1831), and recognizes that the possessor’s mistaken belief does not defeat a claim of adverse possession. [The court then interpreted legislation to overrule Maine precedents and allow mistaken possession to meet the claim of right requirement.]

Notes and Questions

8.11. **Doctrine v. practice.** Richard Helmholz has argued that though adverse possession doctrine generally does not require the adverse possessor to plead good faith, judicial practice is to disfavor those who know they are trespassing compared to those acting out of a good faith mistake. Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 332 (1983). Is *Cahill* an example of this dynamic?

In recent decades, state legislatures have increasingly demanded good faith on the part of the possessor (the Oregon statute in *Tieu* requiring honest belief in ownership, for example, was passed in 1989). See 16 POWELL ON REAL PROPERTY § 91.05 (collecting examples).

8.12. Should good faith be required? And if so, what is good faith? Is it an honest belief about the facts on the ground (e.g., whether the fence builder is correct that his fence is on the right side of the boundary line)? Or is it an attitude about one's potential adversary (a willingness to move the fence if wrong)? Either view creates evidentiary difficulties.

Even when good faith is not part of the analysis as a formal matter, Helmholz argues that judges and juries often cannot help but “prefer the claims of an honest man over those of a dishonest man.” Helmholz, *supra*, at 358. Might this be a satisfactory middle ground? Are there advantages to having courts officially ignore intent while applying a de facto bar to the bad faith possessor when there is evidence of dishonesty? Or is it problematic to have legal practice depart from official doctrine?

Perhaps another way to reconcile the benefits of adverse possession with the distaste for bad faith possessors would be to allow dishonest possessors to keep the land, but pay for the privilege. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1126 (1984) (suggesting “requiring indemnification only in those cases where the [true owner] can show that the [adverse possessor] acted in bad faith.”). As Merrill notes, a California appellate court required such payment in a case concerning a prescriptive easement (which is similar to adverse possession except that it concerns the *right to use* someone else’s land rather than its ownership), only to be overturned by the state supreme court. *Id.* (discussing *Warsaw v. Chicago Metallic Ceilings, Inc.*, 676 P.2d 584 (Cal. 1984)). The proposal may remind you of the *Mannillo* case discussed above. How does it differ?

8.13. A minority of states, as *Dombkowski* indicates, require adverse possessors to prove their subjective intent to take the land without regard to the

existence of other ownership interests. This is sometimes referred to as the “aggressive trespass” standard: “I thought I did not own it [and intended to take it].” Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (brackets in the original). Is there a reason to prefer it? Lee Anne Fennell argues for a knowing trespass requirement that requires the adverse possessor to document her knowledge:

[A] documented knowledge requirement facilitates rather than punishes efforts at consensual dealmaking. One of the most definitive ways of establishing that a possessor knew she was not the owner of the disputed land is to produce evidence of her purchase offer to the record owner. Currently, such an offer often destroys one’s chance at adverse possession because it shows one is acting in bad faith if one later trespasses; one does far better to remain in ignorance (or pretend to) and never broach the matter with the record owner. Under my proposal, such offers would go from being fatal in a later adverse possession action to being practically a prerequisite. As a result, it would be much more likely that any resulting adverse possession claim will occur only where a market transaction is unavailable. A documented knowledge requirement would also reduce litigation costs and increase the certainty of land holdings. Actions or records establishing that the trespass was known at the time of entry, necessary if the possessor ever wishes to gain title under my approach, would serve to streamline trespass actions that occur before the statute has run. Moreover, an approach that refuses to reward innocent mistakes would be expected to reduce mistake-making.

Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1041-44 (2006) (footnotes omitted). One’s position on these matters may depend on which scenarios one believes are most common in adverse possession cases and adjust the state of mind required to include or exclude them accordingly. Should the state of mind required depend on the context? A state might, for example, require good faith for encroachments, but bad faith or color of title if the possessor seeks to own the parcel as a whole. Is this a good idea?

8.3 Finer Points of Adverse Possession Law

Actual and Continuous Possession. Adverse possessors are not required to live on the occupied property; what matters is acting like a true owner would. That use, however, must be continuous, not sporadic. *Compare*, e.g., *Lobdell v. Smith*, 690 N.Y.S.2d 171, 173 (N.Y. App. Div. 3d Dep’t 1999) (although undeveloped land “does not require the same quality of possession as residential or arable land,” no adverse possession where claimant “seldom visited the parcel except to occasionally pick berries or hunt small game”), *with Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) (claimants of a rural parcel suitable for recreational and subsistence activities “visited the property several times during the warmer season to fish, gather berries, clean the premises, and play. . . . That others were free to pick berries and fish is consistent with the conduct of a hospitable landowner, and undermines neither the continuity nor exclusivity of their possession.”). Regular use of a summer home may constitute continuous use. See, e.g., *Nechow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963).

Color of title. Claim of title, an intent to use land as one’s own, is distinct from color of title, which describes taking possession under a defective instrument (like a deed based on a mistaken land survey). States often apply more lenient adverse possession standards to claims made under color of title. *Compare*, e.g., FL. ST. § 95.16, *with id.* § 95.18. Why do you think that is?

Entry under color of title may also affect the scope of the land treated as occupied by the adverse possessor. 2 C.J.S. *Adverse Possession* § 252 (“Adverse possession under color of title ordinarily extends to the whole tract described in the instrument constituting color of title.”). *But see Wentworth v. Forne*, 137 So. 2d 166, 169 (Miss. 1962) (“In brief, when the land involved is, in part, occupied by the real owner, the adverse possession, even when this possessor has color of title, is confined to the area actually possessed.”).

Adverse possession by and against the government. Although government agencies may acquire title by adverse possession, the general rule is that public property held for public use is not subject to the doctrine. Why do you think that is?

Disabilities. The title owner of land may be subject to a disability (e.g., status as a minor, mental incapacity) that may extend the time to bring an ejectment action against an unlawful occupant. States generally spell out such exceptions by statute.

A Moving Target. States vary their adverse possession rules to take into account a variety of factors (e.g., claim under color of title, payment of property

 RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE Section 95.18, Florida Statutes		DR-452 R. 07/13 Provisional Effective 01/14
THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY		
<p>For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.</p>		
COMPLETED BY ADVERSE POSSESSION CLAIMANT		
<p>The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in s. 95.18(1), F.S.</p>		
Name of claimant(s)		
Mailing address		Phone _____ <input type="checkbox"/> Parcel ID, if available _____ <input type="checkbox"/> the property claimed is only a portion of this parcel ID _____
Date of filing _____	Date claimant entered into possession of property _____	
<p>Legal description of property claimed <small>Must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey.</small></p>		
<p>This property has been: <input type="checkbox"/> protected by substantial enclosure <input type="checkbox"/> cultivated, maintained, or improved in a usual manner <small>(Check all that apply.)</small></p>		
<p>Describe your use of the property, in detail below.</p>		
<p>Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:</p>		
<p>Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct. I further acknowledge that the return does not create any interest enforceable by law in the described property.</p>		
<p>Signature of claimant(s) _____</p>		
<p>State of Florida _____ County of _____</p>		
<p>This instrument was sworn to and subscribed before me on _____ by _____ <small>personally known to me or who produced _____ as identification.</small></p>		
<p>_____ <small>Signature and seal, notary public</small></p>		
COMPLETED BY PROPERTY APPRAISER		
<p>Received in the office of the property appraiser of _____ County, Florida, on _____ <small>A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.</small></p>		
<p>_____ <small>Signature, property appraiser or deputy</small></p>		
TO THE OWNER OF RECORD		
<p>A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)</p>		
<p>This return is a public record and may be inspected by any person under s. 119.01, F.S.</p>		

Figure 8.1: Florida's adverse possession form.

taxes, enclosure or cultivation of land, etc.). These factors may change with the times. In the aftermath of the financial crisis, for example, reports of trespassers occupying foreclosed, vacant properties with the goal of acquiring title via adverse possession prompted renewed attention to the doctrine. Florida enacted legislation that requires those seeking adverse possession without color of title to pay all outstanding taxes on the property within one year of taking possession and disclose in writing the possessor's identity, date of possession, and a description of the property sufficient to enable the identification of the property in the public records. Local officials are then required to make efforts to contact the record owner of the property. FL. ST. § 95.18. The form created under the statute is reprinted in Figure 8.1. Are measures like these useful? Consider the problem of "zombie foreclosures." A property may be vacant because the owners received a notice of foreclosure and left. Sometimes the lenders never complete the foreclosure process, perhaps to avoid the costs that come with ownership of the property. Title therefore remains with the out-of-possession owners, who remain responsible for taxes, association fees, and the like. What outcome should adverse possession law seek to promote in such cases?

Chapter 9

Improvers and Good-Faith Purchasers

A chimney-sweep finds a jewel. He gives it to his friend, a jeweler, who designs and crafts a gold ring around the jewel's unique shape. Frederica van Snoot sees the ring, buys it for \$10,000, and wears it around town. One day, Jeremiah Hobnob recognizes the jewel he lost last month and demands it back. As against the chimney-sweep, this is an easy case; nowhere near enough time has passed to satisfy the statute of limitations, even in a jurisdiction that imposes a stringent duty of diligent search on owners. But the jeweler and van Snoot are harder cases, because both of them have made investments. The jeweler invested gold and labor to turn the jewel into a ring. For her part, van Snoot paid out \$10,000. If Hobnob is entitled to the jewel, the jeweler or van Snoot or both will end up poorer than when they started.

The common law mitigated the harshness of this result with two doctrines. One, the rule of **accession**, provided that someone who sufficiently improves another person's property is allowed to keep it. Importantly, the hornbook rule is that accession only operates in favor of *good faith* improvers; someone who knows the property is not hers acts at her own peril when she combines it with her own property or labor. The jeweler is potentially protected by accession. The other doctrine protected **good faith purchasers for value** from the unknown claims of third parties. It too only protects only parties who act in good faith, i.e., those who do not know or have reason to know they are buying property with clouded title. Frederica van Snoot may be just such a purchaser.

This section presents both doctrines. As you read, pay close attention to the preconditions that allow them to be invoked; despite their similarities, they

have important differences. For example, it is hornbook law that “a thief takes no title and can give none”: good faith purchase can never cut off the claims of an owner from whom the property was stolen. But accession can, as you will see. Also, observe that while ownership of the property may be the primary question in these cases, it is often not the only issue. Once ownership is allocated, courts often require restitutionary payments to shift losses from more innocent to more culpable parties.

Wetherbee v. Green

22 Mich. 311 (1871)

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the circuit court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel-hoops, alleged to be of the value of eight hundred dollars. . . .

COOLEY, J.:

The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. [This defense failed; Sumner was not authorized to let Wetherbee cut timber on the land.]

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also [facts tending to show Wetherbee's lack of knowledge of Sumner's duplicity]. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the

property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrongdoer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the mean time, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com.,

404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition: 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns., 348; *Curtis v. Groat*, 6 Johns., 168, and *Chandler v. Edson*, 9 Johns., 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in *Silsbury v. McCoon*, 3 N. Y., 378, 385, the whole subject is very fully examined . . . [In *Silsbury*, a thief who turned the plaintiff's corn into whiskey did not thereby acquire ownership of it.] But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding that, when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, . . . the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed: Popham's Rep. 38, Pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to

A from what belonged to B, the whole belongs to B.”* But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor’s, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor’s, as he would have been under the civil law: In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. “If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title:” 2 KENT, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape: Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice[.]

It may often happen that no difficulty will be experienced in determin-

*The original case report omits the closing quotation mark and citation to 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 364–365 (O. Halsted, 2d ed. 1832). —Eds.

ing the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass. . . .

Notes and Questions

9.1. What factors matter most to the court's holding? Is this a case about the relative value contributed by the plaintiff and defendant, about the difficulty of identifying the plaintiff's original property, about the difficulty of separating it, or about the degree to which it has been physically altered? Consider *Atlas Assurance Co. v. Gibbs*, 183 A. 690 (Conn. 1936), which involved the engine from a damaged car (the Hibben car) that had been properly sold and the body of a car (the Sherline car) that had been stolen. The defendant's predecessor in title combined the two to make one working car. In an action for replevin by the assignee of title to the Sherline car, who should get what?

9.2. How important is Wetherbee's good faith? What if he had been told by Green that Sumner lacked authority, but had examined Sumner's title in some detail and concluded that Green was wrong? What if Wetherbee steals a set of paints and uses it to create a portrait that sells for \$500,000?

9.3. Note that Green retains "an action to recover damages for the unintentional trespass." What is the measure of those damages? Given that Wetherbee owns the hoops via accession, why does he need to pay? Or, to look at it another way, why doesn't an adverse possessor need to pay for the value of the property he retains after the statute of limitations has run?

9.4. Sometimes property transforms itself. A cow from Farmer Jones's herd wanders onto Farmer Smith's land, where it is impregnated by Farmer Smith's bull. Who owns the calf? Does it matter where the cow gives birth? Felix Cohen, in *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), claimed that every legal system in human history appears to have resolved these cases in the same way. Compare the case in which Farmer Smith's bull kicks Farmer Jones's cow and badly injures it. What result then?

9.5. Another theme in confusion cases involves the distinction between unique and fungible property. If I mistakenly pour your 55-gallon drum of water into my storage tank, you are entitled to draw 55 gallons of water from the

tank, even though it is astoundingly improbable that you will get back the same water molecules you started with. Water is water. If I mistakenly mix your bottle of 1967 Chateau de Snoot wine with my bottle of 2015 Rotgut Red, I can't give you a bottle of the resulting mixture and call it even. (What are you entitled to?)

But note that uniqueness is something courts create as well as discover. At the start of the 19th century, wheat and other grains were stored and sold as though they were unique goods; each farmer's and merchant's sacks of grain were treated as distinct from each other's. Today, grain has been standardized and is sold as a commodity: a merchant could order 100 bushels of U.S. No. 1 Hard Red Spring Wheat without needing to specify or worry about what particular farms it came from. A key to this shift was courts' willingness to treat grain (and many other agricultural commodities) as fungible. A merchant whose sacks of wheat were dumped into a grain elevator without his consent would be entitled to the same quantity of wheat of the same standard class, not to his specific sacks or even to wheat with the same more specific characteristics. What was gained and what was lost in this shift?

Uniform Commercial Code

§ 2-312. Warranty of title

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

- (a) The title conveyed shall be good, and its transfer rightful; and
- (b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. . . .

§ 2-403. Power to transfer; good faith purchase of goods; "entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable

title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) The transferor was deceived as to the identity of the purchaser, or
 - (b) The delivery was in exchange for a check which is later dishonored, or
 - (c) It was agreed that the transaction was to be a "cash sale," or
 - (d) The delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Notes and Questions

9.6. What do these two provisions have to do with each other? Hint: think about circumstances in which the warranty of § 2-312 would be violated and consider whether § 2-403 comes into play, and vice-versa.

Kotis v. Nowlin Jewelry, Inc.
844 S.W.2d 920 (Tex. Ct. App. 1992)

DRAUGHN, Justice.

Eddie Kotis appeals from a judgment declaring appellee, Nowlin Jewelry, Inc., the sole owner of a Rolex watch, and awarding appellee attorney's fees. Kotis raises fourteen points of error. We affirm.

On June 11, 1990, Steve Sitton acquired a gold ladies Rolex watch, President model, with a diamond bezel from Nowlin Jewelry by forging a check belonging to his brother and misrepresenting to Nowlin that he had his brother's authorization for the purchase. The purchase price of the watch, and the amount of the forged check, was \$9,438.50. The next day, Sitton

telephoned Eddie Kotis, the owner of a used car dealership, and asked Kotis if he was interested in buying a Rolex watch. Kotis indicated interest and Sitton came to the car lot[.] Kotis purchased the watch for \$3,550.00. Kotis also called Nowlin's Jewelry that same day and spoke with Cherie Nowlin.

Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Ms. Nowlin testified that Kotis would not immediately identify himself. Because she did not have the payment information available, Ms. Nowlin asked if she could call him back. Kotis then gave his name and number. Ms. Nowlin testified that she called Kotis and told him the amount of the check and that it had not yet cleared. Kotis told Ms. Nowlin that he did not have the watch and that he did not want the watch. Ms. Nowlin also testified that Kotis would not tell her how much Sitton was asking for the watch.

John Nowlin, the president of Nowlin's Jewelry, testified that, after this call from Kotis, Nowlin's bookkeeper began attempting to confirm whether the check had cleared. When they learned the check would not be honored by the bank, Nowlin called Kotis, but Kotis refused to talk to Nowlin. Kotis referred Nowlin to his attorney. On June 25, 1990, Kotis' attorney called Nowlin and suggested that Nowlin hire an attorney and allegedly indicated that Nowlin could buy the watch back from Kotis. Nowlin refused to repurchase the watch.

After Sitton was indicted for forgery and theft, the district court ordered Nowlin's Jewelry to hold the watch until there was an adjudication of the ownership of the watch. Nowlin then filed suit seeking a declaratory judgment that Nowlin was the sole owner of the watch. Kotis filed a counterclaim for a declaration that Kotis was a good faith purchaser of the watch and was entitled to possession and title of the watch. After a bench trial, the trial court rendered judgment declaring Nowlin the sole owner of the watch. The trial court also filed Findings of Fact and Conclusions of Law.

In point of error one, Kotis claims the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase with Nowlin, within the meaning of Tex. Bus. & Com. Code Ann. § 2.403(a). Where a party challenges a trial court's conclusions of law, we may sustain the judgment on any legal theory supported by the evidence. Incorrect conclusions of law will not require reversal if the controlling findings of facts will support a correct legal theory.

Kotis contends there is evidence that the watch is a "good" under the UCC, there was a voluntary transfer of the watch, and there was physical delivery of the watch. Thus, Kotis maintains that the transaction between Sitton and Nowlin was a transaction of purchase such that Sitton acquired the ability to transfer good title to a good faith purchaser under § 2.403 [which was identical in relevant part to the UCC excerpt quoted above]....

Neither the code nor case law defines the phrase "transaction of purchase." "Purchase" is defined by the code as a "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." Tex. Bus. & Com. Code Ann. § 1.201(32) (Vernon 1968). Thus, only voluntary transactions can constitute transactions of purchase.

Having found no Texas case law concerning what constitutes a transaction of purchase under § 2.403(a), we have looked to case law from other states. Based on the code definition of a purchase as a voluntary transaction, these cases reason that a thief who wrongfully takes the goods against the will of the owner is not a purchaser. See *Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, 268 Cal. Rptr. 16, 18 (Cal. Ct. App. 1990); *Charles Evans BMW, Inc. v. Williams*, 395 S.E.2d 650, 651-52 (Ga. Ct. App. 1990); *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. Ct. App. 1985). On the other hand, a swindler who fraudulently induces the victim to deliver the goods voluntarily is a purchaser under the code.

In this case, Nowlin's Jewelry voluntarily delivered the watch to Sitton in return for payment by check that was later discovered to be forged. Sitton did not obtain the watch against the will of the owner. Rather, Sitton fraudulently induced Nowlin's Jewelry to deliver the watch voluntarily. Thus, we agree with appellant that the trial court erred in concluding that Sitton did not receive the watch through a transaction of purchase under § 2.403(a). We sustain point of error one.

In point of error two, Kotis contends the trial court erred in concluding that, at the time Sitton sold the watch to Kotis, Sitton did not have at least voidable title to the watch. In point of error nine, Kotis challenges the trial court's conclusion that Nowlin's Jewelry had legal and equitable title at all times relevant to the lawsuit. The lack of Texas case law addressing such issues under the code again requires us to look to case law from other states to assist in our analysis.

In *Suburban Motors, Inc. v. State Farm Mut. Automobile Ins. Co.*, the California court noted that § 2.403 provides for the creation of voidable ti-

tle where there is a voluntary transfer of goods. Section 2.403(a)(1)-(4) set forth the types of voluntary transactions that can give the purchaser voidable title. Where goods are stolen such that there is no voluntary transfer, only void title results. Subsection (4) provides that a purchaser can obtain voidable title to the goods even if “delivery was procured through fraud punishable as larcenous under the criminal law.” This subsection applies to cases involving acts fraudulent to the seller such as where the seller delivers the goods in return for a forged check. Although Sitton paid Nowlin’s Jewelry with a forged check, he obtained possession of the watch through a voluntary transaction of purchase and received voidable, rather than void, title to the watch. Thus, the trial court erred in concluding that Sitton received no title to the watch and in concluding that Nowlin’s retained title at all relevant times. We sustain points of error two and nine.

In point of error three, Kotis claims the trial court erred in concluding that Kotis did not give sufficient value for the watch to receive protection under § 2.403, that Kotis did not take good title to the watch as a good faith purchaser, that Kotis did not receive good title to the watch, and that Kotis is not entitled to the watch under § 2.403. In points of error four through eight, Kotis challenges the trial court’s findings regarding his good faith, his honesty in fact, and his actual belief, and the reasonableness of the belief, that the watch had been received unlawfully.

Under § 2.403(a), a transferor with voidable title can transfer good title to a good faith purchaser. Good faith means “honesty in fact in the conduct or transaction concerned.” Tex. Bus. & Com. Code Ann. § 1.201(19) (Vernon 1968). The test for good faith is the actual belief of the party and not the reasonableness of that belief. *La Sara Grain v. First Nat’l Bank*, 673 S.W.2d 558, 563 (Tex. 1984).

Kotis was a dealer in used cars and testified that he had bought several cars from Sitton in the past and had no reason not to trust Sitton. He also testified that on June 12, 1990, Sitton called and asked Kotis if he was interested in buying a Ladies Rolex. Once Kotis indicated his interest in the watch, Sitton came to Kotis’s place of business. According to Kotis, Sitton said that he had received \$18,000.00 upon the sale of his house and that he had used this to purchase the watch for his girlfriend several months before. Kotis paid \$3,550.00 for the watch. Kotis further testified that he then spoke to a friend, Gary Neal Martin, who also knew Sitton. Martin sagely advised Kotis to contact Nowlin’s to check whether Sitton had financed the watch. Kotis testified that he called Nowlin’s after buying the watch.

Cherie Nowlin testified that she received a phone call from Kotis on June 12, 1990, although Kotis did not immediately identify himself. Kotis asked if Nowlin's had sold a gold President model Rolex watch with a diamond bezel about a month before. When asked, Kotis told Ms. Nowlin that Sitton had come to Kotis' car lot and was trying to sell the watch. Ms. Nowlin testified that Kotis told her he did not want the watch because he already owned a Rolex. Ms. Nowlin told Kotis that Sitton had purchased the watch the day before. Kotis asked about the method of payment. Because Ms. Nowlin did not know, she agreed to check and call Kotis back. She called Kotis back and advised him that Sitton had paid for the watch with a check that had not yet cleared. When Ms. Nowlin asked if Kotis had the watch, Kotis said no and would not tell her how much Sitton was asking for the watch. Ms. Nowlin did advise Kotis of the amount of the check.

After these calls, the owner of Nowlin's asked his bookkeeper to call the bank regarding Sitton's check. They learned on June 15, 1990 that the check would be dishonored. John Nowlin called Kotis the next day and advised him about the dishonored check. Kotis refused to talk to Nowlin and told Nowlin to contact his attorney. Nowlin also testified that a reasonable amount to pay for a Ladies President Rolex watch with a diamond bezel in mint condition was \$7,000.00-\$8,000.00. Nowlin maintained that \$3,500.00 was an exorbitantly low price for a watch like this.

The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Kotis testified that he lied when he spoke with Cherie Nowlin and that he had already purchased the watch before he learned that Sitton's story was false. The judge, as the trier of fact, may not have believed Kotis when he said that he had already purchased the watch. If the judge disbelieved this part of Kotis' testimony, other facts tend to show that Kotis did not believe the transaction was lawful. For example, when Kotis spoke with Nowlin's, he initially refused to identify himself, he said that he did not have the watch and that he did not want the watch, he refused to divulge Sitton's asking price, and he later refused to talk with Nowlin and advised Nowlin to contact Kotis' attorney. Thus, there is evidence supporting the trial court's finding that Kotis did not act in good faith.

There are sufficient facts to uphold the trial court's findings even if the judge had accepted as true Kotis' testimony that, despite his statements to Nowlin's, he had already purchased the watch when he called Nowlin's. The testimony indicated that Kotis was familiar with the price of Rolex

watches and that \$3,550.00 was an extremely low price for a mint condition watch of this type. An unreasonably low price is evidence the buyer knows the goods are stolen. Although the test is what Kotis actually believed, we agree with appellee that we need not let this standard sanction willful disregard of suspicious facts that would lead a reasonable person to believe the transaction was unlawful. Thus, we find sufficient evidence to uphold the trial court's findings regarding Kotis' lack of status as a good faith purchaser. We overrule points of error three through eight. . . .

We affirm the trial court's judgment.

Notes and Questions

9.7. The common-law baseline is **nemo dat quod non habet**: no man can give what he does not have. If I "give" you a car I don't own, you don't own it either. If I sell you a tract of land encumbered by a mortgage and an easement, you receive only as much as I owned, so you take the land subject to the mortgage and the easement. This *nemo dat* baseline is the source of the maxim that a thief cannot give good title. So if Sitton had held up Nowlin's at gunpoint, how would the case have come out, and on what reasoning?

§ 2-403(1), as applied in *Kotis*, distinguishes the thief's **void title** from merely **voidable title**: the quality of title obtained by the buyer in a transaction that is for some reason defective. If the seller in that defective transaction discovers the problem, she has a right to unwind the transaction (and get her stuff back). But until she does, the buyer has the power to convey not just his own, voidable title, but something even better. A good faith purchaser for value receives good title, even as against the original seller. Her right to unwind the transaction has been cut off. This is a harsh way to treat an innocent victim of fraud or mistake. Why would property law do something like that?

9.8. How did the parties get into this mess? Obviously Sitton is most to blame, but is there anything Kotis or Nowlin could have done? Who is left holding the bag and why? Is there anything Kotis can do to recover his \$3,550.00?

9.9. § 2-403 provides for two tests that the buyer must meet to be protected (in addition to the threshold question of whether his seller had voidable title): he must act in good faith and he must give "value." Which of these tripped up Kotis? And what is the reason for not protecting donees along with buyers?

Note on Negotiability

Another version of the good faith purchaser doctrine developed in the law of intangible property called **negotiable instruments**. In the centuries before the development of good national and international banking systems, merchants commonly did business by passing around various promises or instructions to pay. So, for example, Abel might buy a cartload of barrels of wine from Baker on March 1 by giving Baker a signed promise to pay £200 on June 1. Baker could in theory sit on this **promissory note** until June 1 and then demand payment from Abel. But instead, Baker was more likely to use the note to pay his own debts: he might, for example, give it to Crumleigh on April 1 to buy a gold chain. Baker would sign, or **indorse**, the note, making Crumleigh an assignee of Baker's right to collect from Abel, so that come June 1, Crumleigh could present the note to Abel and demand payment. Of course, there was no need to stop there: Crumleigh could indorse the note over to Daniels, and so on. In such a way, credit became a kind of currency, with the note (collecting indorsements as it went) functioning as a token to indicate who currently held the right to collect when the debt came due on June 1.

Another kind of signed promise, the **bill of exchange**, functioned similarly. The difference was where Abel's note was a promise by Abel to pay, a bill of exchange would be an instruction from Abel to a third party to pay. Perhaps the bill would be "drawn on" Abel's business partner Absalom, or perhaps more usefully it would be drawn on another merchant who had agreed to extend Abel credit or make payments against amounts Abel had deposited with him. If this sounds a bit like banking, it is not a coincidence; the modern check is a direct descendent of the medieval bill of exchange.

Now back to our story. Suppose that Abel discovers that the wine Baker sold him was rotten, good only as vinegar. Abel chases down Baker, only to learn that Baker has already indorsed the note over to Crumleigh, who has already done the same to Daniels. Come June 1, Daniels demands payment, but Abel refuses, pointing to the worthless vinegar. Baker didn't hold up his side of the deal; why should Abel have to do the same? In *Miller v. Race*, (1758) 97 Eng. Rep. 398 (K.B.), the great commercial jurist Lord Mansfield gave an answer:

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a

contrary determination. . . . A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

The point is that if Daniels needs to check the details of the Abel-Baker transaction—including inspecting the wine—to determine whether he will be paid on Abel's note, he will refuse. He doesn't know Abel; he doesn't even know Baker. The doctrine of *Miller v. Race* is a good-faith-purchaser doctrine for negotiable instruments; it lets Daniels rely on the note itself, rather than inspecting the details over the underlying transaction. That in turn lets the note circulate as money, enabling other transactions that otherwise would have frozen up for lack of financing.

The doctrine of **negotiability**—“negotiation” being the act of assigning the promise to pay from one recipient to another, typically by indorsing the note and/or physically handing it over—took root in the United States. Indeed, *Swift v. Tyson*—famous for being the case overruled in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”)—was a case about negotiability. Norton and Keith convinced Tyson to sign a bill of exchange for \$540.30, made payable to Norton, who then negotiated it to Swift to pay off a preexisting debt. But when Swift demanded payment from Tyson, Tyson replied that he had given it to Norton and Keith “as part consideration for the purchase of certain lands in the state of Maine, which Norton and Keith represented themselves to be the owners of” but were not. The case turned on whether Swift was a “bona fide holder for a valuable consideration, without notice,” in which case he was entitled to collect from Tyson regardless of the land fraud Norton and Keith had perpetrated on Tyson. The only issue there was whether cancellation of the preexisting debt to Swift meant that Swift had given “valuable consideration” for the note, and again Justice Story’s reasoning was pragmatic:

And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. . . . It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for

pre-existing debts. . . . But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. . . . Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

Today, negotiability shows up in many areas of commercial law. One good illustration comes from Article 3 of the Uniform Commercial Code. A person is a “holder in due course” of a negotiable instrument (and here, think “check” or “promissory note”) if

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument [either to recover the instrument after a theft or to rescind the transaction in which it was transferred], and (vi) without notice that any party has a defense or claim in recoupment . . .

UCC § 3-302(a). That’s a long list of circumstances, but they’re what you’d expect. In addition to the usual requirement that the holder in due course give value (and hence have a reliance interest in being paid), these are all issues that either affect the authenticity of the instrument itself (paragraph (1)) or go to the holder’s notice that something sketchy is afoot. But if a person qualifies as a holder in due course, she receives extensive protections:

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this title or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

UCC § 3-305. Notice the difference between the unconditional defenses in (a)(1) and the “personal” defenses in (a)(2) and (a)(3). Only a few of the contract defenses—infancy, incapacity, fraud in the factum, and bankruptcy – are available against a holder in due course. Something like Baker’s delivery of spoiled wine, even though it would give Abel a right to refuse payment against Baker, will not be effective against a holder in due course like Daniels. The effect is to turn a promise to pay into something stronger. It is freely transferable and it is no longer subject to the individual defenses of the original promisor. In other words, assignability plus negotiability turn an *in personam* contract right into something that looks much more like an *in rem* property right. (Does this remind you at all of how the courts turned unique things into fungible commodities in note 9.5 after *Wetherbee*? It should.)

Negotiability is a powerful doctrine, and it can be a dangerous one. It can be hard on promisors, particularly when they are the victims of fraud that doesn’t

appear on the face of the negotiable instrument itself. In particular, negotiability can be highly dangerous for consumers. If the promissory notes for their debts have been sold by the initial creditor to another financial institution, that institution may be able to collect on the debt even if the initial transaction was fraudulent, unconscionable, or even criminal. For that reason, the Federal Trade Commission's Holder in Due Course Rule, 16 C.F.R. pt. 433, requires consumer credit contracts to include language specifically disclaiming negotiability. But the rule does not apply to mortgage loans, see, e.g., *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 54-55 (D.D.C. 2006). We will see some of the mischief and misdeeds that resulted from the serial negotiation of residential mortgages in the section on the mortgage crisis. For a sustained argument that the doctrine of negotiability has long outlived its original purpose and does more harm than good in an age of robust financial infrastructure, see JAMES STEVEN ROGERS: THE END OF NEGOTIABLE INSTRUMENTS: BRINGING PAYMENT SYSTEMS LAW OUT OF THE PAST (2011).

Chapter 10

Bailments and Liens

We have seen numerous cases in which a possessor—a fox hunter, a finder of a jewel, a lumber thief—is not the true owner according to the law. There are more. The property could have been entrusted by the owner to the possessor: this is called a *bailment*. (Note that the entruster is the bail-OR and the possessor is the bail-EE.) Common bailees include delivery services, dry cleaners, and friends who borrow each others' casebooks. Or perhaps the property is owned by the possessor, but subject to a security interest held by a third party. Car loans are a familiar class of these *liens*: the bank has a right to repossess the car if the buyer fails to make payments on time. Sometimes the two go together. A pawn shop, for example, is both a bailee and lienholder: it has possession of the pawnor's gold-plated fish tank on skis and a lien against it, which it uses to secure the loan it makes to the pawnor.

These arrangements, all of which split full ownership from physical possession, systematically raise the same kinds of issues. First, there is the question of the duties between the possessor and the party out of possession: bailees have a duty to return the property, and secured creditors can satisfy unpaid debts by taking ownership of the property. Second, there is the question of which of the parties has enough of an interest in the property to sue if some third party steals or damages it. Third, there is the difficult problem of protecting the legitimate expectations of third parties dealing with a person in possession of property who may or may not be its full owner—problems that should be familiar from the materials on good faith purchasers.

Allen v. Hyatt Regency-Nashville Hotel
668 S.W.2d 286 (Tenn. 1984)

HARBISON, Justice.

In this case the Court is asked to consider the nature and extent of the liability of the operator of a commercial parking garage for theft of a vehicle during the absence of the owner. Both courts below, on the basis of prior decisions from this state, held that a bailment was created when the owner parked and locked his vehicle in a modern, indoor, multi-story garage operated by appellant in conjunction with a large hotel in downtown Nashville. We affirm.

There is almost no dispute as to the relevant facts. Appellant is the owner and operator of a modern high-rise hotel in Nashville fronting on the south side of Union Street. Immediately to the rear, or south, of the main hotel building there is a multi-story parking garage with a single entrance and a single exit to the west, on Seventh Avenue, North. As one enters the parking garage at the street level, there is a large sign reading "Welcome to Hyatt Regency-Nashville." There is another Hyatt Regency sign inside the garage at street level, together with a sign marked "Parking." The garage is available for parking by members of the general public as well as guests of the hotel, and the public are invited to utilize it.

On the morning of February 12, 1981, appellee's husband, Edwin Allen, accompanied by two passengers, drove appellee's new 1981 automobile into the parking garage. Neither Mr. Allen nor his passengers intended to register at the hotel as a guest. Mr. Allen had parked in this particular garage on several occasions, however, testifying that he felt that the vehicle would be safer in an attended garage than in an unattended outside lot on the street.

The single entrance was controlled by a ticket machine. The single exit was controlled by an attendant in a booth just opposite to the entrance and in full view thereof. Appellee's husband entered the garage at the street level and took a ticket which was automatically dispensed by the machine. The machine activated a barrier gate which rose and permitted Mr. Allen to enter the garage. He drove to the fourth floor level, parked the vehicle, locked it, retained the ignition key, descended by elevator to the street level and left the garage. When he returned several hours later, the car was gone, and it has never been recovered. Mr. Allen reported the theft to the attendant at the exit booth, who stated, "Well, it didn't come out here." The

attendant did not testify at the trial.

Mr. Allen then reported the theft to security personnel employed by appellant, and subsequently reported the loss to the police. Appellant regularly employed a number of security guards, who were dressed in a distinctive uniform, two of whom were on duty most of the time. These guards patrolled the hotel grounds and building as well as the garage and were instructed to make rounds through the garage, although not necessarily at specified intervals. One of the security guards told appellee's husband that earlier in the day he had received the following report:

He said, "It's a funny thing here. On my report here a lady called me somewhere around nine-thirty or after and said that there was someone messing with a car."

The guard told Mr. Allen that he closed his office and went up into the garage to investigate, but reported that he did not find anything unusual or out of the ordinary.

Customers such as Mr. Allen, upon entering the garage, received a ticket from the dispensing machine. On one side of this ticket are instructions to overnight guests to present the ticket to the front desk of the hotel. The other side contains instructions to the parker to keep the ticket and that the ticket must be presented to the cashier upon leaving the parking area. The ticket states that charges are made for the use of parking space only and that appellant assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents. The ticket states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The record indicates that these tickets are given solely for the purpose of measuring the time during which a vehicle is parked in order that the attendant may collect the proper charge, and that they are not given for the purpose of identifying particular vehicles.

The question of the legal relationship between the operator of a vehicle which is being parked and the operator of parking establishments has been the subject of frequent litigation in this state and elsewhere. The authorities are in conflict, and the results of the cases are varied.

It is legally and theoretically possible, of course, for various legal relationships to be created by the parties, ranging from the traditional concepts of lessor-lessee, licensor-licensee, bailor-bailee, to that described in some jurisdictions as a "deposit." Several courts have found difficulty with the traditional criteria of bailment in analyzing park-and-lock cases. One

of the leading cases is *McGlynn v. Parking Authority of City of Newark*, 432 A.2d 99 (N.J. 1981). There the Supreme Court of New Jersey reviewed numerous decisions from within its own state and from other jurisdictions, and it concluded that it was more “useful and straightforward” to consider the possession and control elements in defining the duty of care of a garage operator to its customers than to consider them in the context of bailment. That Court concluded that the “realities” of the relationship between the parties gave rise to a duty of reasonable care on the part of operators of parking garages and parking lots. It further found that a garage owner is usually better situated to protect a parked car and to distribute the cost of protection through parking fees. It also emphasized that owners usually expect to receive their vehicles back in the same condition in which they left them and that the imposition of a duty to protect parked vehicles and their contents was consistent with that expectation. The Court went further and stated that since the owner is ordinarily absent when theft or damage occurs, the obligation to come forward with affirmative evidence of negligence could impose a difficult, if not insurmountable, burden upon him. After considering various policy considerations, which it acknowledged [to] be the same as those recognized by courts holding that a bailment is created, the New Jersey Court indulged or authorized a presumption of negligence from proof of damage to a car parked in an enclosed garage.

Although the New Jersey Court concluded that a more flexible and comprehensive approach could be achieved outside of traditional property concepts, Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication. We believe that this continues to be the majority view and the most satisfactory and realistic approach to the problem, unless the parties clearly by their conduct or by express contract create some other relationship.

The subject has been discussed in numerous previous decisions in this state. One of the leading cases is *Dispeker v. New Southern Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963). In that case the guest at a hotel delivered his vehicle to a bellboy who took possession of it and parked it in a lot adjoining the hotel building. The owner kept the keys, but the car apparently was capable of being started without the ignition key. The owner apparently had told the attendant how to so operate it. Later the employee took the vehicle for his own purposes and damaged it. Under these circumstances

the Court held that a bailment for hire had been created and that upon proof of misdelivery of the vehicle the bailee was liable to the customer.

In the subsequent case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), upon facts practically identical to those of the instant case, the Court again held that an implied bailment contract had been created between a customer who parked and locked his vehicle in a garage. Upon entry he received a ticket dispensed by a machine, drove his automobile to the underground third level of the garage and parked. He retained his ignition key, but when he returned to retrieve the automobile in the afternoon it had disappeared. It was recovered more than two weeks later and returned to the owner in a damaged condition.

In that case the operator of the garage had several attendants on duty, but the attendants did not ordinarily operate the parked vehicles, as in the instant case.

Although the Court recognized that there were some factual differences between the *Scruggs* case and that of *Dispeker v. New Southern Hotel Co.*, *supra*, it concluded that a bailment had been created when the owner parked his vehicle for custody and safe keeping in the parking garage, where there was limited access and where the patron had to present a ticket to an attendant upon leaving the premises.

A bailment relationship was also found in *Jackson v. Metropolitan Government of Nashville*, 483 S.W.2d 92 (Tenn. 1972), when faculty members of a high school conducted an automobile parking operation for profit upon the high school campus. A customer who parked his vehicle there was allowed recovery for theft, even though he had parked the vehicle himself after paying a fee, had locked the vehicle and had kept the keys.

On the contrary, in the case of *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973), a bailment was found not to exist when the owner left his vehicle in an open parking lot which was wholly unattended and where he simply inserted coins into a meter, received a ticket, then parked the vehicle himself and locked it.

Denying recovery, the Court said:

In the case at bar, however, we find no evidence to justify a finding that the plaintiff delivered his car into the custody of the defendant, nor do we find any act or conduct upon the defendant's part which would justify a reasonable person believing that an obligation of bailment had been assumed by the

defendant. 501 S.W.2d at 571.

In the instant case, appellee's vehicle was not driven into an unattended or open parking area. Rather it was driven into an enclosed, indoor, attended commercial garage which not only had an attendant controlling the exit but regular security personnel to patrol the premises for safety.

Under these facts we are of the opinion that the courts below correctly concluded that a bailment for hire had been created, and that upon proof of nondelivery appellee was entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111.

We recognize that there is always a question as to whether there has been sufficient delivery of possession and control to create a bailment when the owner locks a vehicle and keeps the keys. Nevertheless, the realities of the situation are that the operator of the garage is, in circumstances like those shown in this record, expected to provide attendants and protection. In practicality the operator does assume control and custody of the vehicles parked, limiting access thereto and requiring the presentation of a ticket upon exit. As stated previously, the attendant employed by appellant did not testify, but he told appellee's husband that the vehicle did not come out of the garage through the exit which he controlled. This testimony was not amplified, but the attendant obviously must have been in error or else must have been inattentive or away from his station. The record clearly shows that there was no other exit from which the vehicle could have been driven.

Appellant made no effort to rebut the presumption created by statute in this state (which is similar to presumptions indulged by courts in some other jurisdictions not having such statutes). While the plaintiff did not prove positive acts of negligence on the part of appellant, the record does show that some improper activity or tampering with vehicles had been called to the attention of security personnel earlier in the day of the theft in question, and that appellee's new vehicle had been removed from the garage by some person or persons unknown, either driving past an inattentive attendant or one who had absented himself from his post, there being simply no other way in which the vehicle could have been driven out of the garage.

Under the facts and circumstances of this case, we are not inclined to depart from prior decisions or to place the risk of loss upon the consuming public as against the operators of commercial parking establishments

such as that conducted by appellant. We recognize that park-and-lock situations arise under many and varied factual circumstances. It is difficult to lay down one rule of law which will apply to all cases. The expectations of the parties and their conduct can cause differing legal relationships to arise, with consequent different legal results. We do not find the facts of the present case, however, to be at variance with the legal requirements of the traditional concept of a bailment for hire. In our opinion it amounted to more than a mere license or hiring of a space to park a vehicle, unaccompanied by any expectation of protection or other obligation upon the operator of the establishment.

The judgment of the courts below is affirmed at the cost of appellant. The cause will be remanded to the trial court for any further proceedings which may be necessary.

DROWOTA, Justice, dissenting.

In this case we are asked to consider the nature and extent of liability of the operator of a commercial "park and lock" parking garage. In making this determination, we must look to the legal relationship between the operator of the vehicle and the operator of the parking facility. The majority opinion holds that a bailment contract has been created, and upon proof of non-delivery Plaintiff is entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111. I disagree, for I find no bailment existed and therefore the Plaintiff does not receive the benefit of the presumption. Consequently, the Plaintiff had the duty to prove affirmatively the negligence of the operator of the parking facility and this Plaintiff failed to do.

The majority opinion states that "courts have found difficulty with the traditional criteria of bailment in analyzing park and lock cases." The majority discusses the case of *McGlynn v. Parking Authority of City of Newark*, 86 N.J. 551, 432 A.2d 99 (1981), which suggests that bailment is an outmoded concept for analyzing parking lot and garage cases. In *Garlock v. Multiple Parking Services, Inc.*, 427 N.Y.S.2d 670, 677 (1980), the court stated that "the 'bailment theory' as a basis for recovery in parking lot cases is no longer appropriate." That court concluded that since the concept of bailment is no longer a viable theory in application to a very real modern problem that the proper standard to be followed in such cases is "reasonable care under the circumstances whereby foreseeability shall be a measure of liability." *Id.*, 427 N.Y.S.2d at 678.

Even though some courts now suggest that the theory of bailment is an archaic and inappropriate theory upon which to base liability in modern park and lock cases, the majority opinion states that “Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication,” and concludes that this is “the most satisfactory and realistic approach to the problem.” I do not disagree with the longstanding use of the bailment analysis in this type of case. I do disagree, however, with the majority’s conclusion that a bailment for hire has been created in this case.

The record shows that upon entering this parking garage a ticket, showing time of entry, is automatically dispensed by a machine. The ticket states that charges are made for the use of a parking space only and that the garage assumes no responsibility for loss to the car or its contents. The ticket further states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The majority opinion points out that it is not insisted that this language on the ticket is sufficient to exonerate the garage, since the customer is not shown to have read it or to have had it called to his attention. *Savoy Hotel Corp. v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967). The ticket in no way identifies the vehicle, it is given solely for the purpose of measuring the length of time during which the vehicle is parked in order that a proper charge may be made.

In this case Mr. Allen, without any direction or supervision, parked his car, removed his keys, and locked the car and left the parking garage having retained his ignition key. The presentation of a ticket upon exit is for the sole purpose of allowing the cashier to collect the proper charge. The cashier is not required to be on duty at all times. When no cashier is present, the exit gate is opened and no payment is required.¹ As the majority opinion states, the ticket is “not given for the purpose of identifying particular vehicles.” The ticket functioned solely as a source of fee computation, not of vehicle identification.

The majority opinion states: “[W]e do not find the facts of the present case to be at variance with the legal requirements of the concept of a bailment for hire.” I must disagree, for I feel the facts of the present case are clearly at variance with what I consider to be the legal requirements of the

¹Between one or two in the morning and six or seven a.m., the garage is entirely open without a cashier to collect parking fees. During the day if the cashier leaves his or her post on a break, the exit gate is opened and the vehicle owner may exit without payment.

traditional concept of a bailment for hire.

Bailment has been defined by this Court in the following manner:

The creation of a bailment in the absence of an express contract requires that possession and control over the subject matter pass from the bailor to the bailee. In order to constitute a sufficient delivery of the subject matter there must be a full transfer, either actual or constructive, of the property to the bailee so as to exclude it from the possession of the owner and all other persons and give to the bailee, for the time being, the sole custody and control thereof.

In parking lot and parking garage situations, a bailment is created where the operator of the lot or garage has knowingly and voluntarily assumed control, possession, or custody of the motor vehicle; if he has not done so, there may be a mere license to park or a lease of parking space.

Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569, 570 (Tenn. 1973).

From its earliest origins, the most distinguishing factor identifying a bailment has been delivery. Our earliest decisions also recognize acceptance as a necessary factor, requiring that possession and control of the property pass from bailor to bailee, to the exclusion of control by others. The test thus becomes whether the operator of the vehicle has made such a delivery to the operator of the parking facility as to amount to a relinquishment of his exclusive possession, control, and dominion over the vehicle so that the latter can exclude it from the possession of all others. If so, a bailment has been created.

When the automobile began replacing the horse and buggy, our courts allowed bailment law to carry over and govern the parking of vehicles. In cases such as *Old Hickory Parking Corp. v. Alloway*, 177 S.W.2d 23 (Tenn. Ct. App. 1943), and *Savoy Hotel v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967), where the operator of the vehicle left his vehicle with an attendant and left the keys for the attendant to move the vehicle as he wished, the bailment relationship was evident for we had a clear delivery, acceptance of possession, control, and exercise of dominion over the vehicle—all the traditional elements of a bailment. In *Dispeker v. New Southern Hotel Company*, 373 S.W.2d 904 (Tenn. 1963), a bellboy parked plaintiff's car, plaintiff retained the keys but explained to the bellboy that the car could be operated without the key, and apparently showed him how to operate it. The bellboy

went off duty, then returned and stole the car. Once again, the traditional elements of delivery and control were present.

These cases involving parking attendants and personalized service have caused us no problems. The problem arises in this modern era of automated parking, when courts have attempted to expand the limits of existing areas of the law to encompass technological and commercial advances. Such is the case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), relied upon in the majority opinion. In *Scruggs*, as in this case, the entire operation is automated, with the exception of payment upon departure. The operation bears little, if any, resemblance to the circumstances found in *Old Hickory Parking Corp., Savoy Hotel*, and *Dispeker*. Yet the Court in *Scruggs*, in quoting extensively from the *Dispeker* opinion, states that "There are some minute differences of fact . . ." Id., 440 S.W.2d at 22. As pointed out above, the differences of fact in *Dispeker* are not minute or so similar as the *Scruggs* court would suggest. Delivery, custody and control are clearly present in *Dispeker*. I fail to find such delivery, custody and control in *Scruggs* or in the case at bar. In *Dispeker*, the vehicle was actually taken from the owner by an attendant. I believe the *Scruggs* court and the majority opinion today attempt to apply bailment law in situations where there is not a true bailment relationship. . . .

The majority opinion, as did the *Scruggs* court, finds custody and control implied because of the limited access and because "the presentation of a ticket upon exit" is required. I cannot agree with this analysis as creating a bailment situation. I do not believe that based upon the fact that a ticket was required to be presented upon leaving, that this factor created a proper basis upon which to find a bailment relationship. The ticket did not identify the vehicle or the operator of the vehicle, as do most bailment receipts. The cashier was not performing the traditional bailee role or identifying and returning a particular article, but instead was merely computing the amount owed and accepting payment due for use of a parking space. I do not believe the Defendant exercised such possession and control over Plaintiff's automobile as is necessary in an implied bailment. . . .

The full transfer of possession and control, necessary to constitute delivery, should not be found to exist simply by the presentation of a ticket upon exit. In the case at bar, I find no such delivery and relinquishment of exclusive possession and control as to create a bailment. Plaintiff parked his car, locked it and retained the key. Certainly Defendant cannot be said to have sole custody of Plaintiff's vehicle, for Defendant could not move

it, did not know to whom it belonged, and did not know when it would be reclaimed or by whom. Anyone who manually obtained a ticket from the dispenser could drive out with any vehicle he was capable of operating. Also, a cashier was not always on duty. When on duty, so long as the parking fee was paid—by what means could the Defendant reasonably exercise control? The necessary delivery and relinquishment of control by the Plaintiff, the very basis upon which the bailment theory was developed, is missing.

We should realize that the circumstances upon which the principles of bailment law were established and developed are not always applicable to the operation of the modern day automated parking facility. The element of delivery, of sole custody and control are lacking in this case.

Notes and Questions

10.1. Bailments raise interesting issues about the bailor's and bailee's relationships with third parties. Suppose Lord Hobnob takes a valuable jewel to a jewelry shop for repair. While it is there, a chimney-sweep smashes the window and runs off with it. Obviously Lord Hobnob can presently sue the chimney-sweep to recover the jewel or its value. (*Is this so obvious?*) But what about the jeweler? He's admittedly not the owner of the jewel. Should he nonetheless be allowed to sue the chimney-sweep? If the answer is yes, and he wins damages, can he keep the money? If the jeweler wins damages from the chimney-sweep, can the chimney-sweep be held liable in a subsequent suit by Lord Hobnob for the same amount?

10.2. Here's another variation. Suppose a chimney-sweep finds a jewel and gives it to a jeweler for safekeeping. Lord Hobnob, the true owner, shows up in a carriage and a huff, and demands the jewel from the jeweler. Can the jeweler turn it over? Must he? If he does, is he liable to his bailor, the chimney-sweep, for misdelivery? Consider *The Winkfield*, [1902] P. 42 (C.A. 1901), in which the *Winkfield*, a government ship carrying mail, was damaged in a collision with the *Mexican*. The government sued the owners of the *Mexican* and included a claim for mail lost as a result of the collision. The *Mexican*'s owners responded that the government was not liable to the parties whose mail was lost, and so had suffered no compensable damages. Is this a persuasive objection?

10.3. For time immemorial, potential bailees have attempted to limit their potential liability by contract. Why didn't the ticket in *Allen* suffice to protect the hotel from liability for the lost car?

10.4. A common concern of bailees is taking responsibility for unexpectedly valuable items. In *Peet v. Roth Hotel*, 253 N.W. 546 (Minn. 1934), the plaintiff left her engagement ring with a hotel employee with instructions to give it to a jeweler who paid regular visits to the hotel and was known to its employees. She testified:

I had it [the ring] on my finger, and took it off my finger. The Cashier—I told the Cashier that it was for Mr. Ferdinand Hotz. She took out an envelope and wrote “Ferdinand Hotz.” I remember spelling it to her, and then I left. . . . I handed the ring to the Cashier, and she wrote on the envelope. . . . The only instructions I remember are telling her that it was for Mr. Ferdinand Hotz who was stopping at the hotel.

The ring was stolen while in the hotel’s possession and a jury awarded \$2,140.66 in damages. The hotel objected, arguing that plaintiff “failed to divulge the unusual value of her ring when she left it with [the cashier, who] testified that, at the moment, she did not realize its value.” The court was unsympathetic, writing, “No decision has been cited and probably none can be found where the bailee of an article of jewelry, undeceived as to its identity, was relieved of liability because of his own erroneous underestimate of its value.” Is this fair? Compare Minnesota’s modern statute on innkeepers’ liability, in Minn. Stat. § 327.71(1):

No innkeeper who has in the establishment a fireproof, metal safe or vault, in good order and fit for the custody of valuables, and who keeps a copy of this subdivision clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every bedroom, shall be liable for the loss of or injury to the valuables of a guest unless: (1) the guest has offered to deliver the valuables to the innkeeper for custody in the safe or vault; and (2) the innkeeper has omitted or refused to take the valuables and deposit them in the safe or vault for custody and to give the guest a receipt for them. Except as otherwise provided in subdivision 6, the liability of an innkeeper for the loss of or injury to the valuables of a guest shall not exceed \$1,000. No innkeeper shall be required to accept valuables for custody in the safe or vault if their value exceeds \$1,000, unless the acceptance is in writing.

Would this statute have changed the result in *Peet*? How does it alter the relationship between hotels and guests? Does it explain why hotel rooms typically have a statement of this sort posted on the inside of their doors?

Here is part of the Uniform Commercial Code's take on the issue (in the context of carriers' liability for lost or damaged goods given to them for delivery):

Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use. . . .

UCC § 7-309(b). What do you think of this solution?

Williams v. Ford Motor Credit Co.

674 F.2d 717 (8th Cir. 1982)

BENSON, Chief Judge.

In this diversity action brought by Cathy A. Williams to recover damages for conversion arising out of an alleged wrongful repossession of an automobile, Williams appeals from a judgment notwithstanding the verdict entered on motion of defendant Ford Motor Credit Company (FMCC). In the same case, FMCC appeals a directed verdict in favor of third party defendant S & S Recovery, Inc. (S & S) on FMCC's third party claim for indemnification. We affirm the judgment n.o.v. FMCC's appeal is thereby rendered moot.

In July, 1975, David Williams, husband of plaintiff Cathy Williams, purchased a Ford Mustang from an Oklahoma Ford dealer. Although David Williams executed the sales contract, security agreement, and loan papers, title to the car was in the name of both David and Cathy Williams. The car was financed through the Ford dealer, who in turn assigned the paper to FMCC. Cathy and David Williams were divorced in 1977. The divorce court granted Cathy title to the automobile and required David to continue to make payments to FMCC for eighteen months. David defaulted on the payments and signed a voluntary repossession authorization for FMCC. Cathy Williams was informed of the delinquency and responded that she

was trying to get her former husband David to make the payments. There is no evidence of any agreement between her and FMCC. Pursuant to an agreement with FMCC, S & S was directed to repossess the automobile.

On December 1, 1977, at approximately 4:30 a.m., Cathy Williams was awakened by a noise outside her house trailer in Van Buren, Arkansas.¹ She saw that a wrecker truck with two men in it had hooked up to the Ford Mustang and started to tow it away. She went outside and hollered at them. The truck stopped. She then told them that the car was hers and asked them what they were doing. One of the men, later identified as Don Sappington, president of S & S Recovery, Inc., informed her that he was repossessing the vehicle on behalf of FMCC. Williams explained that she had been attempting to bring the past due payments up to date and informed Sappington that the car contained personal items which did not even belong to her. Sappington got out of the truck, retrieved the items from the car, and handed them to her. Without further complaint from Williams, Sappington returned to the truck and drove off, car in tow. At trial, Williams testified that Sappington was polite throughout their encounter and did not make any threats toward her or do anything which caused her to fear any physical harm. The automobile had been parked in an unenclosed driveway which plaintiff shared with a neighbor. The neighbor was awakened by the wrecker backing into the driveway, but did not come out. After the wrecker drove off, Williams returned to her house trailer and called the police, reporting her car as stolen. Later, Williams commenced this action.

The case was tried to a jury which awarded her \$5,000.00 in damages. FMCC moved for judgment notwithstanding the verdict, but the district court, on Williams' motion, ordered a nonsuit without prejudice to refile in state court. On FMCC's appeal, this court reversed and remanded with directions to the district court to rule on the motion for judgment notwithstanding the verdict. The district court entered judgment notwithstanding the verdict for FMCC, and this appeal followed.

Article 9 of the Uniform Commercial Code (UCC), which Arkansas has adopted and codified as Ark. Stat. Ann. § 85-9-503 (Supp. 1981), provides in pertinent part:

Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession,

¹Cathy Williams testified that the noise sounded like there was a car stuck in her yard.

a secured party may proceed without judicial process if this can be done without breach of the peace⁴

In *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979), which involved an alleged conversion arising out of a repossession, the Supreme Court of Arkansas cited Section 85-9-503 and referred to its previous holdings as follows:

In pre-code cases, we have sustained a finding of conversion only where force, or threats of force, or risk of invoking violence, accompanied the repossession.

The thrust of Williams' argument on appeal is that the repossession was accomplished by the risk of invoking violence. The district judge who presided at the trial commented on her theory in his memorandum opinion:

Mrs. Williams herself admitted that the men who repossessed her automobile were very polite and complied with her requests. The evidence does not reveal that they performed any act which was oppressive, threatening or tended to cause physical violence. Unlike the situation presented in *Manhattan Credit Co. v. Brewer, supra*, it was not shown that Mrs. Williams would have been forced to resort to physical violence to stop the men from leaving with her automobile.

In the pre-Code case *Manhattan Credit Co. v. Brewer*, S.W.2d 765 (Ark. 1961), the court held that a breach of peace occurred when the debtor and her husband confronted the creditor's agent during the act of repossession and clearly objected to the repossession. In *Manhattan*, the court examined holdings of earlier cases in which repossession were deemed to have been accomplished without any breach of the peace. In particular, the Supreme Court of Arkansas discussed the case of *Rutledge v. Universal C.I.T. Credit Corp.*, 237 S.W.2d 469 (Ark. 1951). In *Rutledge*, the court found

⁴It is generally considered that the objectives of this section are (1) to benefit creditors in permitting them to realize collateral without having to resort to judicial process; (2) to benefit debtors in general by making credit available at lower costs; and (3) to support a public policy discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.

no breach of the peace when the repossession acquired keys to the automobile, confronted the debtor and his wife, informed them he was going to take the car, and immediately proceeded to do so. As the *Rutledge* court explained and the *Manhattan* court reiterated, a breach of the peace did not occur when the “Appellant [debtor-possessor] did not give his permission but he did not object.” *Manhattan, supra*, 341 S.W.2d at 767-68; *Rutledge, supra*, 237 S.W.2d at 470.

We have read the transcript of the trial. There is no material dispute in the evidence, and the district court has correctly summarized it. Cathy Williams did not raise an objection to the taking, and the repossession was accomplished without any incident which might tend to provoke violence.

Appellees deserve something less than commendation for the taking during the night time sleeping hours, but it is clear that viewing the facts in the light most favorable to Williams, the taking was a legal repossession under the laws of the State of Arkansas. The evidence does not support the verdict of the jury. FMCC is entitled to judgment notwithstanding the verdict.

HEANEY, Circuit Judge, dissenting.

The only issue is whether the repossession of appellant’s automobile constituted a breach of the peace by creating a “risk of invoking violence.” See *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979). The trial jury found that it did and awarded \$5,000 for conversion. Because that determination was in my view a reasonable one, I dissent from the Court’s decision to overturn it.

Cathy Williams was a single parent living with her two small children in a trailer home in Van Buren, Arkansas. On December 1, 1977, at approximately 4:30 a.m., she was awakened by noises in her driveway. She went into the night to investigate and discovered a wrecker and its crew in the process of towing away her car. According to the trial court, “she ran outside to stop them . . . but she made no *strenuous* protests to their actions.” (Emphasis added.) In fact, the wrecker crew stepped between her and the car when she sought to retrieve personal items from inside it, although the men retrieved some of the items for her. The commotion created by the incident awakened neighbors in the vicinity.

Facing the wrecker crew in the dead of night, Cathy Williams did everything she could to stop them, short of introducing physical force to meet the presence of the crew. The confrontation did not result in violence only

because Ms. Williams did not take such steps and was otherwise powerless to stop the crew.

The controlling law is the UCC, which authorizes self-help repossession only when such is done “without breach of the peace . . .” Ark. Stat. Ann. § 85-9-503 (Supp. 1981). The majority recognizes that one important policy consideration underlying this restriction is to discourage “extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.” *Supra*, at 719. Despite this, the majority holds that no reasonable jury could find that the confrontation in Cathy Williams’ driveway at 4:30 a.m. created a risk of violence. I cannot agree. At a minimum, the largely undisputed facts created a jury question. The jury found a breach of the peace and this Court has no sound, much less compelling, reason to overturn that determination.

Indeed, I would think that sound application of the self-help limitation might require a directed verdict in favor of Ms. Williams, but certainly not against her. If a “night raid” is conducted without detection and confrontation, then, of course, there could be no breach of the peace. But where the invasion is detected and a confrontation ensues, the repossession should be under a duty to retreat and turn to judicial process. The alternative which the majority embraces is to allow a repossession to proceed following confrontation unless and until violence results in fact. Such a rule invites tragic consequences which the law should seek to prevent, not to encourage. I would reverse the trial court and reinstate the jury’s verdict.

Notes and Questions

10.5. True or false: Cathy Williams would have been better off if she had thrown a punch or two. What do you make of the UCC’s purported policy of discouraging private extrajudicial violence? Where does *Williams* leave other single mothers facing towing crews at 4:30 AM?

10.6. Is the breach-of-the-peace test really about deterring violence, or is it a proxy for the other kinds of individual and social harms repossession can cause? If so, how good a proxy is it? Are there better ways to avoid those harms?

10.7. Notice that FMCC’s lien is a property interest. One key indicium of this fact—or perhaps a component of it—is that it is freely assignable. FMCC was not the original lender. Who was? How did FMCC end up owning the lien?

10.8. On the other side of the loan, Cathy Williams was not the original borrower; David Williams was. Why is his failure to pay her problem? Indeed, he was

under a court order to continue making payments. Why doesn't that protect her from repossession? This aspect of liens—that they run with the property—is considered crucial to secured lending. Why? Would FMCC be willing to extend credit in the first place if its resulting security interest did not bind David's successors in title?

10.9. In *Williams* the lienholder is not in physical possession of the collateral. Why not? Would car loans work if the lender retained possession? This creates two distinctive problems. First, how and when the lender can retake possession? (Answer: with a tow truck in the middle of the night.) But what if Cathy Williams drives the car out of state and hides it? For that matter, what if she destroys it rather than let FMCC repossess it? So FMCC's property interest in the car provides some protection for its contract rights, but hardly perfect protection. Could FMCC insist that Cathy Williams install a GPS device on the car that continually broadcasts its location? Cf. *Am. Car Rental, Inc. v. Comm'r of Consumer Prot.*, 869 A.2d 1198 (Conn. 2005) (unfair consumer practice for car rental agency to charge customer \$150 per instance of driving over 79 miles per hour for more than two minutes, as revealed by GPS tracker in car). Are there privacy concerns with this type of close monitoring? Safety concerns? Are these more or less severe than if the lender sent employees to personally follow Cathy Williams around and keep tabs on the car? What about a kill-switch that automatically shuts down the car's engine if it is driven more than fifty miles from her house? If FMCC can shut down the car remotely, could someone else? See Andy Greenberg, *Hackers Remotely Kill a Jeep on the Highway—With Me In It*, WIRED (July 21, 2015), <http://www.wired.com/2015/07/hackers-remotely-kill-jeep-highway/>.

10.10. The second distinctive problem when the lienholder is out of possession is notice to third parties. What happens if Cathy Williams sells the car without informing the buyer of the lien? Yes, this is yet another good-faith-purchaser problem; they are everywhere in property law. Consider the following case:

M&I Western State Bank v. Wilson

493 N.W.2d 387 (Wisc. Ct. App. 1992)

ANDERSON, Judge.

Darin Treleven appeals from a judgment of the trial court which awarded possession of a truck owned by Marilyn A. Wilson to the M & I Western State Bank (bank). Because the earlier release of the truck was a

conditional release and the bank had notice of Treleven's lien through his possession of the truck, we reverse.

The bank holds a security interest in a 1978 Peterbilt truck owned by Wilson. Treleven repaired the truck seven times, each time releasing the vehicle to Wilson so she could earn the money to pay Treleven for the repairs. The repairs were invoiced between November 20, 1990 and April 23, 1991.

After Wilson defaulted on her payments to the bank, the bank commenced a replevin action. The parties made a repayment agreement; however, Wilson again defaulted and the bank obtained a judgment of replevin on April 9, 1990. The sheriff attempted to enforce the judgment but was unable to locate the truck. On May 12, 1991, employees of the bank saw the vehicle and followed it to Treleven's place of business, D.T. Truck Repair, Inc. The sheriff again tried to serve the writ of execution, but Treleven refused to release the vehicle, asserting that he held a mechanic's lien for services rendered.

After the attempted levy, the bank filed a second replevin action to determine who was entitled to possession of the truck and named Treleven as a third-party defendant. At the date of the hearing, Treleven still was owed \$3497.26 for the repairs plus \$1273.10 for interest and storage as of the date of the hearing, January 30, 1992. The bank's balance as of January 2, 1992 was \$3032.16. The bank's estimate of the value of the truck is approximately \$3000. If this estimate is correct, only the lien with first priority would be paid from the proceeds of the sale of the truck.

The trial court held that Treleven's release of the vehicle to Wilson constituted a waiver of Treleven's lien as to the bank and that the bank's lien had priority. The trial court ordered the bank to take possession and conduct a sale of the truck. On appeal, Treleven argues that the conditional release of the truck to the owner does not amount to a waiver of the lien and, alternatively, that he should be able to recover from the bank on the theory of unjust enrichment. Because we agree that the conditional release and regained possession do not waive Treleven's mechanic's lien or affect its priority over the prior secured interest, we do not have to address Treleven's unjust enrichment claim.

It is not disputed that before Treleven released possession of the truck, he had a mechanic's lien on Wilson's truck. Section 779.41(1), Stats., governs mechanic's liens and states in part:

Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does any work on personal property at the request of the owner or legal possessor of the personal property, has a *lien on the personal property* for the just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and *may retain possession of the personal property until the charges are paid.* [Emphasis added.]

It also is not disputed that before Treleven released the truck to Wilson, Treleven's mechanic's lien had priority over the bank's security interest. Section 409.310, Stats., states:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, *a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.* [Emphasis added.]

Section 409.310 gave Treleven's mechanic's lien priority over the security interest because Treleven was in possession of the truck, Treleven's lien was created by sec. 779.41(1), Stats., and sec. 779.41(1) does not expressly address the priority given to the lien created.

The issue in this case is whether the mechanic, by allowing the owner to use her vehicle on a temporary basis before paying the repair bill, lost the lien or its priority on that vehicle. The interpretation of statutes is a question of law which we review de novo. We first must examine the language of sec. 779.41(1), Stats., to see if the relinquishment and resumption of possession have any affect on the existence of Treleven's mechanic's lien. Section 779.41(1) provides that a mechanic "may retain possession of the personal property until the charges are paid." This provision allows the mechanic to keep a customer's property until the mechanic has been paid, without a court order. However, once the mechanic has relinquished possession of the vehicle, this statute does not provide the mechanic with a remedy even if the bill has not been paid. The statute also does not tell us whether the mechanic must retain possession of the vehicle to retain the lien—it states only that the mechanic "may retain possession."

But the mechanic's lien statute may not be interpreted in a vacuum. “[M]echanic's lien laws provide *new and additional remedies* to those of the common law and are to be liberally construed to accomplish their equitable purpose of aiding materialmen and laborers to obtain compensation for material used and services bestowed upon property of another and thereby enhancing its value.” *Wiedenbeck-Dobelin Co. v. Mahoney*, 152 N.W. 479, 481 (Wisc. 1915) (emphasis added). Accordingly, in addition to the statutory language of sec. 779.41(1), Stats., we may look to the common law of mechanic's liens and those Wisconsin decisions incorporating common law principles into the statutory mechanic's lien law to determine whether Treleven's lien survives.

Treleven argues that according to *Sensenbrenner v. Mathews*, 3 N.W. 599, 600 (Wis. 1879), the delivery of the vehicle to the owner must be both voluntary and unconditional in order to constitute a waiver of the lien. Treleven maintains that because he returned the vehicle to the owner so she could pay for the repairs and the allowed use was only on a temporary basis, the delivery of the vehicle was conditional and his lien survives. The bank also relies on *Sensenbrenner* for its argument that Treleven waived his lien by releasing the vehicle to Wilson. Alternatively, the bank asserts that even if the lien was not destroyed between Treleven and Wilson when the vehicle was conditionally released to Wilson, the lien was destroyed as to third persons.

Because *Sensenbrenner* is distinguishable on its facts from the present case, neither party's reliance on that case is warranted. The court in *Sensenbrenner* found that the delivery of a buggy by the mechanic to the owner was unconditional and held that this unconditional delivery operated as a waiver of the lien. In contrast, Treleven's release of the vehicle was conditional—*Sensenbrenner* says nothing of the effect of a conditional release to the owner. *Sensenbrenner* also does not explicitly hold that the only way to waive a lien is through the voluntary and unconditional release of the property; *Sensenbrenner* merely states that this is one way to waive a lien. For these reasons, *Sensenbrenner* is not controlling precedent based on the facts of this case.

No Wisconsin court has decided whether the lien is lost once the mechanic conditionally releases the vehicle to the owner. The general and modern rule can be found in Restatement of Security § 80 (1941). This rule states that when the bailor (owner) is under an obligation to return the vehicle to the lienor (mechanic), the lien is revived upon the recovery of

the vehicle, subject only to the interests of bona fide purchasers for value and attaching or levying creditors who do not have notice of the lienor's interest.

The bank would like a rule that upon a conditional release, the lien is lost as to all third parties. The Restatement reflects a more balanced view, recognizing that not all interests of third parties are affected by the conditional release. While the mechanic retains possession, third parties at least would have constructive notice of the mechanic's lien because they would be expected to examine the property in the mechanic's possession and be expected to know of the mechanic's lien statute. After a conditional release, those parties purchasing the vehicle, extending new credit, or levying on the vehicle would be vulnerable because even after examinations of the motor vehicle filings and the vehicle, there would be no way for them to know of the mechanic's prior interest. A creditor whose interest arose before the mechanic's lien would not have this concern. At the time the creditor extends credit, it is presumed to know the mechanic's lien statutes which could subordinate its interest to that of a mechanic making a later repair. This is a known risk to the creditor. A creditor also has the opportunity to protect itself by writing into the security agreement that all subsequent repairs must be approved by the creditor.

Once the mechanic's lien arises, in most circumstances, the later conditional release does no further damage to the prior creditor and actually can be advantageous to the creditor. For example, in a case such as this where the vehicle is necessary to the owner's business, the conditional release allows the owner to generate cash to pay off the mechanic's lien and make payments on the creditor's prior loan. If the mechanic were forced to keep possession of the vehicle, the owner would be unable to raise the cash to pay off either the mechanic or the creditor.

The circumstance where a prior creditor could be damaged by the conditional release also is covered by the Restatement. If a prior creditor does not have notice of the mechanic's lien and goes through the expense of levying upon the vehicle while it is in the owner's possession, then the levying creditor is accorded the same protection as the bona fide purchaser for value or the new attaching creditor. This rule gives the prior creditor a "window of opportunity" to levy, but the mechanic can protect the lien by notifying prior creditors of the conditional release arrangement.

For the reasons stated above, we reject the bank's argument that a con-

ditional release of the vehicle destroys the lien as to all third parties. Instead, we adopt the Restatement's rule that upon a conditional release, the lien is enforceable against all parties except a bona fide purchaser for value or a subsequent attaching or levying creditor who has no notice of the mechanic's interest. Upon the resumption of possession, the lien is revived and retains its priority as before the release, except it is subordinate to the bona fide purchaser or attaching or levying creditor. Applying this rule to the facts of the case, it is apparent that the mechanic's lien is superior to the bank's security interest. The fact that the truck was found at the mechanic's place of business well after the repairs were made supports Treleven's claim that the release of the vehicle was conditional. Furthermore, the bank is not afforded the protection given to the levying creditor because the sheriff levied upon the vehicle while it was in Treleven's possession, and thus had notice of Treleven's interest.

Because Treleven's lien was not waived by the conditional release under sec. 779.41(1), Stats., we next must examine whether the conditional release destroyed the lien's priority under sec. 409.310, Stats. Neither party addressed this issue, but commentary and cases interpreting Uniform Commercial Code § 9-310, the model upon which sec. 409.310 is based, make clear that the possession requirement of this statute is separate from any possession requirement of the underlying mechanic's lien.

U.C.C. § 9-310 gives priority only to the mechanic in possession of the vehicle. It is uniformly held that if the mechanic voluntarily gives up possession of the vehicle, § 9-310 cannot be relied upon by the mechanic to give his lien priority over the prior secured interest. See *United States v. Crittenden*, 563 F.2d 678, 691 (5th Cir. 1977), vacated and remanded, 440 U.S. 715 (1979); *In re Glenn*, 20 B.R. 98, 99 (Bankr. E.D. Tenn. 1982); *Forrest Cate Ford, Inc. v. Fryar*, 465 S.W.2d 882, 884 (Tenn. Ct. App. 1970).

The question then becomes whether the resumption of possession will allow sec. 409.310, Stats., to be applied to give the mechanic's lien priority. The statute's language does not tell us whether continuous possession is required. When a statute is ambiguous we must look to other sources to determine legislative intent. Among the few courts that have decided this issue, the jurisdictions do not agree as to the effect of resuming possession under § 9-310. The three cases discussing this issue the most thoroughly are *Glenn*, *Crittenden* and *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977).

The opinion of the Mississippi Supreme Court in *Thorp* held that the

mechanic retained priority under the Mississippi equivalent to § 9-310 when he resumed possession of equipment. The court reasoned that the status or rights of the parties did not change between the date the mechanic lost possession of the equipment and the date it was restored to the possession of the mechanic. Furthermore, the court recognized that the secured party was not and could not be prejudiced by the restoration. Finally, the court concluded that because the Mississippi equivalent of § 9-310 did not clearly express an intention to reverse long-established principles of law, § 9-310 had to be read together with the older mechanic's lien statute and prior case law which established that mechanic's liens take priority over prior security interests. These justifications supported the court's opinion that priority status of the mechanic's lien was retained under § 9-310 when the mechanic regained possession.

Glenn and the dissenting opinion in *Thorp* stated that the priority of the mechanic's lien is lost under statutes based on § 9-310 when there is a lapse in the mechanic's possession. *Glenn* reasoned that a rule which allowed the reinstatement of priority "would create an ever-present dangerous uncertainty for parties, including prior secured parties, who deal with the debtor with respect to goods in his possession" because the prior secured party would have no notice of the mechanic's lien. *Glenn*, 20 B.R. at 99. *Glenn* also based its conclusion on the same concerns of the dissent in *Thorp*—a rule reinstating priority under the statute would permit the priority of the creditors to be determined by the debtor.

If he chooses to return property once relinquished by a repairman, the repairman prevails, but if he chooses not to relinquish possession of the property the secured creditor prevails [A rule reinstating priority under the statute] invites competition for possession between a secured party and a repairman who has previously relinquished possession of the property.

Id. at 100–01.

The Fifth Circuit Court of Appeals held that a mechanic retained his priority over a prior security interest only to the extent that the mechanic continuously possessed the collateral. *Crittenden*, 563 F.2d at 691. The court analogized § 9-310 to 26 U.S.C. § 6323(b)(5), a provision of the Federal Tax Lien Act, which gives priority to the mechanic's lien only if the mechanic "is, and has been, continuously in possession of such property

from the time such lien arose." 26 U.S.C. § 6323(b)(5). The court justified the continuous possession requirement by reasoning that while considerations of equity and fairness created the mechanic's lien exception to the normal priority rules, at some point when the mechanic gives up possession and the repairs were made in the more distant past the mechanic's interest becomes indistinguishable from the ordinary creditor.

In light of the longstanding Wisconsin policy of protecting materialmen and laborers, we find the Mississippi court's opinion in *Thorp* to be the most persuasive. The bank has not presented any facts which would show how its rights were affected or its interest was prejudiced by the release of the property to Wilson and Treleven's subsequent repossession. If anything, the facts show that the bank was better off through the conditional release because it afforded Wilson the resources to pay off both debts.

Like Mississippi's law in *Thorp*, Wisconsin case law decided prior to the enactment of sec. 409.310, Stats., gave priority to a mechanic's lien over a prior security interest. See *Jesse A. Smith Auto Co. v. Kaestner*, 159 N.W. 738 (Wisc. 1916). Wisconsin's enactment of sec. 409.310 did not expressly state that its effect was to displace prior law in this area. Commentary to the Uniform Commercial Code reveals the drafter's view that § 9-310 was to reverse prior case law which subordinated the mechanic's lien to prior security interests, but it does not state how the rule was to affect prior decisions holding the mechanic's lien superior. See U.C.C. § 9-310 comment 2. Because Wisconsin's prior case law and sec. 409.310 can be read in a consistent manner, we decline to interpret the statute otherwise.

Finally, but not least importantly, the plain language of sec. 409.310, Stats., gives priority to the mechanic "in possession." It does not require "continuous possession" or "retained possession." We must construe laws relating to mechanic's liens in a way to accomplish their equitable purpose of aiding mechanics in obtaining compensation.

The Fifth Circuit's opinion in *Crittenden* which read the continuous possession requirement into § 9-310 is not persuasive. In *Crittenden*, the Fifth Circuit was interested in formulating a federal standard to determine priorities under the Uniform Commercial Code. Thus, it looked to the Federal Tax Lien Act for guidance in its interpretation of the "possession" requirement of § 9-310. *Crittenden*, 563 F.2d at 691. On appeal the Supreme Court reversed, stating that the court should not be looking to federal standards to determine priorities, but should apply Georgia's statutes. *United*

States v. Kimbell Foods, 440 U.S. 715, 740 (1979). On remand, the Fifth Circuit held that Georgia's priority statute was basically the same as model § 9-310 and, without discussion, applied the same interpretation of the statute to the facts in the case. *United States v. Crittenden*, 600 F.2d 478, 479–80 (5th Cir. 1979). Unlike the Fifth Circuit's first *Crittenden* opinion, we are not concerned with formulating a national standard and do not need to look at other federal laws interpreting "possession;" under Wisconsin law, we must interpret sec. 409.310, Stats., in a way that aids the mechanic in obtaining compensation. It is not in a mechanic's best interest to interpret "possession" in sec. 409.310 as "continuous possession," and we decline to do so. Therefore, because Treleven was in possession of the vehicle at the time the bank's lien was enforced, Treleven's mechanic's lien had priority over the bank's interest under sec. 409.310.

Notes and Questions

10.11. *In re Housecraft Industries*, 155 B.R. 79, 86–87 (Bankr. D. Vt. 1993) gives some background on the evolution of security interests in personal property:

Until the early nineteenth century, the only way to create a valid interest in personal property was by physical pledge—the transfer of possession of the property (collateral) by a debtor (the pledgor) to the creditor or secured party (the pledgee). Possession provided public notice of a secured party's interest in collateral and prevented debtors from selling their pledged property to innocent purchasers or from obtaining credit based on encumbered assets. To further protect third parties against undisclosed interests in property, the common law presumed that nonpossessory interests were fraudulent and therefore unenforceable against third parties. *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601).

The increasing demands of the credit economy eventually created a need for collateral that remained in a debtor's possession. Limited only by their creativity, debtors, creditors, and their counsel formulated methods of perfection that provided both possession to debtors and security to creditors. The resulting rules varied from jurisdiction to jurisdiction, producing what one commentator has called a "labyrinthine melange" of

personal property securities laws. Throughout this development toward modern commercial law, the common law pledge existed side by side with other forms of perfecting security interests in personal property.

The Uniform Commercial Code . . . streamlined commercial law and preserved the pledge to complement a public filing system. Article 9 of the UCC, . . . governs security interests in most forms of personal property and fixtures. Article 9 recognizes three general ways to perfect a security interest: filing (public registration); possession of the collateral, either directly, constructively or through an agent; and third party notice, including notice given by the secured party to another holding the collateral.

10.12. Treleven, the mechanic, wins in *Wilson*. But why? Critique the following summaries of the holding:

- “Mechanics in possession have priority over other creditors.”
- “Trevelen’s lien arose before the bank’s.”
- “Trevelen put the bank on notice of his lien.”

Each of these statements is misleading standing alone, but the holding draws on them all. What is the rule of the case?

10.13. Suppose Groucho takes his car to Harpo’s Transmissions for repairs and parks it on Harpo’s lot. That’s a bailment; Harpo must turn over the car when Groucho demands it back. But now suppose that Harpo does \$400 worth of repairs on the car at Groucho’s request and Groucho fails to pay. Harpo now has a mechanic’s lien on the car. Can Groucho get his car back? What remedies could Harpo obtain if he sued Groucho for breach of contract? Does having the car on his lot give him any additional options? What if Groucho sells the car to Chico without telling Chico about Harpo’s lien? What if Harpo lets Groucho drive the car off the lot to confirm that the transmission has been fixed and Groucho floors it as soon as he reaches the highway and never comes back? If Harpo finds the car in Groucho’s driveway, can he tow it back to his lot?

10.14. What are Groucho and Harpo’s respective rights and obligations if Zeppo steals the car while it’s parked on Harpo’s lot? If the police subsequently find the car abandoned on the side of the road, who is entitled to it? Conversely, if Zeppo totals the car by driving it into a tree and both Groucho and Harpo sue him for conversion, what result?

10.15. *Wilson* gives a glimpse at the perennial problem of *priority*, which arises whenever a debtor has multiple creditors and is unable to pay them all. The ultimate system for sorting out priority is federal bankruptcy law, but as *Wilson* illustrates, state commercial law (especially Article 9 of the UCC) plays a significant role too. Even a quick skim through Article 9 shows how extensively its rules are adapted to the particular characteristics of the class of property at issue (or perhaps, to the demands of special-interest lobbying and the successive encrustations of history). See, e.g., UCC § 9-102, which distinguishes accounts; farm products; oil, gas, and minerals both in and out of the ground; tort claims; commodity futures; consumer goods; health-care debts; manufactured homes; software; and much, much, more.

10.16. Many states attempt to solve the core problem in *Wilson* by requiring that car liens be recorded with the state Department of Motor Vehicles and indicated on car owners' certificates of title. The Maryland system, for example, provides that a security interest in a vehicle is "perfected" by "Delivery to the [Motor Vehicle] Administration of every existing certificate of title of the vehicle and an application for certificate of title [including the necessary information about the security interest]" and that a security interest that has not been so perfected "is not valid against any creditor of the owner or any subsequent transferee or secured party." Md. CODE TRANSP. § 13.202. The theory is that the buyer or lender can protect itself by demanding to see the title certificate—indeed, a buyer will need to turn in the old title certificate to register the car and a lender will need to turn it in to record its own security interest. Is this system fair to senior lenders? Fair to buyers and junior lenders? How might the system go wrong? How might a fraudster make it go wrong? All things considered, is this a better system than the Wisconsin one discussed in *Wilson*?

Part III

Interests

Chapter 11

Estates and Future Interests

All land under the dominion of the English crown is held “mediately or immediately, of the king”—that is, the crown has “radical title” to all land under its political dominion. William the Conqueror declared that all land in England was literally the king’s property; everyone else had to settle for the privilege of holding it for him—the privilege of *tenure* (from the Norman French word “tenir”—to hold). Tenurial rights were intensely personal in early feudal society: the right to hold land was a privilege granted by the crown in exchange for an oath of allegiance and a promise of military service by the tenant—the oath of homage. The word homage derives from the French word *homme*—literally “man”—precisely because the ceremony surrounding the oath created not only the right of tenure, but a political and military relationship between “lord and man.”¹ In exchange for the tenant’s loyal support, or *fealty*, the lord warranted

¹The ceremony of homage, recorded by the 13th-century jurist and ecclesiastic Henry de Bracton, required the tenant to come to the lord in a public place, and there

to place both his hands between the two hands of his lord, by which there is symbolized protection, defense and warranty on the part of the lord and subjection and reverence on that of the tenant, and say these words: “I become your man with respect to the tenement which I hold of you . . . and I will bear you fealty in life and limb and earthly honour . . . and I will bear you fealty against all men . . . saving the faith owed the lord king and his heirs.” And immediately after this [to] swear an oath of fealty to his lord in these words: “Hear this, lord N., that I will bear you fealty in life and limb, in body, goods, and earthly honour, so help me God and these sacred relics.”

²HENRY BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 232 (Samuel E. Thorne trans., 1968) (c. 1230). The Anglo-Saxon Chronicle contains a remarkable and much-debated passage in which William the Conqueror is said to have held court at Salisbury twenty years into his reign, and

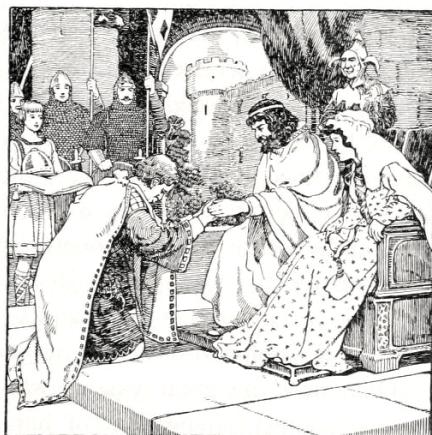


Figure 11.1: Homage Ceremony. From JAMES HENRY BREASTED & JAMES HARVEY ROBINSON, 1 OUTLINES OF EUROPEAN HISTORY 399 (1914).

the tenant's right to hold a plot of land, called a fief, or *fee*.

Acceptance of this form of military tenure obligated the tenant to provide a certain number of knights when called on by the king, and the land held by the tenant was supposed to provide sufficient material support to enable him to meet this military obligation. Sometimes, by the process of *subinfeudation*, the King's direct tenants (or "tenants-in-chief") could spread this burden around by in turn accepting homage from other, lesser nobles and freemen, each of whom would be responsible to the tenant-in-chief for a portion of the tenant-in-chief's obligation to provide knight-service. The tenants-in-chief thereby became "mesne lords" in their own right ("mesne" being Norman French for "middle" or "intermediate"). There could be several layers of mesne lords (i.e., "land lords") in the feudal hierarchy, at the bottom of which were "tenants in demesne" ("demesne" being Norman French for "domain" or "dominion")—who actually held the land rather than subinfeudating it further. Of course, holding land did not mean one actually worked it; a tenant in demesne often left the cultivation and productive use of land to those of lower social status. These could be "villeins"—serfs legally bound to the land by birth—or "leasehold" tenants—a leasehold being a right to hold land for a term of years in ex-

there summoned and taken direct oaths of homage and fealty from every landowner "of any account" in the whole of England. See H. A. Cronne, *The Salisbury Oath*, 19 HISTORY 248 (1934); J.C. Holt, 1086, in COLONIAL ENGLAND, 1066-1215, at 31 (1997).

change for payment of rent in cash or (more often) kind, and of lesser status than the “freehold” estate held by feudal tenants tracing their rights up the feudal pyramid to the crown.

Because a feudal tenant’s land rights were intimately connected to this web of personal, political, and military relationships, there was no logical reason why the tenant ought to be free to transfer those rights to anyone else—and good reason for the lords to resist such alienation of the fee by their tenants. Indeed, fees could be forfeited to the lord for the tenant’s breach of the homage relationship or commission of some other “felony,” and on the tenant’s death it was not clear that his family members had the right to inherit the fee. The king was assumed to have the right to retake the fee and re-grant it to a preferable new tenant upon his displeasure with or the death of the old tenant (it was his land, after all). Within a century, however, the dynastic ambitions of the baronage compelled King Henry I to concede (in his Coronation Charter of 1100) that a recently deceased baron’s heir could redeem his fee upon payment of “a just and lawful relief”—i.e., a payment of money to the crown, as a kind of inheritance tax. Under the principle of primogeniture that took hold in England around this time, the lord’s heir was his eldest son; landowners were not free to choose who would take over their tenancy after their death. Thus, subject to the payment of a relief, the fee became *descendible*—capable of being inherited from one generation to the next—and the grant of a descendible tenancy by the crown was now made not “to Lord Hobnob,” but “to Lord Hobnob *and his heirs*.” To this day, the latter phrase remains the classic common-law formula for creating the broadest interest in land that the law will recognize: the *fee simple absolute*.

Descendibility of the *fee simple* having been settled early in the history of English land law, the broader question of full alienability took several more centuries to work out. The history of medieval English land law is a history of tenants trying to secure their families’ wealth and power by expanding alienability and evading tenurial obligations to their lords and the crown, while the crown and higher nobility tried to adapt the law to preserve their status and prevent such evasions. There is a dialectical quality to this history. For example: for complicated reasons subinfeudation quickly came to present a greater threat to the economic interests of the higher ranks of the feudal hierarchy than simple substitution of one tenant for another. Thus, in 1290 the Statute of Quia Emptores banned subinfeudation. But in doing so it validated substitution, and with it the practice of selling an entire fee in exchange for money during the life of the tenant. Similarly, in 1536, at the insistence of King Henry VIII, the Statute

of *Uses* abolished many clever schemes adopted by tenants to use intermediaries to direct the disposition of real property interests after death and to put those interests outside the reach of the law courts (and of the crown's feudal authority). But in doing so, the statute validated one type of flexible property arrangement we have come to know as a *trust*. Moreover, the removal of the primary mechanism lawyers had developed to meet tenants' demand for inter-generational planning was sufficiently unpopular that Henry felt compelled to consent to the enactment of the Statute of Wills in 1540—finally permitting tenants to pass their legal estates in land by will rather than being at the whim of the rule of primogeniture. Finally, since the 16th century, primogeniture has given way to a more complex system of default inheritance rights for various relatives of the deceased who leaves no will; these rights are designed to try to approximate what legislatures think the *decedent* would have wanted, not necessarily what is best for the government. This set of default rights comprises the law of *intestate succession*, which we will discuss in a separate unit (or which you may study in a separate course on trust and estates law).

Various other statutes and common-law developments over the centuries culminated in the system of possessory estates and future interests that were imported into the North American English colonies, and thus into the independent American states (excluding Louisiana). Underlying them all is a fundamental distinction that traces back to the “radical title” asserted by William the Conqueror in 1066: **there is a conceptual difference between the ownership of land and the ownership of a legal interest in that land.** This distinction remains important to modern property law, and this unit will introduce you to the types of legal interests in land that American law will recognize. In particular, it examines how the common law divides up legal interests in land among successive owners over time.

Before delving into this material, we should warn you that the estates system has limited relevance even for the practicing real estate lawyer of today. The study of estates and future interests remains in property courses for three primary reasons: (1) the estates are still legally valid property interests, and their complexity can therefore be a danger to lawyers who encounter them and are unfamiliar with them; (2) some of the legal estates and future interests in real property can be usefully extended to *equitable* interests in property held in trust; and (3) the bar examiners are fond of testing aspirant attorneys on future interests—perhaps simply because they are fairly mechanical and therefore highly testable. To be sure, mastering the system of estates and future interests requires considerable exercise of the lawyerly skills of close reading, logical

reasoning, and breaking down a big problem into lots of smaller problems. But there are other ways of learning those things, and a contemporary lawyer whose client wanted to divide up interests in property would be courting malpractice by relying on legal estates and future interests in land (which makes the bar examiners' continued affection for them even more baffling). Instead, the modern lawyer should look to the much more flexible law of trusts and to the various forms of business associations—such as corporations—that can own property in their capacity as fictional legal “persons.” We will discuss these strategies in Chapter 15.

11.1 Concepts, Vocabulary, and Conventions

To begin understanding how the law divides up interests in land over time, we begin with the fundamental distinction between possessory estates and future interests. A **possessory estate** is a legal interest that confers on its owner *the right to present possession* of some thing. A **future interest** is a legal interest that exists in the present, but does not entitle the owner to possession until some point in the future.

This may sound confusing, but you are probably already familiar with an arrangement that follows this pattern: a lease. A lease is a transaction in which the landlord gives the tenant a possessory estate (a leasehold estate), and retains a future interest—the right to retake possession after the lease term ends. This retained future interest—an unqualified right to future possession retained by the party who created the possessory interest that precedes it—is called a **reversion**. (Landlord-tenant relationships are obviously more complicated than this—they entail a number of contractual rights and obligations and are heavily regulated by statutory and decisional law and, in many cases, administrative codes. We cover these relationships more thoroughly in Chapter 16.)

The idea that both landlord and tenant can have legal interests in the same parcel of land at the same time, even though only one of them has the right to possess the land at any given time, is a good introduction to the concept of future interests. If you think about it, you will probably recognize that the basic idea of a lease implies certain rights and powers of a landlord in the leased premises even during the term of the lease. The most important one is the reversionary right itself: the right to take possession at some point in the future. That’s a right the tenant can’t take away, even while the tenant has the right to possession. The landlord might be interested in selling (or mortgaging) this

reversionary right, even before the lease ends. And if she does sell or mortgage her interest (which she may, subject to the tenant's interest), the thing sold is not “the property”; it is *the landlord's reversion*: a legal interest in real property *that exists in the present* but will not entitle its holder to *possession* of that real property until some point *in the future*.

When learning about estates and future interests, we will follow some conventions that will simplify our discussion as much as possible. Most of our problems will involve an owner of land transferring some interest in that land to one or more other parties. Following longstanding tradition in the study of Anglo-American property law, we will refer to the parcel of land in question as “Black-acre” (or “Whiteacre,” “Greenacre,” “Ochreacre,” etc. if more than one parcel is at issue). We will refer to the original owner as O, and the other parties as A, B, C, etc.

In addition, there are a variety of technical terms that arise, a few of which you should be familiar with:

- A **grant** or **conveyance** is a transfer of an interest in property. The person making the grant is the **grantor** (or **transferor**); the person receiving the grant is the **grantee** (or **transferee**). If the grant is made during the life of the grantor, it is said to be an **inter vivos** conveyance (literally, “between the living”). If in a will, it is said to be a **testamentary** conveyance. A testamentary conveyance of real property is called a **devise**. A testamentary conveyance of personal property is called a **bequest** (or sometimes a **legacy**).
- When a person dies, they will either have left a valid will or not. A person who dies with a valid will dies **testate**; one who dies without a valid will dies **intestate**. Either way, the dead person can be referred to as a **decedent**. If the decedent did leave a valid will, they may also be referred to as a **testator** if male, or a **testatrix** if female.
- The assets that a decedent owned at her death are collectively referred to as the decedent's **estate**. An estate can sometimes take on the qualities of a legal person—it is not uncommon to say that a certain asset is owned by “the estate of O.” The property rights of this fictional legal person are managed by an actual person whose title depends on whether the decedent left a will. The instructions in a will are carried out by an **executor** (if male) or **executrix** (if female), designated as such in the will itself. An intestate estate is disposed of by a court-appointed **administrator** (if male)

or **administratrix** (if female).

- The authority of an administrator or executor to dispose of the estate's assets is conferred by a **probate court**. When a valid will is filed with the probate court and deemed valid, the court will **admit the will to probate** (or **probate the will**), and will issue **letters testamentary** to the executor authorizing him to take possession of the estate's assets and dispose of them according to the will's instructions. If the decedent died intestate, the court will issue **letters of administration** to an administrator authorizing him to take possession of the estate's assets and dispose of them according to the laws of intestate succession.
- If the decedent did leave a valid will, it will typically contain instructions for transferring assets to various identified people or entities. The parties receiving the bequests are referred to as the will's **beneficiaries, devisees** (for real property), or **legatees** (for personal property). When a decedent passes property by will he or she is said to have **devised** that property. A property interest that the decedent has the power to transfer by will is said to be **devisable**.
- Sometimes a will fails to provide instructions for all the assets owned by the testator at death; in this case the unallocated assets are said to create a **partial intestacy**. When this happens, assets designated in the will are distributed according to the will's terms, while the estate's remaining assets are distributed according to the laws of intestate succession. In order to avoid partial intestacy, it is good practice to include a **residuary clause** in a will, disposing of all the assets of the decedent not devised through specific bequests. Such unenumerated assets are referred to as the **residuary estate**.
- If the decedent did not leave a valid will, her property will pass to her **heirs** (sometimes referred to as **heirs at law**). Heirs are those who are designated by law as successors to property that passes by intestate succession rather than by will. When heirs take such property, they are said to **inherit** it. A property interest that can pass by intestate succession is said to be **descendible**.
- Note that until the decedent actually dies, we don't know who her heirs are; rights of inheritance are allocated only to relatives of the decedent

who **survive** her—who are still alive when the decedent dies. Thus, until a property owner dies, her relatives have no legally enforceable rights in her property under the laws of intestate succession. It is sometimes said that such relatives have a mere **expectancy**, and they are sometimes referred to as **heirs apparent**.

- Heirs under intestacy laws are drawn from various categories of relatives. In addition to spouses, there are **issue**: the direct descendants of the decedent (children, grandchildren, great-grandchildren, etc.); **ancestors** (parents, grandparents, great-grandparents, etc.); and **collaterals**: relatives who are not direct ancestors or descendants (siblings, aunts, uncles, nieces, nephews, cousins).
- If a person dies without a will and without any heirs at law, any property in their estate **escheats** to the state, which becomes its owner.

11.2 Basic Estates and Future Interests

We will begin by examining two possessory estates—the fee simple absolute and the life estate—and two future interests (one of which you have already encountered)—the reversion and the remainder.

11.2.1 The Fee Simple Absolute

The **fee simple absolute** is the most complete interest in land that the law will recognize. When we say that “O owns Blackacre” without any further qualification, what we actually mean is that O owns a *presently possessory fee simple absolute* in Blackacre. The key distinguishing characteristic of the fee simple absolute is that it has no inherent end—it is an estate of *indefinite duration*. It is descendible, devisable, and alienable *inter vivos*; so it can be *transferred* to a new owner, but it cannot be destroyed. At most, it can be carved up into lesser estates and interests for a while, and we will spend most of the rest of this chapter understanding how that happens.

At common law, as previously noted, the fee simple absolute was created by the formula: “to A and his heirs.” That formula still works, but in modern usage it is sufficient to simply say “to A,” and the use of such language in a conveyance from the owner of a fee simple absolute will be presumed to create a fee simple absolute in A.

11.2.2 The Life Estate

The **life estate** is just what it sounds like: an estate that confers a right to possession for the life of its owner. The owner of a life estate is referred to as a **life tenant**. The life estate terminates by operation of law upon the owner's death (i.e., it ceases to exist). It is created by the formula: "to A for life." Because it must by definition end—we all have to die sometime—any land held by a life tenant must also be subject to a *future interest* in some other person. We'll explore what those future interests might be shortly.

Recall the legal principle of *nemo dat*, which we encountered in our discussion of good faith purchasers: a grantor cannot convey title to something she doesn't herself own. Following this principle, life estates are alienable *intervivos* during the life of the life tenant, but obviously not devisable or descendible by the life tenant: they cease to exist upon the death of their owner, so the life tenant's estate has nothing to convey.² *Nemo dat* also implies that the owner of an interest in real property cannot convey *more* than their interest; a life tenant cannot convey a fee simple absolute, for example. More to the point, if a life tenant A transfers their life estate to a grantee B, B cannot receive anything more than what A owns: a possessory estate that will terminate by operation of law *when A dies*. Because such an interest is measured by the life of someone other than its owner, it is called a **life estate pur autre vie** (literally, in Law French, "for another life"). A life estate *pur autre vie* can also be created explicitly, as by a grant "to A for the life of B."

We'll hold off on any further illustrative problems at this point, because we still need some exposition of what happens *after* a life tenant dies. The answer, as we've already noted, involves *future interests*.

11.2.3 The Reversion

We encountered the reversion once before, when discussing leases as an introduction to the concept of a future interest. But reversions often arise in non-leasehold contexts too. Consider what happens when A, owning a life estate in Blackacre, dies. A's life estate terminates by operation of law; it simply ceases to exist and disappears. Who "owns" Blackacre now? It seems obvious that *somebody* must have a right to possession of the land, but it seems equally obvious

²A life estate can theoretically be devised or inherited in the (perhaps contrived) situation where the life tenant conveys to a third party, who dies before the life tenant; the third party's heirs or devisees would receive the estate insofar as the original life tenant is still alive.

that whoever that somebody is, they had *no right to possession* before A died. Whoever they are, during the term of A's life estate they must have held an interest that would entitle them to take possession at *some point in the future* (that is, a *future interest*).

There are two candidates for such an interest. We will begin with the most basic: the **reversion**. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre "to A for life," and says nothing more? What is the legal effect of this grant?

Based on the formula we just learned, it should be clear that A receives a life estate in Blackacre. But what other effects does the grant have on the legal rights of the parties? Think about the interest O held prior to the conveyance: the fee simple absolute. Remember that a fee simple absolute is an interest of *infinite duration*—it never ends. So when O starts with a possessory interest of infinite duration, and then gives away a life estate—whose duration is limited by a human lifespan—to A, *something was left over*. Specifically, O never gave away the right to possession of Blackacre from the day of A's death to the end of time. Whether meaning to or not, O gave away less of an interest in Blackacre than what he owned, meaning *he still holds some interest*. We call this type of interest—the residual interest left over when a grantor gives away less than they have—a *retained interest*.

This retained interest can't entitle O to possession during A's life—A has the exclusive right to possession as the life tenant. So O's interest must be a *future interest* during the term of A's life estate: an interest that will entitle O to possession *after the natural termination of the life estate*. As we discussed in the example of the lease, we call this kind of future interest a **reversion**. It is a *retained interest in the grantor*—created when a grantor conveys less than his entire interest—that will become possessory by operation of law upon the *natural termination* of the preceding estate. Colloquially, we say that Blackacre "reverts" to O. In some opinions, you will see the holder of a reversion referred to as a "reversioner."

A reversion can of course also be created explicitly, for example, if O conveys Blackacre "to A for life, then to O." In this case, O has explicitly created a life estate in A followed by a reversion in O.

11.2.4 The Remainder

A **remainder** is a type of future interest created in someone *other than* the grantor. The distinguishing characteristic of the remainder is that—like a reversion—it *cannot cut short or divest any possessory estate*. (We will later encounter other future interests that can.) A remainder simply “remains,” sitting around and waiting for the natural termination of the preceding possessory estate (be it a life estate or a lease), at which point the remainder will become possessory by operation of law. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre “to A for life, *and then to B*.” Again, A would have a life estate, but now O has also affirmatively created a future interest in B. Because the future interest is created in someone *other than* the grantor, it isn’t a reversion. And because it cannot cut short A’s life estate (note the “*and then*” language), it must therefore be a **remainder**. Due to the persistence of dated gendered terms in legal discourse, you will often see the holder of a remainder referred to as a “remainderman,” even today, regardless of that person’s gender.

Future interests get a lot more complicated than this, but you now have enough to begin examining some problems that can arise from even this limited set of interests.

Notes and Questions

11.1. O, owner of a fee simple absolute in Blackacre, conveys Blackacre “to A for life, then to B for life.” (Assume that both A and B are alive at the time of the grant.) What is the state of title in Blackacre?

- What will be the state of title if A dies, survived by B and O?
- What will be the state of title if B dies, survived by A and O?
- What will be the state of title if O dies, then A dies, then B dies?

11.2. What will be the state of title if, while O, A, and B are still alive, B conveys her interest to C?

- What will be the state of title if, after B conveys her interest to C, A dies, survived by B, C, and O?
- What will be the state of title if, after B conveys her interest to C, C dies, leaving D as his heir, and is survived by A, B, and O?
- What will be the state of title if, after B conveys her interest to C, B dies, survived by A, C, and O?

11.3 Construing Ambiguous Grants

We've recited a few formulas for creating the small number of common-law interests you've encountered. For example, "to A and his heirs" creates a fee simple absolute in A; "to B for life, then to C" creates a life estate in B and a remainder in C. But the actual language of documents conveying legal interests in real property don't always stick to the formula—especially (but unfortunately not exclusively) when they are drafted without the assistance of counsel. Consider the following case.

In the Estate of Dalton Edward Craigen

305 S.W.3d 825 (Ct. App. Tex. 2010)

HOLLIS HORTON, Justice.

We are asked to determine whether the trial court properly interpreted the dispository language in a holographic will. If the will is ambiguous, the applicable rules of will construction yield one result. If the will is unambiguous, the trial court was required to give effect to the express language of the will, and arguably should have reached a different result.

The trial court, in construing the testator's intentions under the will, found "[t]hat it was the intent of the [t]estator to leave his entire estate to his surviving wife in full." The trial court further found "[t]hat there was no intention to leave a life estate to her." In a single issue on appeal, the testator's adult children contend the testator intended to leave a life estate to his wife, and they argue that the remainder of the estate passed to them through the laws of descent and distribution. We find the will is ambiguous and hold that under the appropriate rules of will construction, the trial court properly construed the will. Accordingly, we affirm the judgment.

The Will

Dalton Edward Craigen left a holographic will that in its entirety stated:

Last Will & testament
Debbie gets everything till
she dies.
Being of sound mind & this
is my w. last will & testament.

I leave to my Wife Daphne
Craigen all p. real & personal property.
12-17-99 Dalton Craigen

Contentions of the Parties

The parties stipulated “[t]hat Debbie and Daphne named in Dalton Craigen’s will are one and the same person.” Brian Craigen and Sabrina Brumley, Craigen’s adult children, argue that the testator’s intent under the will is “crystal clear—the testator left everything (all of his real and personal property, his definition of ‘everything’) to his wife for as long as she lived.” According to Brian and Sabrina, the dominant provision of the will (the first sentence) creates a life estate, and the will’s third sentence can be harmonized with the will’s first sentence by construing the third sentence to define the property that Craigen intended to include in his wife’s life estate. Brian and Sabrina ask that we render a judgment in their favor by holding that Daphne received only a life estate under Craigen’s will.

Daphne died on January 17, 2009. Yvonne Christian, the independent administratrix of Daphne’s estate, argues we should affirm the trial court’s judgment. According to Christian, the will is not ambiguous as it reflects Craigen’s intent to leave his entire estate to Daphne.

Rules of Construction

The rules involved in construing wills are well settled. “The primary object of inquiry in interpreting a will is determining the intent of the testator.” *Gee v. Read*, 606 S.W.2d 677, 680 (Tex. 1980). “The [testator’s] intent must be drawn from the will, not the will from the intent.” *Id.* We ascertain intent from the language found within the four corners of the will. “In construing the will, all its provisions should be looked to, for the purpose of ascertaining what the real intention of the [testator] was; and, if this can be ascertained from the language of the instrument, then any particular paragraph of the will which, considered alone, would indicate a contrary intent, must yield to the intention manifested by the whole instrument.” *McMurray v. Stanley*, 69 Tex. 227, 6 S.W. 412, 413 (1887).

When a will has been drafted by a layperson who is not shown to be familiar with the technical meanings of certain words, courts do not place “too great emphasis on the precise meaning of the language used where the will is the product of one not familiar with legal terms, or not trained in

their use.” *Gilkey v. Chambers*, 146 Tex. 355, 207 S.W.2d 70, 71 (1947) (quoting 69 C.J. Wills § 1120 (1934)). Instead, in arriving at the meaning intended by the layman-testator, courts refer to the popular meaning of the words the testator chose to use. In summary, the testator’s intent, as gathered from the will as a whole, prevails against a technical meaning that might be given to certain words or phrases, unless the testator intended to use the word or phrase in the technical sense.

With respect to the creation of a life estate, no particular words are needed to create a life estate, but the words used must clearly express the testator’s intent to create a life estate. A very strong presumption arises that when a person makes a will, the testator intended a complete disposition of his property. “[T]he very purpose of a will is to make such provisions that the testator will not die intestate.” *Gilkey*, 207 S.W.2d at 73. When faced with ambiguity, and in applying that presumption, courts generally interpret wills to avoid creating an intestacy.

. . . In reconciling different parts of a will, the Texas Supreme Court has explained:

Where, however, the language of one part of a will is not easily reconciled with that used in another, the principal and subordinate provisions should be construed in their due relation to each other, and the intent which is disclosed in the express clause ought to prevail over the language used in subsidiary provisions, unless modified or controlled by the latter. And a clearly expressed intention in one portion of the will will not yield to a doubtful construction in any other portion of the instrument.

Heller v. Heller, 114 Tex. 401, 269 S.W. 771, 774 (1925).

Analysis

A will is ambiguous if it is capable of more than one meaning. Because Debbie and Daphne are in fact the same person, the ambiguity in Craigen’s will becomes apparent. Why would Craigen in the first sentence grant his wife a life estate, but then in the concluding sentences bestow upon her all of his property? The resolution of that question by Craigen’s children seems reasonable, as the last sentence could be construed to merely describe the property that Craigen intended to include in Daphne’s life estate.

On the other hand, Craigen did not mention his children in his will and he made no provisions to expressly benefit them. Moreover, Brian and Sabrina's construction of Craigen's will would, if adopted, allow all of Craigen's property to pass under the laws of intestacy at Daphne's death. Brian and Sabrina's construction assumes that Craigen, when writing his will, did not intend to completely dispose of his estate. The rule that Craigen did not likely intend to create an intestacy favors the construction of the will that the trial court adopted.

Brian and Sabrina contend that the will gave Daphne a life estate, but Craigen did not utilize those exact words in his will. Although no particular words are needed to create a life estate, the words used must clearly express the testator's intent to create one. In the absence of a remainder-man clause, we are skeptical that Craigen used the phrase "till she dies" in a technical sense to create a life estate. Instead, Craigen likely intended to limit Daphne's use of his property; nevertheless, the will manifests an intent that she have his property in fee simple absolute. Consequently, although the first sentence in the will is susceptible to the interpretation that Craigen created a life estate, the will becomes ambiguous when, in the will's third sentence, Craigen expressly names Daphne as the beneficiary of all of his property and he makes no further provision for his estate upon her death.

We conclude that the will is reasonably capable of more than one meaning; therefore, we resort to the rules of construction that apply to ambiguous wills Craigen's will can be interpreted to avoid the intestacy certain to result under Brian and Sabrina's construction of the will. The potential intestacy is avoided if the phrase "till she dies" is interpreted as a conditional bequest. The third sentence then functions as intended to give Daphne all of Craigen's property in fee simple. The immediate vesting construction favors Daphne, the sole beneficiary named in Craigen's will. It also affords the phrase "till she dies" a nontechnical meaning.

We decline to apply the presumption that Craigen did not intend to disinherit his children when the will expressly states that Craigen gave all of his real and personal property to Daphne and when Brian and Sabrina offered no evidence regarding Craigen's situation and the circumstances surrounding the execution of the will. Taking the will as a whole, the dominant gift is all of Craigen's real and personal property, and he made that gift to his wife. As this is the dominant clause, Craigen's expressed intention prevails.

We hold that under the appropriate rules of will construction, the trial court correctly construed the will. We overrule the issue and affirm the judgment.

AFFIRMED.

Notes and Questions

11.3. Holographic Wills. A **holographic will**—a will handwritten by the testator—often presents a particular challenge for courts attempting to interpret it. Indeed, they are thought to be so problematic that about half of American jurisdictions refuse to recognize them as valid wills at all. See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 27 (2008) (arguing that the defects of holographic wills, though real, are overstated). Lay testators attempting to settle their affairs without assistance of counsel often make legal or technical errors of various kinds, including errors of ambiguity such as the one that generated the litigation in *Craigen*.

11.4. Presumptions and Rules of Construction. The court reviews a number of rules of construction applied by courts in construing ambiguous grants. Most jurisdictions have similar rules of construction—sometimes promulgated by statute, other times judge-made. In *Craigen*, two rules in particular do considerable work: the presumption against intestacy and the clear-statement rule for creation of a life estate. The latter rule is sometimes expressed in other jurisdictions as a presumption in favor of the largest estate the grantor could convey. See, e.g., *White v. Brown*, 559 S.W.2d 938, 939 (Tenn. 1977) (quoting Tenn. C. Ann. § 32-301) (“Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument.”).

What justification is there for presuming that an ambiguous grant conveys a fee simple absolute rather than a life estate? Is it any different for the justification underlying the presumption against intestacy? Was *Craigen* an appropriate case for the application of these presumptions?

11.5. Finding Ambiguity. Are you convinced by the court’s arguments that the language “till she dies” does not “clearly express the testator’s will to create a life estate”? What do you think Dalton *Craigen* meant by this phrase?

11.6. Dueling Presumptions. The court mentions another rule of construction—the presumption against disinheritance—but declines to

apply it. Why? Is its reason for following the presumption against intestacy but declining to follow the presumption against disinheritance persuasive? How is a court to decide when a presumption or other rule of construction applies and when it doesn't?

11.4 Present vs. Future: The Doctrine of Waste

Even if we are very clear on the nature and allocation of possessory and future interests in a parcel of land, we soon run into a practical problem: it can be difficult to protect the value of a future interest while someone else is in possession of the land, acting for most purposes as its owner. What if a life tenant burns down the structures on the parcel? Or decides to undertake a remodeling project that would make the parcel less desirable to future renters? Or fails to do anything about a leaky pipe, leading to a costly mold infestation? What if the possessor uses the property in such a way as to maximize its current value at the expense of its future value—depleting natural resources, wearing out buildings and fixtures without repairing or maintaining them—in ways that can't be recovered? Can it be wrongful—as a matter of property law—for a lawful possessor to use the possessed premises however they wish, for good or for ill?

The common law recognized that it *could* be wrongful for a present lawful possessor to take (or fail to take) certain acts with respect to land in their possession—if those acts affected the ability of a *future* possessor to enjoy their interest when their turn came around. To vindicate the rights of these future interest holders, the common law gave them a private right of action to enjoin, and obtain damages for, the acts and omissions of possessors that permanently decrease the value of the future interest. This was the action for **waste**.

Jackson v. Brownson

7 Johns. 227 (N.Y. Sup. Ct. 1810)

... This was an action of ejectment for a farm in Whitestown. The cause was tried at the Oneida circuit, the 5th June, 1809, before Mr. Justice Yates.

At the trial, the plaintiff gave in evidence the counterpart of a lease, dated the 3d September, 1790, from Philip Schuyler,* of Albany, to the

*Yes, that Philip Schuyler. See *The Schuyler Sisters*, in Lin Manuel-Miranda, *Hamilton* (2015).
—Eds.

defendant, for the premises in question, for the lives of the defendant, his wife, and Samuel Shaw, respectively. The farm contained 133 acres and a half. The lease contained various covenants, reservations and conditions, among which was the following: . . . "And it is further conditioned on the part of the said lessee, that neither the said lessee, his executors, &c., . . . shall, at any time hereafter, commit any waste."

"And in case the said lessee, his, &c., shall not perform, fulfil, abide by, and keep all and every of the covenants and conditions herein covenanted and conditioned, &c., then in each of the said cases, it shall thenceforth be lawful for the lessor, his, &c., into the whole of the said premises, or into any part thereof, in the name of the whole, to reenter, and the same to have again, repossess and enjoy, as his or their former estate," &c.

The lessors were the heirs of Philip Schuyler; this action was brought to recover the possession of the south half of the premises, on the ground of forfeiture by a breach of the covenant; the lessee or his assigns having committed waste thereon by clearing and draining off the land more than a reasonable and due proportion of the wood. It was admitted that, at the date of the lease, the premises were wild and uncultivated, and covered throughout with a forest of heavy timber.

The plaintiff proved that the defendant occupied the south half of the premises, which were entirely cleared of wood, before the commencement of the suit; and that on the north half occupied by Shaw, the whole was cleared except about six or eight acres, on which more than half the wood and timber had been cut down and removed, before the commencement of the suit.

It was also proved, that a permanent supply of fuel, timber for buildings, and wood for fences, for the use of the demised premises, would require that, at least, thirty acres should have been preserved in wood.

. . . It was also proved, that about 12 years since, there were 35 acres of land covered with wood and timber on the premises, and about 12 acres of woodland, on that part in the possession of the defendant, only half of which was good for timber, . . . that the defendant had cut no wood or timber on the part in his possession, except for fuel, fences, and building for the use of the farm, and which had been gradually cut, . . . [that] the defendant had built a house on the premises, which was completed about four years since; and had used the farm in a husbandlike manner, and had carried on more materials for fences than he had taken off; that . . . cleared land was of much greater value than land covered with wood and timber;

and that good farms in the vicinity of the premises had not reserved more than 12 acres of woodland out of 100 acres

The judge was of opinion, . . . that the gradual clearing of that part in possession of the defendant, . . . did not, in law, amount to waste; and he directed the jury to find a verdict for the defendant; and the jury found accordingly.

A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge. . . .

VAN NESS, J.

. . . It is a general principle, that the law considers every thing to be waste which does a permanent injury to the inheritance. Now, to say that cutting down the wood on almost every acre of the demised premises is not waste, within the spirit and meaning of the covenant in the case, is to say that no waste, by the destruction of wood, can be committed at all. We are bound to give effect to this covenant if we can, but to decide that the facts stated in the case do not constitute waste, would be destroying it almost altogether. That the destruction of the timber is a lasting injury to the reversion cannot be disputed. For this injury the lessors of the plaintiff may, at their election, bring covenant, or enter as for condition broken.

. . . It is true, that what would in England be waste, is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation; but it does not follow that he may, with impunity, destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in England are prohibited from cutting wood upon the demised premises altogether; the prohibition, in principle, extends no further, in this respect, than it does here. In England, that species of wood which is denominated timber shall not be cut down, because felling it is considered as an injury done to the inheritance, and therefore waste. Here, from the different state of many parts of our country, timber may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of

waste, must be left to the sound discretion of a jury, under the direction of the court, as in other cases. . . . The principle upon which all these cases were decided is that which I have before stated, namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste; and that is the principle upon which I place the decision of this cause.

. . . My opinion, therefore, is, that the motion for setting aside the non-suit, and granting a new trial, ought to be granted.

KENT, Ch. J., and THOMPSON, J., were of the same opinion.

SPENCER, J.

. . . The land was covered with heavy timber; and, for the use of it, the lessee was to pay a rent. The parties must, therefore, have intended that the lessee should be at liberty to fell the timber to a certain extent, at least, for agricultural purposes.

If the restriction to commit waste would operate to restrain the lessee from the use of the premises, it would be void, as repugnant to the grant. I shall have no difficulty in maintaining that, according to the common law of England, the lessee could not enjoy the land, nor derive any benefit from it, without the commission of waste; and should that point be established, this covenant must be rejected. The general definition of waste is, that it is a destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him in remainder or reversion. It is not every injury to lands that the law considers as waste, nor every act which injures the remainder-man, or the reversioner. To test this supposed waste, by considering the reversioner injured by the acts done, is not warranted by law; and, in point of fact, when the premises were cleared of the timber, cleared land was more valuable than wood land. . . . I insist that, according to the common law of England, no tenant can cut down timber, &c., or clear land for agricultural purposes; and that the quantity of timber cut down never enters into the consideration whether waste has or has not been committed; but that it is always tested by the fact of cutting timber, without the justifiable excuse of having done it . . . A single tree cut down, without such justifiable cause, is waste as effectually as if a thousand had been cut down; and the reason is this, that such trees belong to the owner of the inheritance, and the tenant has only a qualified property in them for shade and shelter.

The doctrine of waste, as understood in England, is inapplicable to a

new, unsettled country. . . . The rule furnished by the common law is fixed and certain; and the lessor knows what wood he may cut, and for what purposes; but if a covenant not to commit waste is hereafter to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe. If the act of cutting timber on the premises, without the justifiable excuse already stated, was not waste, cutting more or less was immaterial. Under the covenant not to commit waste, we have no right to say some waste might be committed, and other waste might not; the covenant is inapt to the case, and if any remedy exists, it must lie in covenant. I am, therefore, against granting a new trial.

YATES, J., was of the same opinion.

Rule granted.

Notes and Questions

11.7. What exactly is the dispute between the majority and the dissent? Do they agree on the existence of a remedy for waste under New York law? On the definition of waste? On the applicability of waste doctrine to the lease before the court? On the remedy for waste?

11.8. Although this case deals with a lease for life—a peculiar hybrid estate that is not recognized in many jurisdictions—the doctrine of waste applies between freehold possessory estate holders and future interest holders just as it applies between leasehold tenants and landlords. Thus, even in the absence of a lease contract, Brownson could have been held liable for damages, or enjoined from felling any further timber, in an action for waste by the reversioners (if the jury concluded that it would indeed be waste for a possessor in Brownson's position to fell such timber).

11.9. **Forms of Waste.** Waste can be either *voluntary* or *permissive*. Voluntary waste (sometimes called *affirmative* waste) refers to *acts* of the holder of the possessory estate, such as erecting or demolishing a structure, or extracting non-replenishing natural resources. Permissive waste refers to *omissions* of the holder of the possessory estate, such as failing to pay property taxes, or failure to make needed repairs. Either can support a claim for waste by the owner of a future interest whose rights are permanently devalued as a result. Which form of waste was at issue in *Jackson*?

11.10. **Theories of Waste.** One commentator argues that *Jackson* was the starting point for a peculiarly American departure from the English doctrine of

waste deplored by the dissenters. In this view, “courts created the American law of waste for several reasons: to promote efficient use of resources that the English rule would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and perhaps to advance a belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America.” Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 661 (2006). And indeed, the sensitivity of both opinions in *Jackson* to local conditions, the desirability of converting wild lands to agricultural use, and the sustainability of yeoman farming tend to support this pluralist view.

11.11. Law-and-economics theorists, in contrast, identify waste doctrine solely with the criterion of efficiency, and particularly the internalization of externalities and mitigation of holdout problems. As Judge Posner puts it: “The incentive of a life tenant is to maximize not the value of the property—that is, the present value of the entire stream of future earnings obtainable from it—but only the present value of the earnings stream obtainable during his expected lifetime. So he will, for example, want to cut timber before it has attained its mature growth even though the present value of the timber would be greater if the cutting of some or all of it were postponed; for the added value from waiting would inure to the remainderman . . . [Moreover,] since tenant and remainderman would have only each other to contract with, the situation would be one of bilateral monopoly and transaction costs might be high.” To avoid these problems, “[t]he law of waste forbids the tenant to reduce the value of the property as a whole by considering only his own interest in it.” Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095-96 (2011).

Note on Ameliorative Waste

What if, instead of doing something that *decreases* the value of the future interest, the holder of the possessory estate does something that *increases* the market value of the land, but in doing so changes the premises in ways the future interest holder doesn’t like? Such alterations—known as **ameliorative waste**—have generated two types of approaches in the courts.

The first approach, adopted in *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wisc. 1899), looks to the effect of the life tenant’s actions on the market value of the parcel and whether those actions were necessitated by a change in conditions surrounding the parcel. In *Melms*, the Pabst Brewing Company had torn down

an old mansion abutting a brewery it owned, mistakenly believing it owned the lot in fee simple when in fact it owned only the life estate of the widow Melms (the remainder being owned by her children). At the time of the demolition, the neighborhood around the house had become heavily industrialized, and had been re-graded such that the house stood 20-30 feet above street level and was worthless as a residential property. In these circumstances, the court held, whether the act of destroying the mansion and re-grading the lot on which it stood to street level constitutes waste is a question of fact for the jury. The court suggested that such actions will not constitute waste “when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it.” *Id.* at 739.

The second approach—more consistent with the common-law roots of waste doctrine—holds that *any* material change to real property caused by a lawful possessor without the consent of the holder of the future interest is waste, full stop. This approach informed the decision of the New York Supreme Court in *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. N.Y. Cty. 1929). In that case, the court refused to allow the life tenant of a stately mansion on New York’s Fifth Avenue at 79th Street to tear the mansion down over the objections of the holders of future interests in the lot, even though living in the mansion had become cost-prohibitive and the neighborhood had become a prime location for luxury apartment buildings, which could be built and operated on the site for a substantial profit. The theory underlying this result is that a life tenant has merely the rights of use, not full rights of ownership, and that the holder of the future interest is entitled to take possession of the parcel in substantially the same condition as it existed at the time the future interest was created: “The act of the tenant in changing the estate, and whether or not such act is lawful or unlawful, i.e., whether the estate is so changed as to be an injury to the inheritance, is the sole question involved.” *Id.* at 15.

The opinion in *Brokaw* generated a backlash in New York’s reform-minded legislature, which enacted a statute redefining waste law along the lines set forth in *Melms*; that statute remains in force today. See N.Y. REAL PROP. ACTS. & PROCS. L. § 803. But interestingly, the opinion in *Melms* itself seems to have arisen from a number of questionable factual and legal pronouncements from the Wisconsin courts. The full, fascinating story is recounted in Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055 (2011). As of 2009, the rule of *Melms* was followed in most U.S. jurisdictions, while a small number continued to follow the rule of *Brokaw*. *Id.* at 1083 (citing Gina Cora, *Want Not, Waste Not: Contracting Around*

the Law of Ameliorative Waste (Apr. 1, 2009) (Yale Law School Student Prize Papers: Paper 47), http://digitalcommons.law.yale.edu/yllspps_papers/47.

Which of these two rules do you think is most consistent with the pluralist justifications for waste doctrine described by Professor Purdy? Which do you think is most consistent with the law-and-economics approach? Do either of the rules require some other form of justification, and if so, what might that justification be?

Chapter 12

Preserving Marketability

As we saw in our discussion of estates and future interests, the common law gave property owners a fairly diverse and subtle array of tools to effectuate their intent regarding the use and disposition of their property. But this level of control raises serious potential for conflicts between the plans and wishes of the property owners of yesterday and the needs and desires of (actual and aspiring) property owners of today.

Consider that about 80 years before the Empire State Building was constructed, the land on which it now stands was a farm situated a mile beyond the northern edge of the urban quarters of New York City. See JAMES REMINGTON MCCARTHY & JOHN RUTHERFORD, PEACOCK ALLEY: THE ROMANCE OF THE WALDORF-ASTORIA 4-10 (1931). What if the first private owner of that farm—John Thompson, who purchased it in 1799 out of the common lands held by the city government for \$2,400 (*id.*)—had executed a conveyance of the land that included a future interest in “the eldest of my great-great-great-great grandchildren”? What if he had devised the land to his eldest child “on condition that the family farm may never be sold”? Or “on condition that the land may be used for farming purposes only”? Could the Empire State Building ever have been built? If not, is that a result we would be happy with?

The common law recognized that some property owners might try to dictate the disposition of property much farther into the future than could be justified by any legitimate interest or expertise they might have. As one commentator put it, writing in 1967: “[I]t would have been utterly impossible for any testator dying in 1866 to foresee the events that have taken place in the succeeding century, and . . . any prediction as to what may occur in the century following 1966 would be even more unlikely to conform to reality.” W. BARTON LEACH, PROP-

ERTY LAW INDICTED! 71 (1967). As years pass, new generations undertake stewardship of resources, and the economic, social, and cultural demands on those resources change with the times. Allowing long-dead property owners to dictate the disposition of those resources to the fourth, fifth, or sixth generation after they're gone significantly limits the ability of the possessors of today to flexibly direct resources to uses appropriate to the age.

The common law developed various doctrines designed to balance respect for property owners' wishes to provide for their families as they see fit with vigilance against the dangers of dead-hand control. One powerful tool for striking this balance is the infamous **Rule Against Perpetuities**. We will not be studying the Rule at any length here, but its classic formulation—that an interest in property is void unless it necessarily will vest within 21 years of the end of a life in being at the time the interest is created—essentially operates to limit a property owner's control to one generation beyond the end of his own life. For example, a grant to John Thompson's great-great-great-great-grandchild would be clearly invalid under the Rule Against Perpetuities, but a grant by John Thompson to his living daughter's yet-unborn child would almost certainly be valid.¹

Beyond limiting the *duration* of property owners' control, the common law developed additional rules regarding the *types* of restrictions grantors could place on otherwise valid interests in property that they conveyed. The following cases provide some examples. As you read them, consider how the principles they rely on relate to the aforementioned balance between respecting property owners' wishes and guarding against dead-hand control.

Ford v. Allen
526 S.W.2d 643 (Ct. Civ. App. Tex. 1975)

O'QUINN, Justice.

Chester Melvin Ford and Lola Mae Ford, the deceased persons whose wills are under review, were married in August of 1943, and Clyde M. Ford, appellant here and plaintiff below, was the only child born to their marriage. Mr. [Chester] Ford had been married twice prior to his marriage to Mrs. Ford, but had no children from those marriages. Mrs. Ford also had

¹We say "almost" only because if Thompson for some reason made the future interest in his unborn grandchild subject to the condition precedent of that grandchild attaining an age of more than 21 years, the interest would be void under the common-law Rule Against Perpetuities.

been married earlier, and from that marriage she had a son, Otis Martin Allen, who died in April of 1958, leaving three sons, resulting from two marriages. The three surviving sons were defendants below and are appellees in this appeal.

The undisputed evidence supports the finding of the trial court that Chester Melvin Ford and his wife, Lola Mae Ford, each executed a holographic will on the same day in April of 1960, and each of them devised "all my property to my beloved" spouse, followed by certain additional identical language which is under dispute. Mr. Ford died November 25, 1972, and less than a month later Mrs. Ford died, on December 18, 1972.

It also appears undisputed that, as the court found, Mr. Ford at the time of his death owned approximately 450 acres of land in Bell County

The language of the wills giving rise to this suit, as contained in the will of Mr. Ford, follows:

After the Payments of my Just Debts I devise all my property to my beloved wife Lola Mae Ford to do with as she See fit except that she is not to Sell, Morage (sic), or Lease any of our real Estate for more than Three (3) years without the written agreement of our son Clyde Melvin Ford.

Appellant contends that the language is ambiguous and requires construction, and that under a proper construction the language "created a life estate in real property in Lola Mae Ford with remainder to Clyde M. Ford in fee simple, or alternatively created a testamentary trust expressly or by implication for the use and benefit of Clyde M. Ford."

. . . The trial court concluded (1) that the language in the wills, providing that the devisee was not to sell, mortgage, or lease any of the realty for three years without written agreement of Clyde M. Ford, was "void as being a restraint on alienation and repugnant to the devise in fee;" and (2) the language of the wills . . . devised fee simple title to all property, since the wills contained no "language clearly showing a lesser estate than the fee was intended to be devised." We approve these conclusions as correct applications of the law to the language of the wills.

Appellant contends that by extrinsic evidence it may be demonstrated that the true intent of Mr. and Mrs. Ford was to devise their real property to their only son, Clyde M. Ford, and that because of the ambiguity of the language in the wills, such evidence should have been considered

In brief, the evidence was that the real estate was the separate property of Mr. Ford, and that the three grandsons of Mrs. Ford were not kin to Mr. Ford; that Clyde M. Ford had helped to work the lands contained in the 450 acres, whereas the defendants had never worked any part of the land; that the grandsons were not close to their grandmother or to Mr. Ford, and none of them attended either the funeral of Mr. Ford or their grandmother; that Mrs. Ford set up a savings account for the grandsons and this alone was intended to take care of them; that Clyde M. Ford was close to his parents and was the natural object of the deceaseds' bounty, and the defendants were not; that during their life both Mr. and Mrs. Ford indicated orally that they wanted Clyde to have the land.

It is the established rule that an ambiguity arises only when the meaning which emanates from language used in the will admits of more than one interpretation. We find no ambiguity in the language of the Ford wills which in each writing clearly and plainly devises all property to the other spouse to do with as the other may see fit. The attempt, in language that follows, to place a restraint on alienation could not change or nullify the devise. It is not a function of the courts, nor is it a role the courts may assume, to revise or to make over the writing in a will to achieve results different from results which flow from the plain language used by the maker of the will. The courts may not speculate, from extrinsic evidence or otherwise, that some other result may have been intended.

... Appellant also urges that the trial court erred in refusing to make a determination of heirship, and under these points insists that if Mrs. Ford died intestate, appellant is entitled to one-half of her estate and defendants are entitled only to the remaining one-half. The trial court correctly declined to decide the matter of heirship since administration of the estates is still pending in Bell County, where the County Court has acquired jurisdiction to determine heirs of the deceased.

All of appellant's point of error have been carefully examined and considered, and all points are overruled.

The trial court in its judgment denied the request of Clyde M. Ford that attorney's fees, court costs, and other expenses incurred by this suit to construe the wills be paid out of the two estates as costs and expenses of administration, and ordered all such costs and expenses to be paid by Ford individually.

The judgment of the trial court is in all things affirmed. It is ordered that costs of this appeal be taxed against appellant, Clyde M. Ford, individ-

ually.

Notes and Questions

12.1. Do you think Clyde is right that his parents wanted him to have the farm after both of them died? Or at least that they would rather Clyde have it than Lola Mae's estranged grandchildren from another marriage? If so, why do you think both Chester and Lola Mae executed wills without any explicit devise to Clyde? If not, why do you think the Fords' wills included a restriction on alienating the farm without Clyde's consent? Consider the previous discussion of holographic wills here.

12.2. Why is the court unwilling to consider Clyde's evidence that his parents wanted him to have the farm? What's wrong with looking outside the four corners of the will itself to understand what the testator *really* wanted? Would we take a similar view of extrinsic evidence if the document being interpreted were, say, a contract for the sale of goods?

12.3. Justice O'Quinn says that the language of the Fords' wills "clearly and plainly devises all property to the other spouse to do with as the other may see fit." But this is at best disingenuous and at worst deliberately false: the wills also, *in the very next clause*, "clearly and plainly" purport to limit what the other spouse can do with the property in the absence of Clyde's consent. Why does the court enforce the former clause and render the latter clause void?

The reasoning of the trial court in this case may help explain things. Note that the trial court is said to have given two somewhat different reasons for invalidating Clyde's power to block any effort by his surviving parent to alienate the farm (and with it any future interest he might have claimed by implication from this right). We are told that an attempt to convey such a power to Clyde must be void, both "as a restraint on alienation," and as "repugnant to the . . . fee." These reasons invoke two long-standing common-law principles: a policy against **restraints on alienation**, and the doctrine of **numeris clausus**.

Courts have generally strongly disfavored overt restraints on a grantee's right to alienate their interest. Such restraints can make it quite difficult to move resources from lower-valued to higher-valued uses. A current owner of a resource might well be willing to sell it to a willing buyer who wants it more and can make more valuable use of it, but if we enforce a restraint on alienation imposed on the current owner by a past grantor, such a beneficial transaction cannot happen. The result would be serious misallocation of resources, and the rule that restraints on alienation are void demonstrates the common law's will-

ingness to defeat even the clearly expressed intent of a grantor where necessary to avoid such misallocation.

Numerus clausus (literally, “the number is closed”) is a legal principle derived from civil law systems but invoked in Anglo-American property law to refuse recognition of any interest in land other than the traditional common-law estates. Under this principle property owners may not create any new “bundle of rights” other than those that are already represented by the common-law estates themselves. So, because a possessory estate subject to a veto on the right of alienation by someone other than the possessory estate’s owner is not a “bundle of rights” that we can identify among our common-law estates, it must be outside the power of the Fords to create it. Courts have similarly rejected efforts by testators to, for example, give their surviving spouses unfettered control over devised property while also giving any property left over at the surviving spouse’s death to another beneficiary. Such hybrid bequests are, like the devise in *Ford*, typically treated as a fee simple (rendering the putative future interest void). See, e.g., *Sumner v. Borders*, 98 S.W.2d 918 (Ky. 1936).

Is the rule of *numerus clausus* motivated by the same rationales that give rise to the rule against restraints on alienation? Imagine if, rather than selecting from the fixed menu of common-law estates, property owners were free to build their own tailored bundles of property interests for grantees, with their own ad hoc collections of limitations and restrictions on the rights of those grantees, and that these idiosyncratic collections of rights and limitations became commonplace across society. Suppose you now want to buy a parcel of land in that society. Can you be sure what you’re buying? How? How well would we expect a real estate market built on a potentially infinite variety of interests in real property to function? See generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

12.4. Are there other principles underlying the rule against restraints on alienation or the *numerus clausus* principle other than ensuring a well-working market for property rights? Consider that the law of *intellectual property* has long included a so-called “first sale” doctrine, which provides that the first authorized purchaser of a good embodying an intellectual property right (for example, a book embodying a copyrighted work, or a machine embodying a patented invention) has the power to alienate *that particular article* free of any claim by the intellectual property right owner. See, e.g., 17 U.S.C. § 109(a) (copyright); *Adams v. Burke*, 84 U.S. 453, 456 (1873) (“[W]hen the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its

use, he receives the consideration for its use and he parts with the right to restrict that use.”). At least where the owners of the relevant intellectual property rights can be clearly identified, can this rule be justified by the same principle as the rule against restraints on alienation of *land*? If not, what is the rationale for the first-sale doctrine?

12.5. Consider the following excerpts from the September 6, 2012 Amazon Kindle Store Terms of Use Agreement,² which governs the downloading of electronic copies of copyrighted literary works from Amazon for viewing on electronic devices.

“Kindle Content” means digitized electronic content obtained through the Kindle Store, such as books, newspapers, magazines, journals, blogs, RSS feeds, games, and other static and interactive electronic content.

....

Use of Kindle Content. Upon your download of Kindle Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times, solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use. Kindle Content is licensed, not sold, to you by the Content Provider

Limitations. Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Kindle Content.

....

Termination. Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Kindle Store and the Kindle Content, and Amazon may

²*Kindle Store Terms of Use*, AMAZON (Sept. 6, 2012), <https://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>.

immediately revoke your access to the Kindle Store and the Kindle Content without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

Is this agreement consistent with the rules you've just learned? If not, is it enforceable? See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

12.6. Might a grantor impose restrictions on a grantee *other than* explicit limitations on the power to alienate that would raise the same concerns as those that motivate the rule against restraints on alienation? Consider the following cases:

Wills v. Pierce
208 Ga. 417 (1951)

... Mrs. Walter Tilley Pierce and others filed in Terrell Superior Court, against Mrs. J. C. Wills and others, a petition, which alleged substantially the following: On December 1, 1923, J. W. Tilley by warranty deed conveyed described realty known as the Aven Home to J. C. Wills. The deed contained the clause: "The above property is conveyed to J. C. Wills [the grantee] to be used as a home by himself, his family and his heirs, upon condition that the same be used by him or them as a home and a residence, and further that upon the failure of the said condition and the abandonment of said property as a residence by [the grantee], . . . his family or heirs, the same shall revert to [the grantor's] . . . estate and go as directed by [the grantor's] . . . will." The grantor died testate in 1924, and under the terms of his will the petitioners are the owners of the reversionary interest in the realty. The grantee died intestate in 1945, leaving as his sole surviving heirs his widow, Mrs. J. C. Wills, and two named children, who are the defendants. The condition under which the realty was conveyed has been violated, in that the defendants have abandoned the property as a home and residence, and are now residing elsewhere. . . . The petitioners prayed . . . that the interest of the defendants in the realty be declared forfeited, and the fee-simple title thereof be decreed to be in the petitioners; and that the petitioners have general equitable relief.

The defendants demurred to the petition on the ground that it failed to set forth any cause of action against them. The trial court overruled the demurrer, and the defendants excepted . . .

ATKINSON, Presiding Justice (after stating the foregoing facts).

The granting clause in the deed under consideration was: "In consideration of the sum of one dollar to me paid, I . . . do hereby sell and convey to [the grantee and] . . . his heirs, a tract or parcel of land and appurtenances in fee simple." Then followed a description of the land, after which the grantor inserted the provision that the property was to be used as a home by the grantee, his family, and his heirs, and that upon the abandonment of the property as a residence by the grantee, his family, or his heirs, the same should revert to the grantor's estate and go as provided in his will.

Standing alone, the first clause in the deed would have conveyed an unconditional fee-simple estate, and the sole question for determination is whether or not the condition subsequent under which the forfeiture is claimed is valid and enforceable.

A provision in a deed or will that a fee-simple estate may not be sold is void as being repugnant to the estate granted.

While no express language is used in the present deed inhibiting alienation of the property, nevertheless—the condition being that the property was to be used as a home by the grantee, his family, and his heirs—the requirement to use as a home and the right to sell are mutually exclusive, and whether or not the case falls within the rule against perpetuities, the conclusion is inescapable that since the grantee and his heirs must use the premises as a home they cannot sell it.

. . . A different question would have been presented if the condition subsequent had been that the premises should be used "as a home" or "for residential purposes" generally. See, in this connection, *City of Barnesville v. Stafford*, 161 Ga. 588(1), 131 S.E. 487, 43 A.L.R. 1045; *Taylor v. Bird*, 150 Ga. 626, 104 S.E. 502; *Rustin v. Butler*, 195 Ga. 389, 24 S.E.2d 318; *Williams v. Ramey*, 201 Ga. 737(1), 41 S.E.2d 159; *Tabor v. Gilmer County*, 205 Ga. 439(1), 53 S.E.2d 915; and similar cases, where conditions subsequent requiring use of property generally for park, school, religious, and courthouse purposes were held valid and enforceable.

Accordingly, the present petition, seeking to enforce a forfeiture for breach of a void condition subsequent, failed to set forth a cause of action, and the trial court erred in overruling the defendants' general demurrer.

Judgment reversed.

All the Justices concur.

Notes and Questions

12.7. A “fee simple subject to a condition subsequent” is another type of estate, in which the grantee’s property rights may terminate if a condition that the grantor specified becomes true. Do grantors appear to have the power to set such conditions subsequent after *Wills*? If so, what are its limits?

12.8. Why does the court consider the enforcement of the condition that the property at issue “be used as a home by [the grantee], his family and his heirs” to present a “different question” than the enforcement of a condition “that the premises should be used ‘as a home’ or ‘for residential purposes’ generally”? What makes these questions different?

12.9. Is there any relationship between the holding of *Wills* and our previously discussed rule against restraints on alienation or the principle of *numerus clausus*? If so, what’s the connection?

Smedley v. City of Waldron 739 F.2d 399 (8th Cir. 1984)

PER CURIAM.

In 1940, the City of Waldron, lacking funds to acquire a reservoir site, asked Hannah Smedley to donate land for that purpose. The governing agreement provided in part that:

5. The City of Waldron shall never sell, transfer, convey, lease, rent or otherwise dispose of the lands herein above described to other persons, firms, groups and/or corporations, except successors and/or assigns of itself, and if it attempts to do so, the lands immediately revert to Hannah Smedley and her heirs[.]

In 1977, Harry Smedley (Hannah Smedley’s sole heir and devisee) sued unsuccessfully for reconveyance, arguing that the city had abandoned the land. In dismissing the complaint, the district court found that the city had not abandoned the reservoir; rather, it continuously maintained and used it as a reserve water supply.

In 1981, the city leased the oil and gas rights of the deeded land to Texas Oil and Gas Corporation. As a result, Harry Smedley brought this case, alleging that the city’s lease of the mineral rights subjacent to the land violated paragraph 5 of the 1940 agreement. For relief, he demanded immedi-

ate reconveyance of the land and payment of all monies the city received under the lease. Both parties moved for summary judgment. The district court found that the agreement was an impermissible restraint on alienation and granted the city's motion for summary judgment. We reverse and remand for further proceedings.

Some Arkansas courts have disapproved restraints on alienation. *See, e.g., First National Bank of Fort Smith v. Graham*, 195 Ark. 586, 593, 113 S.W.2d 497 (1938); *Letzkus v. Nothwang*, 170 Ark. 403, 408, 279 S.W. 1006 (1926). . . . [But w]hen the grant is to a governmental unit for a public purpose, Arkansas courts have been reluctant to void the grant as impermissibly restraining alienation if doing so would flout the grantor's intent. One line of Arkansas cases, for example, approved disabling language in grants to localities where the land was to be used for school purposes. *McCrory School Dist. of Woodruff v. Brogden*, 231 Ark. 664, 333 S.W.2d 246, 249–50 (1960); *Vanndale Special School Dist. No. 6 v. Feltner*, 215 Ark. 252, 220 S.W.2d 131, 133 (1949); *Taylor v. School Dist. No. 45 of Searcy County*, 214 Ark. 434, 216 S.W.2d 789 (1949); *Coffelt v. Decatur School Dist. No. 17*, 212 Ark. 743, 208 S.W.2d 1, 2 (1948); *Milner v. New Edinburg School Dist.*, 211 Ark. 337, 200 S.W.2d 319, 322 (1947); *Williams v. Kirby School Dist.*, 207 Ark. 458, 181 S.W.2d 488, 490 (1944); *Steel v. Rural Special School Dist. No. 15*, 180 Ark. 36, 20 S.W.2d 316, 317 (1929). Because summary judgment in favor of the city ignores the public purpose of the grant and defeats the donor's intent, we reverse the district court's judgment.

Having decided that the restraint on alienation here is not impermissible, we remand the case to the district court to resolve the important remaining factual questions. The district court shall determine whether the mineral lease is a violation of the parties' agreement. Because Arkansas courts hold that if the restraint is valid the intent of the donor controls, *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532, 535 (1974), the district court shall determine whether the donor intended that the city would lose the land only if the land was not used for a reservoir. Finally, the district court should determine the best means of fulfilling the donor's intent: will her intentions be satisfied merely by awarding her heirs the revenues from the lease, or will the extreme remedy of forfeiture of the reservoir to the heirs be necessary?

Notes and Questions

12.10. **Wait . . . what?** How can Hannah Smedley's clearly expressed intent to absolutely forbid the City of Waldron from alienating the reservoir get around the common-law rule against restraints on alienation? And why can't Chester Ford's far more modest but no less clearly expressed intent to restrain Lola Mae's right to alienate do the same thing?

12.11. **Restraints on Alienation vs. Restrictions on Use.** In *Wills* the court seemed to be concerned that the condition subsequent restricting the grantee's use of the land conveyed was a sort of restraint on alienation in disguise. Could a naked restraint on alienation—such as the one in *Smedley*—really be a restriction on *use* in disguise? If so, would it be any less offensive to the principles underlying the rule against restraints on alienation?

12.12. Does *Smedley* reach the opposite result from *Ford* and *Wills* because the grantor's *motivation* is different in *Smedley* than in the other cases? (Is it?) Because the grantee is a public entity rather than a private individual? Because the restraint on the grantee is less onerous? (Is it?)

Chapter 13

Easements

13.1 What Is an Easement?

Easements are interests in land. Unlike fee simple ownership, they are non-possessory. Rather, they allow the easement holder to use or control someone else's land. Suppose Anna owns Blackacre, and Brad owns Whiteacre, which borders Blackacre. Anna would like to cross Whiteacre to reach Blackacre. She could ask Brad for permission to cross, but even if he says yes, permission can be revoked. Brad might also convey Whiteacre to a less welcoming owner. Anna may therefore wish to acquire a property interest that gives her an *irrevocable* right to cross over Whiteacre. If Brad conveys her this interest (by sale or grant), Anna now owns an **easement of access**, which is a right to enter and cross through someone's land on the way to someplace else.

Terminology. Easements come in multiple flavors. The first distinction is between affirmative and negative easements. An **affirmative easement** lets the owner do something on (or affecting) the land of another, known as the **servient estate** (or **servient tenement**). The right is the **benefit** of the easement, and the obligation on the servient estate is its **burden**.

As noted above, a common affirmative easement is an **easement of access** (also known as an **easement of way**), which requires the owner of the servient estate to allow the easement holder to travel on the land to reach another location. In the example above, Anna has an affirmative easement to cross Whiteacre, the servient estate, to access Blackacre.¹ A **negative easement** pro-

¹If the easement holder is allowed to take something from the land (suppose Anna has the right to harvest wheat from Whiteacre while in transit to Blackacre), the right is called a *profit*

hibits the owner of the servient estate from engaging in some action on the land. For example, if Anna has a solar panel on her property, she might acquire a solar easement from Brad that would prohibit the construction of any structures on Whiteacre that might block the sun from Anna's panel on Blackacre.

Another distinction is between the **easement appurtenant** and **easement in gross**. An easement appurtenant benefits another piece of land, the **dominant estate**. The owner of the dominant estate exercises the rights of the easement. If ownership of the dominant estate changes, the new owner exercises the powers of the easement; the prior owner retains no interest. So if Anna's easement to cross Whiteacre to reach Blackacre is an easement appurtenant, Blackacre is the dominant estate. If she conveys Blackacre to Charlie, Charlie becomes the owner of the easement.

In an easement in gross, the easement benefits a specific person, who exercises the rights of the easement rights regardless of land ownership. If Anna's easement to cross Whiteacre to reach Blackacre is an easement in gross, she keeps her easement even if she conveys Blackacre. In general, the presumption is in favor of an easement appurtenant over an easement in gross. Why do you think that is?

Easements are part of the larger law of **servitudes**, which include real covenants and equitable servitudes. A servitude is a legal device that creates a right or obligation that **runs with the land**. A right runs with the land when it is enjoyed not only by its initial owner but also by all successors to that owner's benefited property interest. A burden runs with the land when it binds not only its initial obligor but also all successors to that obligor's burdened property interest. A servitude can be, among other things, an easement, profit, or covenant. These interests overlap, and the **RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)** (2000) seeks to unify them.² As a matter of history, however, easement law developed as a distinct set of doctrines, and this chapter gives them

à prendre or profit. Profits were traditionally classified as distinct from easements, though their legal treatment is typically similar. See, e.g., *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 414 (Wis. 1994) ("[W]e can find no distinction between easements and profits relevant to recording the property interest[.]"). The RESTATEMENT characterizes the profit as a kind of easement. § 1.2.

²A covenant is a servitude if either its benefit or its burden runs with the land; otherwise it is merely a contract enforceable only as between the original contracting parties (or perhaps a gratuitous promise enforceable by nobody at all). When a covenant is a servitude, it may equivalently be described as either a "servitude" or "a covenant running with the land." We will discuss covenants in Chapter 26.

separate treatment.³

13.2 Creating Easements

13.2.1 Express Easements

Because easements are interests in land, **express easements** are subject to the Statute of Frauds. Failures to comply with the statute may still be enforced in cases of reasonable detrimental reliance. See, e.g., *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.9.

Third parties. Easements are often created as part of the transfer of land (e.g., selling a property, but retaining the right to use its parking lot). Traditionally, grantors could reserve an easement in the conveyed land for themselves, but could not create an easement for the benefit of a third party. This rule led to extra transactions. Where the traditional rule applied, if A wanted to convey to B while creating an easement for C, A could convey to C who would then convey to B, while reserving an easement.

The modern trend discards this restriction. See, e.g., *Minton v. Long*, 19 S.W.3d 231, 238 (Tenn. Ct. App. 1999). The California Supreme Court explained:

The rule derives from the common law notions of reservations from a grant and was based on feudal considerations. A reservation allows a grantor's whole interest in the property to pass to the grantees, but revests a newly created interest in the grantor. While a reservation could theoretically vest an interest in a third party, the early common law courts vigorously rejected this possibility, apparently because they mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin. Insofar as this mistrust was the foundation of the rule, it is clearly an inapposite feudal shackle today. Consequently,

³Moreover, the THIRD RESTatement is somewhat notorious for the extent to which it seeks not only to “restate” the common law, but to push it in a particular direction. While the THIRD RESTatement does tend to provide the modern approach to most servitudes issues, it has a tendency to advocate against traditional, formalist rules that are often still good law in many American jurisdictions. We will not thoroughly explore these distinctions here; you should however be aware of the importance of thoroughly investigating the applicable law in your jurisdiction if you ever encounter servitudes in practice.

several commentators have attacked the rule as groundless and have called for its abolition.

California early adhered to this common law rule. In considering our continued adherence to it, we must realize that our courts no longer feel constricted by feudal forms of conveyancing. Rather, our primary objective in construing a conveyance is to try to give effect to the intent of the grantor. In general, therefore, grants are to be interested in the same way as other contracts and not according to rigid feudal standards. The common law rule conflicts with the modern approach to construing deeds because it can frustrate the grantor's intent. Moreover, it produces an inequitable result because the original grantee has presumably paid a reduced price for title to the encumbered property.

Willard v. First Church of Christ, Scientist, 7 Cal. 3d 473, 476-77 (1972) (citations omitted). The modern RESTATEMENT likewise dispenses with the traditional approach, allowing the direct creation of easements on behalf of third parties. RESTATEMENT § 2.6. Some jurisdictions nonetheless retain the bar, citing reliance interests and the prospect that such easements create instability in title records. *Estate of Thomson v. Wade*, 509 N.E.2d 309, 310 (N.Y. 1987) ("The overriding considerations of the public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation, persuade us to decline to depart from our settled rule." (internal citation and quotation omitted)). There is an argument that the extra transactions required by the traditional rule promote better title indexing. The RESTATEMENT observes:

To avoid the prohibition, two conveyances must be used: the first conveys the easement to the intended beneficiary; the second conveys the servient estate to the intended transferee. The only virtue of the rule is that it tends to ensure that a recorded easement will be properly indexed in the land-records system, but there are so many exceptions to the rule, where it is still in force, that it does not fill that function very well.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.6 cmt. a (2000). Are you persuaded that the benefits of a separate transaction for recording purposes outweigh the costs?

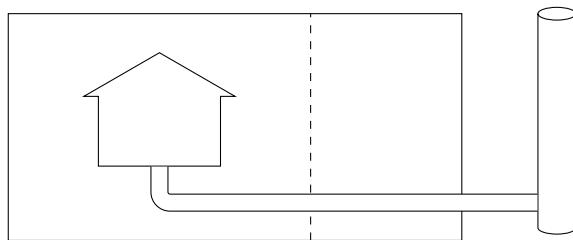


Figure 13.1: A divided parcel of land with a sewer line running through both lots.

13.2.2 Implied Easements

Easements may come into being without explicit agreements. They may arise from equitable enforcement of implied agreements or references to maps or boundary references in conveyances. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.13. In this section, we focus on two forms of implied easements: An **easement implied by existing use** and an **easement by necessity**. Both such easements commonly arise as a byproduct of land transactions.

13.2.2.1 Easement Implied by Existing Use

An **easement implied by existing use** may arise when a parcel of land is divided and amenities once enjoyed by the whole parcel are now split up, such that in order to enjoy the amenity (a utility line, or a driveway, for example), one of the divided lots requires access to the other. Imagine, for example, a home connected to a city sewer line via a privately owned drainpipe, on a parcel that is later divided by carving out a portion of the lot between the original house and the sewer line connection, as shown in Figure 13.1.

In such a situation, courts will frequently find an easement implied by prior existing use, allowing the owner of the house to continue using the drainpipe even though it is now under someone else's land. See, e.g., *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938). There are, however, some limits to the circumstances that will justify the implication of such an easement:

[T]he easement implied from a preexisting use, [is] also characterized as a quasi-easement. Such an easement arises where, during the unity of title, an apparently permanent and obvious

servitude is imposed on one part of an estate in favor of another part. The servitude must be in use at the time of severance and necessary for the reasonable enjoyment of the severed part. A grant of a right to continue such use arises by implication of law. An implied easement from a preexisting use is established by proof of three elements: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance or transfer separating that ownership; (2) before severance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transferrer.

Dudley v. Neteler, 924 N.E.2d 1023, 1027-28 (Ill. App. 2009) (internal citations and quotations omitted). The following notes consider each of these elements.

Notes and Questions

13.1. Common Ownership. Are easements implied by prior existing use fair to owners of subdivided land? Why shouldn't we require purchasers of subdivided lots to "get it in writing"—that is, to bargain for easements to obvious and necessary amenities when accepting a parcel carved out from a larger plot of land? For that matter, why don't we require the original owner to bargain for the right to continue to use land that they are purporting to sell? Who do we think is in a better position to identify the need for such an easement, the prior owner of the undivided parcel, or the purchaser of the carved-out portion of that parcel? Should the answer matter in determining whether to imply an easement or not?

The common law did draw distinctions between implied *reservation* of an easement (to the owner of the original undivided lot) and implied *grant* of an easement (to the first purchaser of the separated parcel). The latter required a lesser showing of necessity than the former, which would only be recognized upon a showing of *strict* necessity. The theory was that the deed that first severed the parcels from one another should be construed against its grantor, who was in a better position to know of the need for an easement to property she already owned, and to write such an easement into the deed she was delivering. Indeed, a minority of jurisdictions still follow this rule.

The modern RESTATEMENT, in contrast, makes no distinction as to whether the easement is sought by the grantor or the grantee, providing simply that the use will continue if the parties had reasonable grounds to so expect. Factors tending to show that expectation are that: "(1) the prior use was not merely temporary or casual, and (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and (3) existence of the prior use was apparent or known to the parties, or (4) the prior use was for underground utilities serving either parcel." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.12 (2000). The commentary allows for the possibility that the balance of hardships and grantor knowledge might justify a court's refusing to imply a servitude in favor of the grantor when it would have for the grantee. *Id.* cmt. a. But the general approach is to accept and accommodate the fact that grantors do not always protect themselves as well as they perhaps should. *Id.* ("Although grantors might be expected to know that they should expressly reserve any use rights they intend to retain after severance, experience has shown that too often they do not.").

13.2. **Reasonable necessity.** Reasonable necessity is something less than absolute necessity. See, e.g., *Rinderer v. Keeven*, 412 N.E.2d 1015, 1026 (Ill. App. 1980) ("It is well established that one who claims an easement by implication need not show absolute necessity in order to prevail; it is sufficient that such an easement be reasonable, highly convenient and beneficial to the dominant estate." (internal quotation and citation omitted)). Does this leave courts with too much discretion to impose easements? A minority of jurisdictions make a formal distinction between implied easements in favor of grantees and grantors, requiring strict necessity in the case of the latter. RESTATEMENT § 2.12. *But see Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.*, 489 So. 2d 22, 22 (Fla. 1986) (concluding that an absolute necessity is required in all cases).

13.3. **What is apparent?** Should home purchasers be expected to investigate the state of utility lines upon making a purchase? The RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) reports that most cases consider the question imply the easement when underground utilities are at issue. § 2.12 (Reporter's Note) (such easements "will be implied without regard to their visibility or the parties' knowledge of their existence if the utilities serve either parcel"). Are such uses plausibly apparent? Or is this simply a case of the law implying terms that the parties likely would have bargained for had they thought to consider the matter?

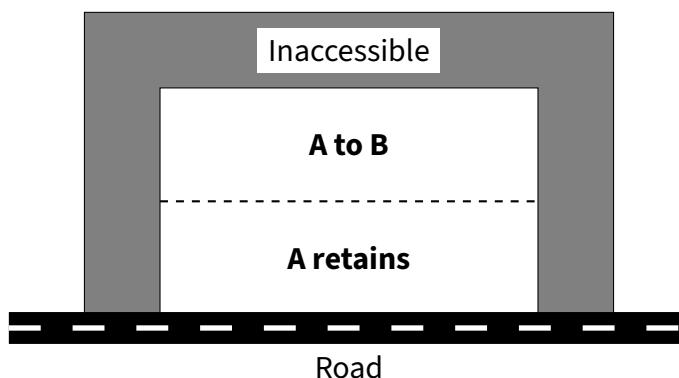


Figure 13.2: A “landlocked” parcel of land.

13.2.2.2 *Easements by Necessity*

An **easement by necessity** (or sometimes **way by necessity**) arises when land becomes landlocked or incapable of reasonable use absent an easement. For example, if A owns a rectangular parcel bordered on the north, east, and west by privately owned land and on the south by a public street, and conveys to B a strip of her land on the northern boundary, B will acquire an easement by necessity across the southern portion of the parcel retained by A, as shown in Figure 13.2.

Thomas v. Primus
84 A.3d 916 (Conn. App. 2014)

MIHALAKOS, J.

The plaintiffs, William Thomas, Craig B. Thomas and Andrea Thomas Jabs, appeal from the trial court’s declaratory judgment granting an easement by necessity and implication in favor of the defendant, Bruno Primus. On appeal, the plaintiffs claim that the court erred in finding an easement by necessity.¹ The plaintiffs also claim that the defendant’s claim for an easement should have been barred by the defense of laches. We affirm the judgment of the trial court.

¹The plaintiffs also claim that the court erred in finding an easement by implication. Because we conclude that the court properly found an easement by necessity, we need not consider this claim.

The following facts, as found by the court, are relevant to this appeal. The plaintiffs own property located at 460 Camp Street in Plainville. The defendant owns one and one-quarter acres of undeveloped land abutting the eastern boundary of the plaintiffs' property. The dispute at issue here concerns the northernmost portion of the plaintiffs' property, a twenty-five feet wide by three hundred feet long strip of land known as the "passway," which stretches from the public road on the western boundary of the plaintiffs' property to the defendant's property to the east.

Both the plaintiffs' and the defendant's properties originally were part of a single lot owned by Martha Thomas, the grandmother of the plaintiffs. In 1959, Martha Thomas conveyed the one and one-quarter acres of landlocked property, currently owned by the defendant, to Arthur Primus, the defendant's brother. At the conveyance, which the defendant attended, Martha Thomas and Arthur Primus agreed that access to the landlocked property would be through the passway, which until that time had been used by Martha Thomas to access the eastern portions of her property. In 1969, the defendant took possession of the land. In 2002, the plaintiffs took possession of the western portion of Martha Thomas' property, including the passway.

In 2008, the plaintiffs decided to sell their property. When the defendant learned of their intention, he sent a letter to the plaintiffs asserting his right to use the passway to access his land. In 2009, the plaintiffs signed a contract to sell their property, but the prospective purchasers cancelled the contract when they learned of the defendant's claimed right to use the passway. The plaintiffs then brought the action to quiet title that is the subject of this appeal, seeking, among other things, a declaratory judgment that the defendant had no legal interest in the property. The defendant brought a counterclaim asking the court to establish his right to use the passway uninterrupted by the plaintiffs. . . . In response to the defendant's counterclaim, the plaintiffs asserted the special defense of laches.

A trial was held on June 5 and 6, 2012. On August 31, 2012, the court issued its decision, finding in favor of the defendant on the plaintiffs' complaint and on his counterclaim, and concluding that the defendant had an easement by necessity and an easement by implication over the passway. Specifically, the court found an easement by necessity was created when Martha Thomas conveyed a landlocked parcel to Arthur Primus, as it was absolutely necessary in order to access the property. . . .

I

On appeal, the plaintiffs claim that the court erred in finding an easement by necessity because (1) the defendant's predecessor in title had the right to buy reasonable alternative access to the street, (2) the defendant failed to present full title searches of all adjoining properties, and (3) Martha Thomas and Arthur Primus did not intend for an easement to exist. . . .

Originating in the common law, easements by necessity are premised on the conception that "the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance . . ." *Collins v. Prentice*, 15 Conn. 39, 44 (1842). An easement by necessity is "imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor . . ." *Hollywyle Assn., Inc. v. Hollister*, 164 Conn. 389, 398, 324 A.2d 247 (1973). The party seeking an easement by necessity has the burden of showing that the easement is reasonably necessary for the use and enjoyment of the party's property.

A

First, the plaintiffs claim that an easement by necessity does not exist because the defendant's predecessor in title had the right to buy reasonable alternative access to the street. We disagree.

In considering whether an easement by necessity exists, "the law may be satisfied with less than the absolute need of the party claiming the right of way. The necessity need only be a reasonable one." *Hollywyle Assn., Inc. v. Hollister*, supra, 164 Conn. at 399, 324 A.2d 247.

In this case, the plaintiffs presented evidence at trial that, at the time he purchased the property from Martha Thomas in 1959, Arthur Primus maintained bonds for deed that allowed him to purchase access to Camp Street through a different piece of property for \$900. Although he did not exercise this right, the plaintiffs contend that the fact that Arthur Primus held this option establishes that the defendant's use of the passway is not reasonably necessary.

The plaintiffs correctly note that the ability of a party to create alternative access through his or her own property at a reasonable cost can preclude the finding of reasonable necessity required to establish an easement by necessity. Nonetheless, we are aware of nothing in our case law

that suggests that a party is required to purchase *additional* property in order to create alternative access, even at a reasonable price.²

Furthermore, easements by necessity need not be created at the time of conveyance. See *D'Addario v. Truskoski*, 57 Conn. App. 236, 247, 749 A.2d 38 (2000) (recognizing easement by necessity created by state taking and natural disaster). Even if we were to assume, arguendo, that Arthur Primus' bonds for deed made use of the passway unnecessary at the time he owned the property, those bonds for deed expired in 1962, several years before the defendant owned the property, and provide no reasonable alternative access today. Thus, we see no reason to disturb the court's finding that use of the passway is currently necessary for the use and enjoyment of the defendant's property. . . .

C

Finally, the plaintiffs argue that an easement by necessity does not exist because Martha Thomas and Arthur Primus did not intend for the easement to exist. We disagree.

The seminal case in this state on easements by necessity recognized that "the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties." *Collins v. Prentice*, *supra*, 15 Conn. at 44, 15 Conn. 39. This rationale does not, as the plaintiffs suggest, establish intent as an element of an easement by necessity. Instead, "[t]he presumption as to the intent of the parties is a fiction of law . . . and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use." (Citation omitted.) *Hollywyle Assn., Inc. v. Hollister*, *supra*, 164 Conn. at 400, 324 A.2d 247. Thus, absent an explicit agreement by the grantor and grantee that an easement does *not* exist, a court need not consider

²The plaintiffs' sole authority in support of their position; *Griffeth v. Eid*, 573 N.W.2d 829 (N.D. 1998); is distinguishable from the case before us. In that case, the North Dakota Supreme Court upheld a trial court's ruling that a party seeking an easement by necessity had not met his burden of establishing reasonable necessity because potential alternate access existed, including the possibility of purchasing an easement over another abutting property, and the party had not provided evidence that he had pursued these options and found them unavailing. In this case, there is no evidence in the record that the defendant had the opportunity to purchase alternate access.

intent in establishing an easement by necessity. See *O'Brien v. Coburn*, 46 Conn.App. 620, 633, 700 A.2d 81 (holding that “the intention of the parties [was] irrelevant” in case establishing easement by necessity), cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

In this case, the court found that the defendant’s property was landlocked and that access over the pass-way was reasonably necessary for the use and enjoyment of the defendant’s property. Therefore, the court found an easement by necessity to exist over the pass-way. This conclusion was supported by the record and there is no legal deficiency in the court’s analysis. . . .

Notes and Questions

13.4. As *Thomas* indicates, there are two traditional rationales for easements by necessity. The first considers it an implied term of a conveyance, assuming that the parties would not intend for land to be conveyed without a means for access. The second simply treats the issue as one of public policy favoring land use. See *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.15 cmt. a (2000).

13.5. *Thomas*’s implication to the contrary aside, the traditional view is that the necessity giving rise to an easement by necessity must exist at the time the property is severed. *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 2.15 (2000) (“Servitudes by necessity arise only on severance of rights held in a unity of ownership.”); *Roy v. Euro-Holland Vastgoed, B.V.*, 404 So. 2d 410, 412 (Fla. Dist. Ct. App. 1981) (“[I]n order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement both properties must at one time have been owned by the same party In addition, the common source of title must have created the situation causing the dominant tenement to become landlocked. A further requirement is that at the time the common source of title created the problem the servient tenement must have had access to a public road.”).

13.6. Easements by necessity are typically about access, but other kinds of uses may be necessary to the reasonable enjoyment of property. For example, suppose O conveys mineral rights to Blackacre to A. A would have both an easement of access to Blackacre and the right to engage in the mining necessary to reach the minerals. Likewise, an express easement of way may require rights to maintain and improve the easement. Access for utilities may also give rise to an

easement by necessity, creating litigation over which utilities are “necessary”:

When questioned by defendants as to why he could not use a cellular phone on his property, plaintiff testified he ran a home business and a cellular phone was not adequate to handle his business needs; for example, a computer cannot access the Internet over a cellular phone. Plaintiff also testified solar power and gas generators were unable to produce enough electricity to make his home habitable.

Smith v. Heissinger, 745 N.E.2d 666, 672 (Ill. App. 2001) (affirming finding of necessity of easement for underground utilities).

Courts often describe the degree of necessity required to find an easement by necessity as being “strict.” See, e.g., *Ashby v. Maechling*, 229 P.3d 1210, 1214 (Mont. 2010) (“Two essential elements of an easement by necessity are unity of ownership and strict necessity.”). It is certainly higher than that needed for an easement implied by existing use. That said, considerable precedent indicates that the necessity need not be absolute. See, e.g., *Cale v. Wanamaker*, 121 N.J. Super. 142, 148, 296 A.2d 329, 333 (Ch. Div. 1972) (“Although some courts have held that access to a piece of property by navigable waters negates the ‘necessity’ required for a way of necessity, the trend since the 1920’s has been toward a more liberal attitude in allowing easements despite access by water, reflecting a recognition that most people today think in terms of ‘driving’ rather than ‘rowing’ to work or home.”).

13.7. Several states provide owners of landlocked property a statutory right to obtain access through neighboring land by means of a **private condemnation** action. Some courts have held that the availability of private condemnation actions negate the necessity prong of a common law easement by necessity claim. See, e.g., *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287, 290 (Wyo. 1991) (“[A] civil action for a common law way of necessity is not available because of the existence of W.S. 24–9–101.”). Private condemnation actions may also extend to contexts beyond those covered by the common law easement by necessity. See, e.g., Cal. Civ. Code § 1001 (utilities).

13.2.3 Prescriptive Easements

Easements may also arise from prescription. An **easement by prescription** is acquired in a manner similar to adverse possession, as it is a non-permissive

use that ultimately ripens into a property interest. Recall the five elements of adverse possession: Entry and possession that is (1) actual, (2) exclusive, (3) hostile or under claim of right, (4) open and notorious, and (5) continuous for the statutory limitations period. Which (if any) of these elements might have to be modified where the right being acquired is not a right of possession, but a right of use?

Felgenhauer v. Soni

17 Cal. Rptr. 3d 135 (Cal. App. 2004).

GILBERT, P.J.

Here we hold that to establish a claim of right to a prescriptive easement, the claimant need not believe he or she is legally entitled to use of the easement. Jerry and Kim Felgenhauer brought this action to quiet title to prescriptive easements over neighboring property owned by Ken and Jennifer Soni. A jury made special findings that established a prescriptive easement for deliveries. We affirm.

Facts

In November of 1971, the Felgenhausers purchased a parcel of property consisting of the front portion of two contiguous lots on Spring Street in Paso Robles. The parcel is improved with a restaurant that faces Spring Street. The back portion of the lots is a parking lot that was owned by a bank. The parking lot is between a public alley and the back of the Felgenhauers' restaurant.

From the time the Felgenhausers opened their restaurant in 1974, deliveries were made through the alley by crossing over the parking lot to the restaurant's back door. The Felgenhausers never asked permission of the bank to have deliveries made over its parking lot. The Felgenhausers operated the restaurant until the spring of 1978. Thereafter, until 1982, the Felgenhausers leased their property to various businesses.

The Felgenhausers reopened their restaurant in June of 1982. Deliveries resumed over the bank's parking lot to the restaurant's back door. In November of 1984, the Felgenhausers sold their restaurant business, but not the real property, to James and Ann Enloe. The Enloes leased the property from the Felgenhausers. Deliveries continued over the bank's parking lot.

James Enloe testified he did not believe he had the right to use the bank's property and never claimed the right. Enloe said that during his tenancy, he saw the bank manager in the parking lot. The manager told him the bank planned to construct a fence to define the boundary between the bank's property and the Felgenhauers' property. Enloe asked the manager to put in a gate so that he could continue to receive deliveries and have access to a trash dumpster. The manager agreed. Enloe "guess[ed]" the fence and gate were constructed about three years into his term. He said, "[Three years] could be right, but it's a guess." In argument to the jury, the Sonis' counsel said the fence and gate were constructed in January of 1988.

The Enloes sold the restaurant to Brett Butterfield in 1993. Butterfield sold it to William DaCossee in March of 1998. DaCossee was still operating the restaurant at the time of trial. During all this time, deliveries continued across the bank's parking lot.

The Sonis purchased the bank property, including the parking lot in dispute in 1998. In 1999, the Sonis told the Felgenhauers' tenant, DaCossee, that they were planning to cut off access to the restaurant from their parking lot.

The jury found the prescriptive period was from June of 1982 to January of 1988.

Discussion

I

The Sonis contend there is no substantial evidence to support a prescriptive easement for deliveries across their property. They claim the uncontested evidence is that the use of their property was not under "a claim of right." . . .

At common law, a prescriptive easement was based on the fiction that a person who openly and continuously used the land of another without the owner's consent, had a lost grant. California courts have rejected the fiction of the lost grant. Instead, the courts have adopted language from adverse possession in stating the elements of a prescriptive easement. The two are like twins, but not identical. Those elements are open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right. Unfortunately, the language used to state the elements of a prescriptive easement or adverse possession invites misinterpretation. This is a case in point.

The Sonis argue the uncontested evidence is that the use of their property was not under a claim of right. They rely on the testimony of James Enloe that he never claimed he had a right to use the bank property for any purpose.

Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: "In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor." (3 Casner, American Law of Property (1952) Title by Adverse Possession, § 5.4, p. 776.) . . . Enloe testified that he had no discussion with the bank about deliveries being made over its property. The jury could reasonably conclude the Enloes used the bank's property without its permission. Thus they used it under a claim of right.

The Sonis attempt to make much of the fence the bank constructed between the properties and Enloe's request to put in a gate. But Enloe was uncertain when the fence and gate were constructed. The Sonis' attorney argued it was constructed in January of 1988. The jury could reasonably conclude that by then the prescriptive easement had been established.

The Sonis argue the gate shows the use of their property was not hostile. They cite *Myran v. Smith* (1931) 117 Cal.App. 355, 362, 4 P.2d 219, for the proposition that to effect a prescriptive easement the adverse user ". . . must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."

But *Myran* made the statement in the context of what is necessary to create a prescriptive easement. Here, as we have said, the jury could reasonably conclude the prescriptive easement was established prior to the erection of the fence and gate. The Sonis cite no authority for the proposition that even after the easement is created, the user must keep the flag of hostility flying. To the contrary, once the easement is created, the use continues as a matter of legal right, and it is irrelevant whether the owner of the servient estate purports to grant permission for its continuance. . . .

Notes and Questions

13.8. **Fiction of the lost grant.** *Felgenhauer* refers to the fiction of the lost grant. The principle traces back to English law. 4-34 POWELL ON REAL PROPERTY § 34.10 (“In early England the enjoyment had to have been ‘from time immemorial,’ and this date came to be fixed by statute as the year 1189. Towards the close of the medieval period, this theory was rephrased and an easement of this type was said to arise from a grant, presumably made in favor of the claimant before the time of legal memory, but since lost.”). The usual American approach is to ignore the fiction and simply apply rules of prescription that largely track those of adverse possession. See *id.*

13.9. How do the elements of a prescriptive easement differ from the elements of adverse possession? Why do you think they differ in this way? How do the resulting interests differ?

13.10. **Easements acquired by the public.** What happens if city pedestrians routinely cut across a private parking lot? May an easement by prescription be claimed by the public at large? Does it matter that the right asserted is not in the hands of any one person? Here, too, the fiction of the lost grant may play a role in the willingness of courts to entertain the possibility.

There is a split of authority as to whether a public highway may be created by prescription. A number of older cases hold that the public cannot acquire a road by prescription because the doctrine of prescription is based on the theory of a lost grant, and such a grant cannot be made to a large and indefinite body such as the public. See II American Law of Property § 9.50 (J. Casner ed. 1952). The lost grant theory, however, has been discarded. W. Burby, Real Property § 31, at 77 (1965). In its place, courts have resorted to the justifications that underlie statutes of limitations: “[The] functional utility in helping to cause prompt termination of controversies before the possible loss of evidence and in stabilizing long continued property uses.” 3 R. Powell, *supra* note 5, ¶ 413, at 34–103–04; W. Burby, *supra*, § 31, at 77; Restatement of Property ch. 38, Introductory Note, at 2923 (1944). These reasons apply equally to the acquisition of prescriptive easements by public use. The majority view now is that a public easement may be acquired by prescription. 2 J. Grimes, Thompson on Real Property § 342, at 209 (1980).



Figure 13.3: Image by the Greater Southwestern Exploration Company, available under a Creative Commons Attribution 2.0 Generic license, <https://www.flickr.com/photos/gsec/10784349106>.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 416 (Alaska 1985).

What then should the owner of a publicly accessible location do? The owners of Rockefeller Center reportedly block off its streets one day per year in order to prevent the loss of any rights to exclude. David W. Dunlap, *Closing for a Spell, Just to Prove It's Ours*, N.Y. TIMES (Oct. 28, 2011), <http://www.nytimes.com/2011/10/30/nyregion/lever-house-closes-once-a-year-to-maintain-its-ownership-rights.html> (“But there is another significant hybrid: purely private space to which the public is customarily welcome, at the owners’ implicit discretion. These spaces include Lever House, Rockefeller Plaza and College Walk at Columbia University, which close for part of one day every year.”). Another option is to post a sign granting permission to enter (thus negating any element of adversity). Some states approve this approach by statute. CAL. CIV. CODE § 1008 (“No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: ‘Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.’ ”).

13.2.4 Irrevocable Licenses

An easement is distinct from a **license**. A license is permission from the owner to enter the land. Because it is permissive, it is revocable. Many difficulties with distinguishing easements from licenses arise when parties fail to clearly bargain over the right to use land. See, e.g., *Willow Tex, Inc. v. Dimacopoulos*, 503 N.E.2d 99, 100 (N.Y. 1986) (“The writing must establish unequivocally the grantor’s intent to give *for all time to come* a use of the servient estate to the dominant estate. The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement.”).

Under the right circumstances, a license may become **irrevocable**.

Richardson v. Franc
182 Cal. Rptr. 3d 853 (Cal. App. 2015)

RUVOLO, P.J.

In order to access their home in Novato, California, James Scott Richardson and Lisa Donetti (respondents) had to traverse land belonging to their neighbors, Greg and Terrie Franc (appellants) on a 150-foot long road which was authorized by an easement for “access and public utility purposes.” Over a 20-year period, both respondents and their predecessors-in-interest maintained landscaping, irrigation, and lighting appurtenant to both sides of the road within the easement area without any objection. Six years after purchasing the property burdened by the easement, appellants demanded that respondents remove the landscaping, irrigation, and lighting on the ground that respondents’ rights in the easement area were expressly limited to access and utility purposes, and the landscaping and other improvements exceeded the purpose for which the easement was granted. Respondents brought this lawsuit seeking, among other things, to establish their right to an irrevocable license which would grant them an uninterrupted right to continue to maintain the landscaping and other improvements. . . .

.... In 1989, Karen and Tom Poksay began building their home on undeveloped property at 2513 Laguna Vista Drive in Novato, California. The project included constructing and landscaping a 150-foot long driveway within the 30-foot wide easement running down to the site of their new

home, which was hidden from the street. The driveway was constructed pursuant to an easement over 2515 Laguna Vista Drive, which was then owned by [appellants' predecessors in interest]. The easement was for access and utility purposes only.

Landscaping along the driveway was important to the Poksays. . . . They hired a landscaper, who dug holes for plants and trees. Ms. Poksay then added plants and trees along both sides of the driveway in the easement area—hawthorn trees, Australian tea trees, daylilies, Mexican sage, breath of heaven, flowering pear trees, and evergreen shrubs.

The landscaper installed a drip irrigation system. . . . Water fixtures were also installed along the driveway for fire safety. The Poksays also added electrical lighting along the driveway, later replacing the electrical lighting with solar lighting.

During the decade that the Poksays resided at the property Ms. Poksay regularly tended to the landscaped area, including trimming and weeding, ensuring the irrigation system was working properly, and replacing plants and trees as necessary. In addition to Ms. Poskay's own labor, the Poksays paid their landscaper to perform general maintenance

Respondents purchased the property in late 2000. . . . Over the years, respondents added new plants and trees, including oleanders, an evergreen tree, another tea tree, Mexican sage, lavender, rosemary, and a potato bush. Respondent Donetti testified that landscapers came weekly or every other week, and the landscapers spent 40 to 50 percent of their time in the easement area. . . . During her testimony, respondent Donetti explained, “we've paid a lot of money to nurture it and grow it. It's beautiful. It has privacy. It's absolutely tied to our house value. It's our curb appeal.”

Appellants purchased 2515 Laguna Vista Drive in 2004. [Appellant Greg Franc admitted he knew about the landscaping in the easement area, as well as the hiring of landscapers.] He even admitted that the trees were “beautiful and provide a lot of color and [were] just all-around attractive.” From 2004 to August 2010, appellants and respondents lived in relative harmony It was not until late 2010—approximately six years after appellants bought the property and two decades after the landscaping and other improvements began—that appellants first raised a concern about the landscaping and other improvements. Prior to that date, no one had ever objected.

In late September or early October 2010, without any notice, appellant Greg Franc cut the irrigation and electrical lines on both sides of the

driveway. He cut not only the lines irrigating the landscaping on the easement, but also those irrigating respondents' own property. The water valve pumps leading to the irrigation lines were disassembled as well. As part of these proceedings, the trial court granted respondents' motion for preliminary injunction and the irrigation system was restored. . . . Following a bench trial and an on-site visit to the property, the court . . . granted respondents' request for an irrevocable license. . . .

. . . [A]s appellants acknowledge, the grant of an irrevocable license is "based in equity." After the trial court has exercised its equitable powers, the appellate court reviews the judgment under the abuse of discretion standard. . . .

Before we address the specific issues appellants raise on appeal, it is helpful to review the law governing the grant of an irrevocable license. "A license gives authority to a licensee to perform an act or acts on the property of another pursuant to the express or implied permission of the owner." (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) Easements, § 15:2, p. 15-10.) "A licensor generally can revoke a license at any time without excuse or without consideration to the licensee. In addition, a conveyance of the property burdened with a license revokes the license . . ." (*Id.* at pp. 15-10 to 15-11, fns. omitted.)

However, a license may become irrevocable when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in reasonable reliance on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor's knowledge. Under such circumstances, it would be inequitable to terminate the license. In that case, the licensor is said to be estopped from revoking the license, and the license becomes the equivalent of an easement, commensurate in its extent and duration with the right to be enjoyed. A trial court's factual finding that a license is irrevocable is reviewed for substantial evidence.

In the paradigmatic case, a landowner allows his neighbor the right to use some portion of his property—often a right of way or water from a creek—knowing that the neighbor needs the right to develop his property. The neighbor then builds a house, digs an irrigation ditch, paves the right of way, plants an orchard, or farms the land in reliance on the landowner's acquiescence. Later, after failing to make a timely objection, the landowner or his successor suddenly raises legal objections and seeks to revoke the neighbor's permissive usage. . . .

In the instant case . . . the statement of decision states: "Because [respondents] adduced sufficient evidence at trial concerning their substantial expenditures in the easement area for landscaping, maintenance, care, and physical labor, and because sufficient evidence was presented at trial to support that [respondents'] predecessor-in-interest, Ms. Poksay, also expended substantial sums in the easement area for landscaping, maintenance, care, and physical labor, and because, as the evidence and testimony at trial showed, that no objection was made to any of this by either [appellants] or [appellants'] predecessor-in-interest, Mr. Schaefer, over the course of more than 20 years, [respondents] have sufficiently met the requirements for an irrevocable parol license for both [respondents], and [respondents'] successors-in-interest. Both law and equity dictate this result."

. . . [Appellants] contend the trial court erred in finding the evidence supported the creation of an irrevocable license because respondents' reliance on continued permission to landscape and make other improvements in the easement area was not reasonable as a matter of law. Appellants point out the evidence at trial revealed that throughout the history of the ownership of the property, there was never an actual request for permission to make and maintain these improvements and express consent was never given. In essence, appellants contend that tacit permission by silence is insufficient to create an irrevocable license and that respondents were required to show an express grant of permission induced them into undertaking the improvements within the easement area.

Permission sufficient to establish a license can be express or implied. . . . A license may also arise by implication from the acts of the parties, from their relations, or from custom. When a landowner knowingly permits another to perform acts on his land, a license may be implied from his failure to object. . . .

. . . Here, the undisputed evidence revealed appellants failed to object to the landscaping and other improvements for 6 years before appellants first made their demand that the landscaping and other improvements be removed. Thus, with full knowledge that the road providing ingress and egress to respondents' property was landscaped, irrigated, and lit, and with full knowledge that respondents were maintaining these improvements on an ongoing basis, appellants said nothing to respondents. When coupled with the previous 14 years appellants' predecessors-in-interest acquiesced in these improvements, this constituted a total of 20 years of un-

interrupted permissive use of the easement area for the landscaping and other improvements. Therefore, we find the court had ample evidence to conclude that adequate and sufficient permission was granted to respondents by appellants to maintain the extensive landscaping improvements on either side of the roadway.

Appellants next stress that for the license to be irrevocable, there must be substantial expenditures in reliance on the license. In this regard, the trial court made the necessary findings that respondents "have expended substantial monetary sums to improve, maintain, landscape, and care for the easement area, including the retention of professional landscapers on a regular basis"

Appellants next challenge "the unlimited physical scope and duration of the license" granted by the trial court. They claim "the trial court, in derogation of equity and the law, decided that [r]espondents . . . should have sole and absolute discretion to decide what will happen on property that is owned by [appellants]." In making this argument, appellants ignore the fact that the trial court was vested with broad discretion in framing an equitable result under the facts of this case. . . . As it was empowered to do, the trial court exercised its broad equitable discretion and fashioned relief to fit the specific facts of this case. The court found "by a preponderance of the evidence that [respondents] hold an irrevocable parol license for themselves and their successors-in-interest to maintain and improve landscaping, irrigation, and lighting within the 30' wide and 150' long easement."

Appellants assert "it is wholly erroneous and grossly unfair to make the license *irrevocable in perpetuity*." (Original italics.) Appellants argue that a proper ruling in this case would be to grant respondents an irrevocable license but "with the license to landscape and garden limited in duration until [respondents] transfer title to anyone else or no longer reside on the property"

The principles relating to the duration of an irrevocable license were stated by our Supreme Court over a century ago, and these principles are still valid today. An otherwise revocable license becomes irrevocable when the licensee, acting in reasonable reliance either on the licensor's representations or on the terms of the license, makes substantial expenditures of money or labor in the execution of the license; and the license will continue "for so long a time as the nature of it calls for." As explained in a leading treatise, "A license remains irrevocable for a period sufficient

to enable the licensee to capitalize on his or her investment. He can continue to use it only as long as justice and equity require its use.” (6 Miller & Starr, *supra*, § 15:2, p. 15-15.)

The evidence adduced at trial indicates respondents and their predecessors in interest expended significant money and labor when they planted and nurtured the landscaping abutting the roadway, installed sophisticated irrigation equipment throughout the easement area, and constructed lighting along the roadway. Under such circumstances the trial court did not abuse its discretion in concluding it would be inequitable to require respondents to remove these improvements when the property is transferred, given the substantial investment in time and money and the permanent nature of these improvements. . . .

Lastly, we reject appellants’ hyperbolic claim that in fashioning the scope and duration of the irrevocable license granted in this case, “the trial court, without exercising caution, took property that rightfully belonged to [appellants] and ceded it to [r]espondents—and their successors—forever.”

This argument ignores that a license does not create or convey any interest in the real property; it merely makes lawful an act that otherwise would constitute a trespass. . . . Far from granting respondents “an exclusive easement amounting to fee title” as appellants’ claim, the court’s decision simply maintains the status quo that has existed for over 20 years and was obvious to appellants when they purchased the property a decade ago.

Notes and Questions

13.11. The RESTATEMENT characterizes irrevocable license situations as a servitude created by estoppel. RESTATEMENT § 2.10. Is there any difference, then, between an irrevocable license and an easement by prescription? Is there any reason to treat them differently?

13.12. Is landscaping important enough to justify the intrusion into property ownership interests? What do you think would have happened had the appellants won?

13.13. How well does *Richardson* track your intuitions about everyday behavior? Would you ask permission before engaging in the landscaping at issue here? Would you advise a client to? Suppose you asked your neighbor for an easement of way to enable you to build on an adjoining property? You’re

friends, and he says yes. But you know a thing or two about the law, so you know that if your relations turn sour you would have to rely on an irrevocable license claim. Would you push for a formal grant in writing? Is that a neighborly thing to do? For one view, see *Shepard v. Purvine*, 248 P.2d 352, 361-62 (Or. 1952) ("Under the circumstances, for plaintiffs to have insisted upon a deed would have been embarrassing; in effect, it would have been expressing a doubt as to their friend's integrity."). Does it make a difference that you know to ask? What about those without legal training? Should the law accommodate private ordering or funnel property holders into formal arrangements? Do the interests of third parties, including possible future purchasers of each of the affected properties, matter to your analysis?

13.3 Altering Easements

Brown v. Voss

715 P.2d 514 (Wash. 1986)

BRACHTENBACH, Justice.

The question posed is to what extent, if any, the holder of a private road easement can traverse the servient estate to reach not only the original dominant estate, but a subsequently acquired parcel when those two combined parcels are used in such a way that there is no increase in the burden on the servient estate. The trial court denied the injunction sought by the owners of the servient estate. The Court of Appeals reversed. We reverse the Court of Appeals and reinstate the judgment of the trial court.

A portion of an exhibit [in Figure 13.4] depicts the involved parcels.

In 1952 the predecessors in title of parcel A granted to the predecessor owners of parcel B a private road easement across parcel A for "ingress to and egress from" parcel B. Defendants acquired parcel A in 1973. Plaintiffs bought parcel B on April 1, 1977 and parcel C on July 31, 1977, but from two different owners. Apparently the previous owners of parcel C were not parties to the easement grant.

When plaintiffs acquired parcel B a single family dwelling was situated thereon. They intended to remove that residence and replace it with a single family dwelling which would straddle the boundary line common to parcels B and C.

Plaintiffs began clearing both parcels B and C and moving fill materials

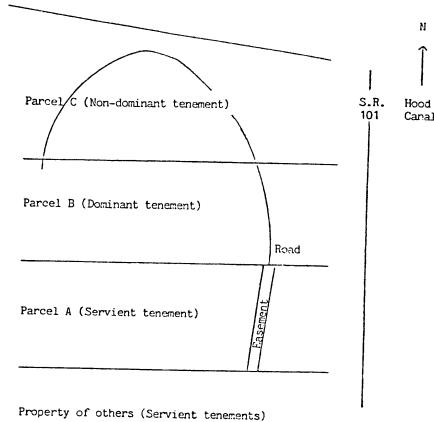


Figure 13.4: Exhibit from *Brown v. Voss*.

in November 1977. Defendants first sought to bar plaintiff's use of the easement in April 1979 by which time plaintiffs had spent more than \$11,000 in developing their property for building.

Defendants placed logs, a concrete sump and a chain link fence within the easement. Plaintiffs sued for removal of the obstructions, an injunction against defendant's interference with their use of the easement and damages. Defendants counterclaimed for damages and an injunction against plaintiffs using the easement other than for parcel B.

The trial court awarded each party \$1 in damages. The award against the plaintiffs was for a slight inadvertent trespass outside the easement.

The trial court made the following findings of fact:

VI

The plaintiffs have made no unreasonable use of the easement in the development of their property. There have been no complaints of unreasonable use of the roadway to the south of the properties of the parties by other neighbors who grant easements to the parties to this action to cross their properties to gain access to the property of the plaintiffs. Other than the trespass there is no evidence of any damage to the defendants as a result of the use of the easement by the plaintiffs. There has been no increase in volume of travel on the easement to reach

a single family dwelling whether built on tract B or on Tacts [sic] B and C. There is no evidence of any increase in the burden on the subservient estate from the use of the easement by the plaintiffs for access to parcel C.

VIII

If an injunction were granted to bar plaintiffs access to tract C across the easement to a single family residence, Parcel C would become landlocked; plaintiffs would not be able to make use of their property; they would not be able to build their single family residence in a manner to properly enjoy the view of the Hood Canal and the surrounding area as originally anticipated at the time of their purchase and even if the single family residence were constructed on parcel B, if the injunction were granted, plaintiffs would not be able to use the balance of their property in parcel C as a yard or for any other use of their property in conjunction with their home. Conversely, there is and will be no appreciable hardship or damage to the defendants if the injunction is denied.

IX

If an injunction were to be granted to bar the plaintiffs access to tract C, the framing and enforcing of such an order would be impractical. Any violation of the order would result in the parties back in court at great cost but with little or no damages being involved.

X

Plaintiffs have acted reasonable *[sic]* in the development of their property. Their trespass over a “little” corner of the defendants’ property was inadvertent, and *de minimis*. The fact that the defendants counter claim seeking an injunction to bar plaintiffs access to parcel C was filed as leverage against the original plaintiffs’ claim for an interruption of their easement rights, may be considered in determining whether equitable relief by way of an injunction should be granted.

Relying upon these findings of fact, the court denied defendant's request for an injunction and granted the plaintiffs the right to use the easement for access to parcels B & C "as long as plaintiffs [sic] properties (B and C) are developed and used solely for the purpose of a single family residence."

The Court of Appeals reversed

The easement in this case was created by express grant. Accordingly, the extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties. By the express terms of the 1952 grant, the predecessor owners of parcel B acquired a private road easement across parcel A and the right to use the easement for ingress to and egress from parcel B. Both plaintiffs and defendants agree that the 1952 grant created an easement appurtenant to parcel B as the dominant estate. Thus, plaintiffs, as owners of the dominant estate, acquired rights in the use of the easement for ingress to and egress from parcel B.

However, plaintiffs have no such easement rights in connection with their ownership of parcel C, which was not a part of the original dominant estate under the terms of the 1952 grant. As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant.

Plaintiffs, nonetheless, contend that extension of the use of the easement for the benefit of nondominant property does not constitute a misuse of the easement, where as here, there is no evidence of an increase in the burden on the servient estate. We do not agree. If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement. . . . Under the express language of the 1952 grant, plaintiffs only have rights in the use of the easement for the benefit of parcel B. Although, as plaintiffs contend, their planned use of the easement to gain access to a single family residence located partially on parcel B and partially on parcel C is perhaps no more than technical misuse of the easement, we conclude that it is misuse nonetheless.

However, it does not follow from this conclusion alone that defendants are entitled to injunctive relief. Since the awards of \$1 in damages were not appealed, only the denial of an injunction to defendants is in issue. Some fundamental principles applicable to a request for an injunction must be considered. (1) The proceeding is equitable and addressed to the sound

discretion of the trial court. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the *particular facts, circumstances, and equities of the case before it*. Appellate courts give great weight to the trial court's exercise of that discretion. (3) One of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction.

The trial court found as facts, upon substantial evidence, that plaintiffs have acted reasonably in the development of their property, that there is and was no damage to the defendants from plaintiffs' use of the easement, that there was no increase in the volume of travel on the easement, that there was no increase in the burden on the servient estate, that defendants sat by for more than a year while plaintiffs expended more than \$11,000 on their project, and that defendants' counterclaim was an effort to gain "leverage" against plaintiffs' claim. In addition, the court found from the evidence that plaintiffs would suffer considerable hardship if the injunction were granted whereas no appreciable hardship or damages would flow to defendants from its denial. Finally, the court limited plaintiffs' use of the combined parcels solely to the same purpose for which the original parcel was used—*i.e.*, for a single family residence.

... Based upon the equities of the case, as found by the trial court, we are persuaded that the trial court acted within its discretion. The Court of Appeals is reversed and the trial court is affirmed.

DORE, Justice (dissenting).

The majority correctly finds that an extension of this easement to non-dominant property is a misuse of the easement. The majority, nonetheless, holds that the owners of the servient estate are not entitled to injunctive relief. I dissent.

The comments and illustrations found in the Restatement of Property § 478 (1944) address the precise issue before this court. Comment *e* provides in pertinent part that "if one who has an easement of way over Whiteacre appurtenant to Blackacre uses the way with the purpose of going to Greenacre, the use is improper even though he eventually goes to Blackacre rather than to Greenacre." Illustration 6 provides:

6. By prescription, A has acquired, as the owner and possessor of Blackacre, an easement of way over an alley leading from Blackacre to the street. He buys Whiteacre, an adjacent lot, to which the way is not appurtenant, and builds a public garage

one-fourth of which is located on Blackacre and three-fourths of which is located on Whiteacre. A wishes to use the alley as a means of ingress and egress to and from the garage. He has no privilege to use the alley to go to that part of the garage which is built on Whiteacre, and he may not use the alley until that part of the garage built on Blackacre is so separated from the part built on Whiteacre that uses for the benefit of Blackacre are distinguishable from those which benefit Whiteacre.

The majority grants the privilege to extend the agreement to nondominant property on the basis that the trial court found no appreciable hardship or damage to the servient owners. However, as conceded by the majority, any extension of the use of an easement to benefit a nondominant estate constitutes a misuse of the easement. Misuse of an easement is a trespass. The Brown's use of the easement to benefit parcel C, especially if they build their home as planned, would involve a continuing trespass for which damages would be difficult to measure. Injunctive relief is the appropriate remedy under these circumstances. . . .

The Browns are responsible for the hardship of creating a landlocked parcel. They knew or should have known from the public records that the easement was not appurtenant to parcel C. In encroachment cases this factor is significant. . . .

In addition, an injunction would not interfere with the Brown's right to use the easement as expressly granted, *i.e.*, for access to parcel B. An injunction would merely require the Browns to acquire access to parcel C if they want to build a home that straddles parcels B and C. One possibility would be to condemn a private way of necessity over their existing easement in an action under RCW 8.24.010. *See Brown v. McAnally*, 97 Wash.2d 360, 644 P.2d 1153 (1982). . . .

Notes and Questions

13.14. What do you make of the reasoning in *Brown*? What is the point of taking a strict view of the modification of easements if the majority has no intention of following it through to its logical consequence? Would it be better to be more flexible about easement law? Or is the dissent's approach preferable?

13.15. It turns out that the facts in *Brown* were a good deal less straightforward than the majority indicates. Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445, 1451 (1995) ("What I

discovered from the record in the case, related land and other court records, and interviews with the parties was predictable in some ways and startling in others. As the reader of the opinion suspects, the conflict between the neighbors had a dark and bitter emotional history. As one cannot easily suspect, the physical aspects of the property differ in legally significant ways from the court's description and understanding. When the supreme court of Washington decided the case, the controversy, unbeknownst to the court, was moot. And the party who appears to be the loser in the opinion was in reality the winner." (footnotes omitted)).

13.16. Can you reconcile this case with *Jacque v. Steenberg Homes*?

13.17. Note the range of possible outcomes in easement disputes. It is not so simple as saying the property owner has the right to block the would-be easement holder or not. Cases like *Brown* honor the property interests of the landowner, but by requiring the payment of damages rather than granting an injunction. In other words, the trespasser gets to choose whether or not to continue using the land. Likewise, the right-of-way statutes discussed above allow passage with payment. Recall similar remedies in the adverse possession setting in cases of innocent encroachments. What do you think motivates courts to elect payment remedies in these situations? Why do you think they are not the norm in property law?

M.P.M. Builders, LLC v. Dwyer
809 N.E.2d 1053 (Mass. 2004)

COWIN, J.

We are asked to decide whether the owner of a servient estate may change the location of an easement without the consent of the easement holder. We conclude that, subject to certain limitations, described below, the servient estate owner may do so.

1. *Facts.* The essential facts are not in dispute. The defendant, Leslie Dwyer, owns a parcel of land in Raynham abutting property owned by the plaintiff, M.P.M. Builders, L.L.C. (M.P.M.). Dwyer purchased his parcel in 1941, and, in the deed, he was also conveyed an easement, a "right of way along the cartway to Pine Street," across M.P.M.'s land. The cartway branches so that it provides Dwyer access to his property at three separate points. The deed describes the location of the easement and contains no language concerning its relocation.

In July, 2002, M.P.M. received municipal approval for a plan to subdivide and develop its property into seven house lots. Because Dwyer's easement cuts across and interferes with construction on three of M.P.M.'s planned lots, M.P.M. offered to construct two new access easements to Dwyer's property. The proposed easements would continue to provide unrestricted access from the public street (Pine Street) to Dwyer's parcel in the same general areas as the existing cartway. The relocation of the easement would allow unimpeded construction by M.P.M. on its three house lots. M.P.M. has agreed to clear and construct the new access ways, at its own expense, so "that they are as convenient [for the defendant] as the existing cartway[]." Dwyer objected to the proposed easement relocation, "preferring to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years."

2. *Procedural history.* M.P.M. sought a declaration, pursuant to G.L. c. 231A, that it has a right unilaterally to relocate Dwyer's easement. When M.P.M. moved for summary judgment, a Land Court judge found that there were no material issues of fact in dispute, denied M.P.M.'s motion for summary judgment, entered summary judgment against M.P.M., and dismissed the case.

The judge recognized that this case was "a clear example of an increasingly common situation where a dominant tenant is able to block development on the servient land because of the common-law rule which . . . may well be the result of unreflective repetition of a misapplied rationale." He noted that the rule conflicts with the "right of a servient tenant to use his land in any lawful manner that does not interfere with the purpose of the easement." Nevertheless, he concluded that under the "settled" common law, once the location of an easement has been fixed it cannot be changed except by agreement of the estate owners. The judge concluded that, unless this court decides "to dispel the uncertainty that now exists and adapt the common law to present-day circumstances," he was bound to apply the law currently in effect. We granted M.P.M.'s application for direct appellate review to decide whether our law should permit the owner of a servient estate to change the location of an easement without the easement holder's consent.

3. *Discussion. . . .*

The parties disagree whether our common law permits the servient estate owner to relocate an easement without the easement holder's consent. Dwyer, citing language in our cases, contends that, once the location of an

easement has been defined, it cannot be changed except by agreement of the parties. . . . M.P.M. claims that our common law permits the servient estate owner to relocate an easement as long as such relocation would not materially increase the cost of, or inconvenience to, the easement holder's use of the easement for its intended purpose. M.P.M. urges us to clarify the law by expressly adopting the modern rule proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) § 4.8(3) (2000).

This section provides that:

Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

Section 4.8(3) is a default rule, to apply only in the absence of an express prohibition against relocation in the instrument creating the easement and only to changes made by the servient, not the dominant, estate owner.¹ It "is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder." *Id.* at comment f, at 563. Section 4.8(3) maximizes the over-all property utility by increasing the value of the servient estate without diminishing the value of the dominant estate; minimizes the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate; and encourages the use of easements. Regardless of what heretofore has been the common law, we conclude that § 4.8(3) of the Restatement

¹We previously have concluded that the dominant estate owner, that is, the easement holder, may not unilaterally relocate an easement. According to the Restatement, many jurisdictions have erroneously expanded that sensible restriction into one that prevents the owner of the servient estate from relocating the easement without the consent of the easement holder. Restatement (Third) of Property (Servitudes) § 4.8(3) comment f, at 563 (2000).

is a sensible development in the law and now adopt it as the law of the Commonwealth.

We are persuaded that § 4.8(3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a "fair tradeoff for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate." Restatement (Third) of Property (Servitudes), *supra* at comment f, at 563. Therefore, under § 4.8(3), the owner of the servient estate is "able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders." *Roaring Fork Club, L.P. v. St. Jude's Co.*, [36 P.3d 1229,] 1237 [(Colo. 2001)].

It is a long-established rule in the Commonwealth that the owner of real estate may make any and all beneficial uses of his property consistent with the easement. . . . We conclude that § 4.8(3) is consistent with these principles in its protection of the interests of the easement holder: a change may not significantly lessen the utility of the easement, increase the burden on the use and enjoyment by the owner of the easement, or frustrate the purpose for which the easement was created. The servient owner must bear the entire expense of the changes in the easement.

Dwyer urges us to reject the Restatement approach. He argues that adoption of § 4.8(3) will devalue easements, create uncertainty in property interests, and lead to an increase in litigation over property rights. Our adoption of § 4.8(3) will neither devalue easements nor place property interests in an uncertain status. An easement is by definition a limited, nonpossessory interest in realty. . . . An easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.

The limitations embodied in § 4.8(3) ensure a relocated easement will continue to serve the purpose for which it was created. So long as the easement continues to serve its intended purpose, reasonably altering the location of the easement does not destroy the value of it. For the same reason, a relocated easement is not any less certain as a property interest. The only uncertainty generated by § 4.8(3) is in the easement's location. A rule that permits the easement holder to prevent any reasonable changes in the location of an easement would render an access easement virtually a posses-

sory interest rather than what it is, merely a right of way. Finally, parties retain the freedom to contract for greater certainty as to the easement's location by incorporating consent requirements into their agreement.

"Clearly, the best course is for the [owners] to agree to alterations that would accommodate both parties' use of their respective properties to the fullest extent possible." *Roaring Fork Club, L.P. v. St. Jude's Co.*, *supra* at 1237. In some cases, the parties will be unable to reach a meeting of the minds on the location of an easement. In the absence of agreement between the owners of the dominant and servient estates concerning the relocation of an easement, the servient estate owner should seek a declaration from the court that the proposed changes meet the criteria in § 4.8(3). Such an action gives the servient owner an opportunity to demonstrate that relocation comports with the Restatement requirements and the dominant owner an opportunity to demonstrate that the proposed alterations will cause damage. The servient owner may not resort to self-help remedies, and, as M.P.M. did here, should obtain a declaratory judgment before making any alterations.

Although Dwyer may be correct that increased litigation could result as a consequence of adopting § 4.8(3), we do not reject desirable developments in the law solely because such developments may result in disputes spurring litigation. Section 4.8(3) "imposes upon the easement holder the burden and risk of bringing suit against an unreasonable relocation," but this "far surpasses in utility and fairness the traditional rule that left the servient land owner remediless against an unreasonable easement holder." *Roaring Fork Club, L.P. v. St. Jude's Co.*, *supra* at 1237, quoting Note, *Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements?*, 61 Mo. L.Rev. 1039, 1060 (1996). We trust that, over time, uncertainties will diminish and litigation will subside as easement holders realize that in some circumstances unilateral changes to an easement, paid for by the servient estate owner, will be enforced by courts. Dominant and servient estate owners will have an incentive to negotiate a result rather than having a court impose one on them.

We return to the facts of this case. The Land Court judge ruled correctly under existing law. But we conclude that § 4.8(3) of the Restatement best complies with present-day realities. The deed creating Dwyer's easement does not expressly prohibit relocation. Therefore, M.P.M. may relocate the easement at its own expense if the proposed change in location does not significantly lessen the utility of the easement, increase the burdens

on Dwyer's use and enjoyment of the easement, or frustrate the purpose for which the easement was created. M.P.M. shall pay for all the costs of relocating the easement.

Because we cannot determine from the present record whether the proposed relocation of the easement meets the aforementioned criteria, we vacate the judgment and remand the case to the Land Court for further proceedings consistent with this opinion.

Notes and Questions

13.18. The ability to adapt long-term easements to new uses often depends on formal labels. Suppose a railroad acquires the right to conduct rail service over a stretch of land. Decades pass, and the railroad seeks to abandon the line and turn the tracks over to a local government that will tear them out and create a system of nature trails. Can it? If the railroad had acquired a fee simple, sure. But if it only had an easement of way for railroad operations, the change would exceed the easement's scope, giving the owner of the underlying land a claim. *RESTATEMENT (FIRST) OF PROPERTY* § 482 (1944) ("The extent of an easement created by a conveyance is fixed by the conveyance."). This is so even if the easement gave the railroad exclusive access to the land in question while the easement was active. See, e.g., *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

13.4 Transferring Easements

Easements appurtenant. Transferring easements appurtenant is simple; when the dominant estate is conveyed, the rights of the easement come along. This is a natural consequence of the principle that servitudes (such as easements) run with the land. A more complicated problem concerns the division of the dominant estate into smaller parcels. The default approach is to allow each parcel to enjoy the benefit of the easement. *RESTATEMENT (FIRST) OF PROPERTY* § 488 (1944) ("Except as limited by the terms of its transfer, or by the manner or terms of the creation of the easement appurtenant, those who succeed to the possession of each of the parts into which a dominant tenement may be subdivided thereby succeed to the privileges of use of the servient tenement authorized by the easement."). Here, however, foreseeability and the extent of the added burden matters. See generally R. W. Gascoyne, *Right of owners of parcels*

into which dominant tenement is or will be divided to use right of way, 10 A.L.R.3d 960 (Originally published in 1966) (collecting cases).

Easements in gross. The modern view is that easements in gross are transferable, assuming no contrary intent in their creation (e.g., that the benefit was intended to be personal to the recipient). RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.6 cmt. (2000) (“Although historically courts have often stated that benefits in gross are not transferable, American courts have long carved out an exception for profits and easements in gross that serve commercial purposes. Under the rule stated in this section, the exception has now become the rule.”); RESTATEMENT (FIRST) OF PROPERTY § 489 (1944) (commercial easements in gross, as distinct from easements for personal satisfaction, are transferable); § 491 (noncommercial easements in gross “determined by the manner or the terms of their creation”).

Another issue concerns the divisibility of an easement in gross. Here, too, the danger is that divisibility may lead to excessive burdens on the servient estate. Section 493 of the FIRST RESTATEMENT OF PROPERTY provides that whether divisibility is permitted depends on the circumstances surrounding the easement’s creation. The facts giving rise to a prescriptive easement, for example, may give a landowner fair notice that a single trespasser may acquire an easement, but not that the easement may then be shared by many others once the prescription period passes. In contrast, an exclusive easement might lead to a presumption of divisibility, for “the fact that [the owner of the servient tenement] is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable.” *Id.* cmt. c. Where the grant is non-exclusive a clearer indication of intended divisibility may be required. *Id.* cmt. d. Section 5.9 of the modern RESTATEMENT goes further by making divisibility the default assumption unless contrary to the parties intent or where divisibility would place unreasonable burdens on the servient estate.

13.5 Terminating Easements

Easements can be terminated in a variety of ways.

Unity of ownership. When the dominant and servient estates of an easement appurtenant unite under one owner, the easement ends. Likewise an easement in gross ends if the owner acquires an interest in the servient tene-

ment that would have provided independent authority to exercise the rights of the easement.

Release by the easement holder. The FIRST RESTATEMENT would require a written instrument under seal for an *inter vivos* release, while the modern RESTATEMENT simply requires compliance with the Statute of Frauds.

Abandonment. Abandonment resembles a release. The FIRST RESTATEMENT treats them separately, however, and distinguishes the two by describing abandonment as intent by the easement holder to give up the easement, while a release is an act done on behalf of the owner of the burdened property. Abandonment may be inferred by actions. RESTATEMENT (FIRST) OF PROPERTY § 504 (1944).

Estoppel. Estoppel may terminate an easement when (1) the owner of the servient tenement acts in a manner that is inconsistent with the easement's continuation; (2) the acts are in foreseeable reasonable reliance on conduct by the easement holder; and (3) allowing the easement to continue would work an unreasonable harm to the owner of the servient property. *Id.* § 505.

Prescription. Just as an easement may be gained by prescription, so too may it be lost by open and notorious adverse acts by the owner of the servient tenement that interrupt the exercise of the easement for the prescription period.

Condemnation. The exercise of the eminent domain power to take the servient estate creates the possibility of compensation for the easement owner.

A tax deed. Section 509 of the FIRST RESTATEMENT provides that a tax deed will extinguish an easement in gross, but not an easement appurtenant.

Expiration. If the interest was for a particular time.

Recording Acts. Being property interests, easements are subject to the recording acts, and unrecorded interests may be defeated by transferees without notice. The modern restatement provides for exceptions for certain easements not subject to the Statute of Frauds and generally for servitudes that "would be discovered by reasonable inspection or inquiry." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 7.14 (2000).

13.6 Negative Easements/Conservation Easements

In the United States, most of the work that could have been done by negative easements is largely performed by real covenants or equitable servitudes, which we take up in a future reading. See *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 1.2 (“A ‘negative’ easement, the obligation not to use land in one’s possession in specified ways, has become indistinguishable from a restrictive covenant, and is treated as such in this Restatement.”). Nineteenth century English law gave negative easements a narrow domain. They were available only to prevent the servient estate from restricting light, air, support, or the flow of water of an artificial stream to the dominant estate. *Id.* § 1.2 cmt. h. Such easements were likewise not widely embraced in the United States, where equitably enforced negative covenants held in gross were disfavored.

For the most part, negative easements only arise by agreement or grant. U.S. courts therefore consistently reject the English “doctrine of ancient lights,” which recognizes a right to light from a neighbor’s land after the passage of time under certain circumstances. 4-34 POWELL ON REAL PROPERTY § 34.11.

The limitations of negative easements complicated efforts to create conservation and preservation easements. Such easements tend to be held in gross (e.g., by a conservation organization), and the common law prohibited equitable enforcement of negative covenants held in gross. The law likewise was skeptical about expanding the categories for which negative easements were available. *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 1.6 cmt. a (2000). The problem was addressed by the Uniform Conservation Easement Act, which has now been adopted by every state. 4-34A POWELL ON REAL PROPERTY § 34A.01.

13.7 Public Use Rights

Public prescriptive easements are not the only way to grant members of the public access rights to land. The **public trust** doctrine addresses the public’s right to access certain natural resources.

Lawrence v. Clark County
254 P.3d 606, 608-09 (Nev. 2011)

The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian. *See State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that “[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.” The Institutes of Justinian, Lib. II, Tit. I, § 1 (Thomas Collett Sandars trans. 5th London ed. 1876). He also stated that “rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.” *Id.* § 2.

The doctrine was thereafter adopted by the common law courts of England, which espoused the similar principle that “title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King” and that such title “is held subject to the public right.” *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). . . .

Courts in this country have readily embraced the public trust doctrine. In 1821, in the first notable American case to express public trust principles, the Supreme Court of New Jersey observed that citizens have a common right to sovereign-controlled waterways:

The sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821).

Thereafter, the United States Supreme Court similarly recognized that “when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.” *Martin et al. v. Waddell*, 41 U.S. 367, 410, 16 Pet. 367, 10 L.Ed. 997 (1842).

Fifty years later, in what has become the seminal public trust doctrine case, the Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S.

387 (1892). In *Illinois Central* the Court noted that because the State of Illinois was admitted to the United States on “equal footing” with the original 13 colonies, it, like the colonies, was granted title to the navigable waters and the lands underneath them. For Illinois, that meant that upon its admission, it held title to its portion of the waters of and lands beneath Lake Michigan. However, the waters and lands underneath Lake Michigan were not freely alienable by the State of Illinois—its title to those areas was “different in character from that which the State holds in lands intended for sale.” More specifically, it possessed only “title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” As a result, the Court concluded that the Illinois Legislature’s attempted relinquishment of such trust property to the Illinois Central Railroad

is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public The State can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace.

While the Court noted that such lands need not, under all circumstances, be perpetually held in trust, it recognized that in effecting transfers, the public interest is always paramount, providing that “[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Id.*

Note

As public uses of waters expanded, so too did the public trust doctrine. In New Jersey, the courts extended the public trust doctrine to protect recreational uses. It then extended the public’s right to access the “wet sands,” which is land extending from the ocean to the average high tide water mark, to include access via certain “dry sands.”

Matthews v. Bay Head Imp. Ass'n
471 A.2d 355 (N.J. 1984)

. . . In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. . . . We [previously] held that where a municipal beach is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." 61 N.J. at 309, 294 A.2d 47. . . .

We now address the extent of the public's interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches . . . namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. . . .

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea. . . .

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many sit-

uations eliminate the right to the recreational use of the ocean. This was a principal reason why in [earlier cases] we held that municipally-owned dry sand beaches "must be open to all on equal terms . . ." We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), dedication, *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), or custom, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309, 294 A.2d 47.

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

Notes and Questions

13.19. Do the rights covered by the public trust doctrine preexist the state, or are they pure creatures of law? When may courts change public trust rules? When they do so, are the rules changing or is the court explaining that the rule “always” thus, but is only now being announced? Does anything turn on this distinction? As we will see, how we define such changes has implications on whether a property owner may claim that the state is committing a constitutional violation by “taking” land without just compensation.

13.20. When a court alters preexisting conceptions of the right to exclude should anything be due to the property owner? Does your conception of what the public trust doctrine is help determine your answer to this question?

13.21. **Other theories of expanding public access rights.** Courts have used other doctrines to expand public access to private lands, including theories of prescriptive easements, “implied dedication,” and customary uses. See generally 4-34 POWELL ON REAL PROPERTY § 34.11. As an example of implied dedication, the California Supreme Court declared:

Although “No Trespassing” signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner’s activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

Gion v. City of Santa Cruz, 2 Cal. 3d 29, 41, 465 P.2d 50, 58 (1970). On custom, see, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (“The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.”).

13.22. **Politics!** Do not overlook the role of the political process in questions of beach access. Following the *Gion* ruling noted above, the California leg-

islature added Cal. Civ. Code § 1009, which opines that “[o]wners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes” and that the “stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.” It therefore provides that “no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use.” Does the availability of a legislative remedy if landowners organize and convince the legislature to act suffice to address the concerns about cases like *Matthews*?

13.23. **Conflicting uses.** Once the public has the right of access to private land, what other limits on private ownership follow? See, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (private landowner's construction of tower on beach did not interfere with customary public rights).

13.24. **Public Policy.** Are expansions of public access rights by the courts beneficial? What kinds of incentives do they create? Consider the following criticism:

Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent, the failure to consider total loss to the owner, and the prohibition of taking property without compensation, but also that the case created an obvious inequity and would prove counterproductive to the public policy espoused. [Citations of critical commentary omitted.]

The inequity addressed by commentators appears when weighing penalties against rewards to landowners having no immediate use for their property so that permitting public use poses no interference or impairment. Those landowners who were neighborly and hospitable in permitting public use were penalized by *Gion-Dietz* by loss of their land, while those excluding the public by fencing or other means were rewarded by retention of their exclusive use. While virtue is usually its own reward, the law does not usually penalize the virtuous. The decision was asserted to be counterproductive because landowners to avoid prescriptive dedication would now exclude the public from using open and unimproved property for recreation pur-

poses. Thus the very policy sought to be furthered would be defeated. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564, 126 Cal.Rptr. 765, 767, points out that one of the reactions to *Gion-Dietz* was “soaring sales of chain link fences.”)

Cnty. of Los Angeles v. Berk, 26 Cal. 3d 201, 228-31, 605 P.2d 381, 398-401 (1980) (Clark, J., dissenting). But expanding access offers benefits of its own:

The law of beach access in Hawaii has an enormous, incalculable impact on social life. Though the law limits the property rights of beachfront owners as they are defined elsewhere, it increases the wealth of every single person in the state by giving them a right to go to the beach anywhere in the state. Everyone, no matter how poor, has a backyard on the beach. Individuals and families go the shore in the morning to swim or surf before work. Families gather to watch the sun go down in the evening. Even if they only have a small apartment inland, they have a right to sit outside on the beach wherever they please. It affects the range of options people have, their daily routine, and the sense of satisfaction of almost everyone.

Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1329 (2014).

13.25. Many European nations recognize (either by tradition or statute) a “right to roam” on private lands (excluding homestead or cultivated areas). Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility As Rationale for Limiting the Right to Exclude*, 23 GEO. INT'L ENVT'L L. REV. 211 (2011). The right to roam often encompasses the picking of berries, mushrooms, and the like. Open access used to be the norm for unenclosed land in the United States until the late 1800s; open range laws allowed cattle grazing on unimproved lands. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674 (2011); *Nashville & C.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854) (“Our present Code contains similar provisions, which show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen.”). Pressure to close the range and forbid the crossing of uncultivated or unenclosed land came from three sources: farmers, who were relying less on free range livestock; railroads, who wished to avoid liability for cattle collisions; and southern planters, who viewed closed range laws as a mechanism for limit-

ing the independence of newly emancipated African-American farmers. *Sawers, supra*, at 681-84; R. Ben Brown, *Free Men and Free Pigs: Closing the Southern Range and the American Property Tradition*, 108 RADICAL HIST. REV. 117, 119 (Fall 2010) (“When the most important political and economic project of the post-Reconstruction era became recapturing the labor of African Americans to produce staple crops, restricting African American access to open range resources became a priority.”).

Chapter 14

Co-ownership and Marital Property

More than one person can “own” a thing at any given time. Their rights will be exclusive as against the world, but not exclusive as against each other. When conflicts between them develop, or when the outside world seeks to regulate their behavior, we need to understand the nature and limits of their rights.

In this section, we will not address the form of concurrent ownership known as partnership, which we cover separately, though you will see some comparative references to it in the case that follows. Nor will we address corporations (in which ownership can be nearly infinitely divided and is separated from control). These topics are dealt with in detail in business associations and similar courses. We will also not consider forms of concurrent ownership that are of purely historical interest, such as coparceny.¹ The main types of co-ownership we will consider are (1) tenancy in common, (2) joint tenancy, and (3) tenancy by the entireties, along with a brief look at (4) community property, a particular kind of co-ownership available in some states.

In the late 1980s, a sample of real estate records showed that about two-thirds of residential properties were held in some form of co-ownership. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenancy Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331; see also CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 171-72 (1987) (showing percentage of land held in joint tenancies rising from under 1% in 1890 to nearly 80% in 1960, then dropping to 63% in

¹A form of ownership only available to female heirs, when there were no male heirs.

1980); N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582 (1966) (finding that joint tenancies in Iowa rose from under 1% of acquisitions in 1933 to over a third of farm acquisitions and over half of urban acquisitions in 1964, almost exclusively by married couples); Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87 (1961) (study of California counties in 1959 and 1960 finding that married couples held over two-thirds of property as cotenants, 85% of which was as joint tenants).

Given that many justifications for the institution of private property rely on the idea that competing interests in property lead to inefficiency, waste, and conflict, it is perhaps surprising that so much private property is, in practice, owned by more than one person. If communal ownership is so inefficient, why do we recognize so many kinds of co-ownership?

14.1 Types of Co-Ownership: Introduction

United States v. Craft

535 U.S. 274 (2002)

Justice O'CONNOR delivered the opinion of the Court.

. . . English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common, joint tenancy, and tenancy by the entirety. The tenancy in common is now the most common form of concurrent ownership. The common law characterized tenants in common as each owning a separate fractional share in undivided property. Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. Tenants in common have many other rights in the property, including the right to use the property, to exclude third parties from it, and to receive a portion of any income produced from it.

Joint tenancies were the predominant form of concurrent ownership at common law, and still persist in some States today. The common law characterized each joint tenant as possessing the entire estate, rather than a fractional share: “[J]oint-tenants have one and the same interest . . . held by one and the same undivided possession.” Joint tenants possess many of the rights enjoyed by tenants in common: the right to use, to exclude, and to enjoy a share of the property’s income. The main difference be-

tween a joint tenancy and a tenancy in common is that a joint tenant also has a right of automatic inheritance known as “survivorship.” Upon the death of one joint tenant, that tenant’s share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it. Joint tenants’ right to alienate their individual shares is also somewhat different. In order for one tenant to alienate his or her individual interest in the tenancy, the estate must first be severed—that is, converted to a tenancy in common with each tenant possessing an equal fractional share. Most States allowing joint tenancies facilitate alienation, however, by allowing severance to automatically accompany a conveyance of that interest or any other overt act indicating an intent to sever.

A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons. Because of the common-law fiction that the husband and wife were one person at law (that person, practically speaking, was the husband), Blackstone did not characterize the tenancy by the entirety as a form of concurrent ownership at all. Instead, he thought that entireties property was a form of single ownership by the marital unity. Neither spouse was considered to own any individual interest in the estate; rather, it belonged to the couple.

Like joint tenants, tenants by the entirety enjoy the right of survivorship. Also like a joint tenancy, unilateral alienation of a spouse’s interest in entireties property is typically not possible without severance. Unlike joint tenancies, however, tenancies by the entirety cannot easily be severed unilaterally. Typically, severance requires the consent of both spouses, or the ending of the marriage in divorce. At common law, all of the other rights associated with the entireties property belonged to the husband: as the head of the household, he could control the use of the property and the exclusion of others from it and enjoy all of the income produced from it. The husband’s control of the property was so extensive that, despite the rules on alienation, the common law eventually provided that he could unilaterally alienate entireties property without severance subject only to the wife’s survivorship interest.

With the passage of the Married Women’s Property Acts in the late 19th century granting women distinct rights with respect to marital property, most States either abolished the tenancy by the entirety or altered it significantly. Michigan’s version of the estate is typical of the modern tenancy by the entirety. Following Blackstone, Michigan characterizes its tenancy

by the entirety as creating no individual rights whatsoever: “It is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other Each is vested with an entire title.” And yet, in Michigan, each tenant by the entirety possesses the right of survivorship. Each spouse—the wife as well as the husband—may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. Neither spouse may unilaterally alienate or encumber the property, although this may be accomplished with mutual consent. Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divorce decree specifies otherwise. . . .

14.2 Tenancy in Common

Tenancy in common is the modern default form of co-ownership, unless a contrary intent is expressed; usually that intent must be in writing. All tenants in common are entitled to possession and use of the property. Only **partition**, discussed below, results in separate and divided interests.

Tenants in common need not own equal shares. If there is no document or legal rule of inheritance specifying their shares, courts will often look to the contribution of the cotenants to the purchase in order to determine appropriate shares.

14.2.1 Rights and Duties of Tenants in Common

Concurrent owners can generally contract among themselves to allocate the various benefits and burdens of ownership as they see fit. But in the absence of such agreement, there are several default rules regarding the rights and obligations that arise between cotenants of property.

This system of default rules begins with the premise that each cotenant is entitled to all the rights of ownership in the entire co-owned parcel. Thus, for example, cotenants do not necessarily have the right to compromise other cotenants’ right to exclude. If one cotenant objects to a police search and the other would allow it, the objecting cotenant prevails. A warrantless search is not allowed unless an exception to the warrant requirement applies. *Georgia v. Randolph*, 547 U.S. 103 (2006).

The implications of multiple equal and undivided interests in a co-owned parcel become far more complicated with respect to other rights of ownership—particularly the rights of possession and use. If all co-owners are equally entitled to possession and use of the whole parcel, what happens when more than one cotenant decides to assert those rights at the same time? Is it physically possible to put co-equal rights of all concurrent owners into practice? And if not, what if any obligation does a cotenant in possession owe to cotenants out of possession? Consider the following case:

Martin v. Martin
878 S.W. 2d 30 (Ky. Ct. App. 1994)

. . . Garis and Peggy own an undivided one-eighth interest in a tract of land in Pike County. This interest was conveyed to Garis by his father, Charles Martin, in 1971. Appellees, Charles and Mary Martin, own a life estate in the undivided seven-eighths of the property for their joint lives, with remainder to appellants.

In 1982, Charles Martin improved a portion of the property and developed a four lot mobile home park which he and Mary rented. In July of 1990, Garis and Peggy moved their mobile home onto one of the lots. It is undisputed that Garis and Peggy expended no funds for the improvement or maintenance of the mobile home park, nor did they pay rent for the lot that they occupied.

In 1990, Garis and Peggy filed an action which sought an accounting of their claimed one-eighth portion of the net rent received by Charles and Mary from the lots. The accounting was granted, however, the judgment of the trial court required appellants to pay “reasonable rent” for their occupied lot. It is that portion of the judgment from which this appeal arises.

The sole issue presented is whether one cotenant is required to pay rent to another cotenant. Appellants argue that absent an agreement between cotenants, one cotenant occupying premises is not liable to pay rent to a co-owner. Appellees respond that a cotenant is obligated to pay rent when that cotenant occupies the jointly owned property to the exclusion of his co-owner.

Appellants and appellees own the subject property as tenants in common. The primary characteristic of a tenancy in common is unity of possession by two or more owners. Each cotenant, regardless of the size of

his fractional share of the property, has a right to possess the whole.

The prevailing view is that an occupying cotenant must account for outside rental income received for use of the land, offset by credits for maintenance and other appropriate expenses. The trial judge correctly ordered an accounting and recovery of rent in the case *sub judice*.

However, the majority rule on the issue of whether one cotenant owes rent to another is that a cotenant is not liable to pay rent, or to account to other cotenants respecting the reasonable value of the occupancy, absent an ouster or agreement to pay.

The trial court relied erroneously on *Smither v. Betts*, Ky., 264 S.W.2d 255 (1954), for its conclusion that appellants were "obligated to pay seven-eighths of the reasonable rental for the use of the lot they occupy." In *Smither*, one cotenant had exclusive possession of jointly owned property by virtue of a lease with a court-appointed receiver and there was an agreement to pay rent. That clearly is not the case before us. There was no lease or any other agreement between the parties.

The appellees reason that the award of rent was proper upon the premise that Garis and [Peggy] ousted their cotenants. While the proposition that a cotenant who has been ousted or excluded from property held jointly is entitled to rent is a valid one, we are convinced that such ouster must amount to exclusive possession of the entire jointly held property. We find support for this holding in *Taylor*, *supra*, in which the Court stated at 807-08:

But, however this may be, running throughout all the books will be found two essential elements which must exist before the tenant sought to be charged is liable. These are: (a) That the tenant sought to be charged and who is claimed to be guilty of an ouster must assert exclusive claim to the property in himself, thereby necessarily including a denial of any interest or any right or title in the supposed ousted tenant; (b) he must give notice to this effect to the ousted tenant, or his acts must be so open and notorious, positive and assertive, as to place it beyond doubt that he is claiming the entire interest in the property.

We conclude that appellants' occupancy of one of the four lots did not amount to an ouster. To hold otherwise is to repudiate the basic characteristic of a tenancy in common that each cotenant shares a single right to

possession of the entire property and each has a separate claim to a fractional share.

Accordingly, the judgment of the Pike Circuit Court is reversed as to the award of rent to the appellees.

Notes and Questions

14.1. Recurring conflicts between cotenants. Rules for cotenant liability are incoherent and unsatisfactory despite centuries of litigated cases. Evelyn Lewis speculates that “cotenant conflicts receive little attention from property law reformers” because they involve “‘one-shotters’—parties who rarely litigate, who are predominantly members of the obedient middle-class and who suffer quietly the rules of law they were too unsophisticated to know or consider in advance of the conflict.” Evelyn Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability*, 1994 Wis. L. REV. 331.

Management conflicts can arise easily because, unlike in a trust or a corporation (both forms of joint ownership) there is no one with the legal right to manage the property on behalf of the other owners, and a cotenant who takes on the burden of management is not entitled to be paid for her services to the others. See *Combs v. Ritter*, 223 P.2d 505 (Cal. Ct. App. 1950). Although each cotenant has the right to possess and benefit from the property, and the duty to pay her share of necessary expenses such as taxes, there is no mechanism for group decision-making. If co-owners can’t agree, they may simply have to split—by divorce followed by a transfer to one party or sale in the case of tenancy by the entirety and community property; by severance and partition for joint tenants; and by partition for tenants in common. Short of partition, which involves selling or physically dividing the property, the only assistance the courts offer cotenants is a claim for accounting for rents or profits received by another cotenant, or a claim for contribution for payments of another cotenant’s share of taxes, mortgage payments, and necessary maintenance expenses.

14.2. Ouster. Denial of a right to possession constitutes **ouster**, and the damages are the non-possessing cotenant’s share of the rental value of the property. *Harlan v. Harlan*, 168 P.2d 985 (Cal. Ct. App. 1946) (damages for ouster are rental value).

Evelyn Lewis concludes that, as with adverse possession, the standard for what constitutes an ouster is so manipulable that courts can reach almost any result on any given set of facts. See, e.g., *Cox v. Cox*, 71 P.3d 1028 (Idaho 2003) (tenant in common was ousted and was entitled to ½ of the fair rental value of

the house occupied by her brother when he told her he was selling the house and that she “had better find a place to live”); *Mauch v. Mauch*, 418 P.2d 941 (Okla. 1966) (cotenants in possession of family farm ousted widowed sister-in-law by telling her they “didn’t want to have her on the place” and that she “was not to come back”); *but see Fitzgerald v. Fitzgerald*, 558 So.2d 122 (Fla. Dist. Ct. App. 1990) (ex-wife didn’t oust ex-husband by telling him to leave the family home and that otherwise “she’d call the law”).

What if one cotenant denies that the other has any title to the property? *Estate of Duran*, 66 P.3d 326 (N.M. 2003) (cotenant lived on the property kept silent or gave evasive answers to questions about his use of the property; this was not ouster where he “never expressly told [the other cotenants] that he claimed to own their portions of the property”). Purporting to convey full title to the property is an ouster, since it sets up a claim for adverse possession by the grantee. *Whittington v. Cameron*, 52 N.E.2d 134 (Ill. 1943).

What if one cotenant seeks to use a portion of the land, and the other prevents her from doing so, perhaps by building a structure on it?

14.3. Constructive Ouster. What if the property is a single-family home and the cotenants are recently divorced or separated? *Hertz v. Hertz*, 657 P.2d 1169 (N.M. 1983) (applying theory of “constructive ouster” to require payment of half of fair rental value); *Stylianopoulos v. Stylianopoulos*, 455 N.E.2d 477 (Mass. Ct. App. 1983) (divorce constituted ouster, so ex-wife had to pay fair rental value to ex-husband); *In re Marriage of Watts*, 217 Cal. Rptr. 301 (Ct. App. 1985) (separated spouse must reimburse community for exclusive use of house); *Palmer v. Protrka*, 476 P.2d 185 (Or. 1970) (if, as a practical matter, the couple can’t live together, requiring the cotenant in possession to pay half of fair rental value most closely matches parties’ intentions).

Suppose a woman moves out of her family home after being physically assaulted by her husband. The husband begs her to come back, but she refuses. After two years, when their divorce becomes final, the ex-wife sues for half the fair rental value of the house during the two-year period she was out of possession. Should she win? What if, instead of the wife leaving, she ejects the husband and tells him not to come back, and two years later, after she’s awarded the house in the divorce, he sues for half the fair rental value of the house during the two-year period he was out of possession? See *Cohen v. Cohen*, 746 N.Y.S.2d 22 (App. Div. 2002) (no right to rent for period during which a court protective order barred cotenant from the property due to his assaultive conduct).

The majority rule is against constructive ouster, in the absence of physical exclusion. See, e.g., *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D.N.J. 1986) (“[T]he

mere fact that defendant does not wish to live with plaintiff on the premises is of no import. What counts is that she could physically live on the premises.”).

Which rule is better? If you were advising a client in a divorce, how would you deal with co-owned property?

What if the property is so small that physical occupation by all cotenants is impracticable? Some courts will also call this a “constructive ouster” of the cotenants out of possession. *Capital Fin. Co. Delaware Valley, Inc. v. Asterbadi*, 942 A.2d 21 (N.J. Super. Ct. App. Div. 2008) (finding that a bank that was a cotenant through foreclosure with the wife of the defaulting mortgagor was constructively ousted from a single-family home).

14.4. Contribution: sharing the costs. “[T]he protection of the interest of each cotenant from extinction by a tax or foreclosure sale imposes on each the duty to contribute to the extent of his proportionate share the money required to make such payments.” 2 AMERICAN LAW OF PROPERTY § 6.17. Because failure to pay carrying costs increases the risk that the asset will be lost to all cotenants, every concurrent owner has an obligation to pay her share. See also *Beshear v. Ahrens*, 709 S.W.2d 60 (Ark. 1986) (allowing contribution for mortgage payments and property taxes as “expenditures necessarily made for the protection of the common property”).

The majority rule is that cotenants out of possession need not share in the costs of repairs in the absence of an agreement to do so. The idea is that questions “of how much should be expended on repairs, their character and extent, and whether as a matter of business judgment such expenditures are justified,” are too uncertain for judicial resolution. 2 AMERICAN LAW OF PROPERTY § 6.18. But then, in a partition action, cotenants who pay for repairs will get credit for them—does that make sense? Further, some courts will allow contribution for “necessary” repairs. *Palanza v. Lufkin*, 804 A.2d 1141 (Me. 2002) (finding contribution towards necessary repairs justified, even though some of the repairs had cosmetic effects). Some jurisdictions require a cotenant to provide her fellow cotenants with notice and opportunity to object to the repairs in order to be entitled to contribution. *Anderson v. Joseph*, 26 A.3d 1050 (Md. Ct. Spec. App. 2011) (denying contribution for repairs that resulted from “massive flooding” for failure to provide notice).

14.5. Accounting: the right to share in profits. Cotenants who allow others to use the land, whether to exploit resources or to rent, must give other cotenants their shares of any consideration received from the third-party users.

Recall that in at least some contexts one cotenant cannot unilaterally exercise the right to exclude of the other cotenants. But that isn’t always true with

respect to productive uses of land by third parties with permission of one cotenant. To be sure, in some states, a lease from only one co-owner is void and the lessee can be ejected. But in other states, one cotenant can lease his interest, subject only to a duty to account to the non-leasing cotenants for net profits. *Swartzbaugh v. Sampson*, 54 P.2d 73 (Cal. Ct. App. 1936). Where there is such a duty, to whom does the lessee owe rent? The answer is that she only owes rent to the leasing cotenant, unless she ousts the other cotenants. Those other cotenants must look to a contribution action against the leasing cotenant.

The usual rule is that cotenants must account for the raw value of resources they extract themselves, but particularly bad misbehavior by a cotenant may lead to an award of the processed value. *Kirby Lumber Co. v. Temple Lumber Co.*, 83 S.W.2d 638 (Tex. 1935) (raw value of timber where timber was taken in good faith); cf. *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948) (cotenant who mined asphalt without consent from other cotenants had to account for net profits, although he took no more than his one-ninth interest—resource could not be partitioned in kind because the quality and quantity of asphalt varied sharply across the parcel in ways that could not be easily determined; cotenant couldn't take the most easily mined resources for himself and make his own partition).

Absent an ouster, an accounting usually just requires the cotenant to share the actual value received, not the fair market value. Suppose a lease claims to be nonexclusive and to only lease one cotenant's share, and is for half of the fair market rental value of the property. What should happen when the other cotenant seeks an accounting? See Annot., 51 A.L.R.2d 388 (1957). Suppose the lease is made by one cotenant to spite or harm another? Cf. *George v. George*, 591 S.W.2d 655 (Ark. Ct. App. 1979) (where 99-year lease carried nominal rent and the court found an intent to defraud the cotenant, the lease was set aside).

14.6. Tenants in possession; tenants out of possession. *Martin* applies the majority rule that—absent ouster—a cotenant in possession need not pay anything to cotenants out of possession if she lives on and farms the land, absent an ouster. *DesRoches v. McCrary*, 24 N.W.2d 511 (Mich. 1946) (no duty of cotenant in possession to pay rent to other cotenants). Reciprocally, there is generally no ouster if one cotenant requests her share of the fair rental value of the land from the occupying cotenant, and the occupying cotenant denies the request. *Von Drake v. Rogers*, 996 So. 2d 608 (La. Ct. App. 2008) (“A co-owner in exclusive possession may be liable for rent, but only beginning on the date another co-owner has demanded occupancy and been refused.”) (emphasis added). But a few cases hold that denying a request for rent constitutes an ouster. *Eldridge v. Wolfe*, 221 N.Y.S. 508 (1927).

Why might courts have developed a practice of requiring cotenants to account for profits from mining and cutting lumber, but not for profits from their own farming or residential uses of co-owned property? Logically, the cotenant in possession should have to pay—she is receiving a benefit from using the land, the fair market rental value of the property, and the other cotenants are not. As *Martin* itself proves, if she did rent the land to a third party, she would be required to share that benefit with the other co-owners. This rule creates an incentive for the cotenant to stay in possession rather than renting the land out, even if renting to a third party would be more efficient overall.

14.7. The relationship between contribution and accounting. If one cotenant occupies the property, with no ouster, and seeks contribution from the non-occupant for his share of the taxes and insurance, can the non-occupant offset the amounts due by the value of living on the property to the occupant? Many courts say yes. See, e.g., *Barrow v. Barrow*, 527 So. 2d 1373 (Fla. 1988) (occupant can only recover contribution if non-occupant's proportionate share of expenses is greater than the value of occupying the property); *Esteves v. Esteves*, 775 A.2d 163 (N.J. Super. Ct. App. Div. 2001) (parents who occupied house for 18 years were entitled to be reimbursed by their son for half of the expenses of mortgage and maintenance, but the son was allowed to set off the amount equal to the reasonable value of the parents' sole occupancy). This view is not strictly consistent with the majority rule that non-ousting tenants are not liable to non-possessing cotenants for rent, because it means that the occupant is essentially paying the non-occupant for being able to live on the land. Is this rule, which will often keep much actual cash from changing hands nonetheless fair?

The minority view is that no defensive offset is available against a cotenant in possession, absent ouster. *Yakavonis v. Tilton*, 968 P.2d 908 (Wash. Ct. App. 1998); *Baird v. Moore*, 141 A.2d 324 (N.J. App. Div. 1958) (cotenant out of possession may not offset value of occupation if cotenant's possession is not adverse). Which rule makes more logical sense? More practical sense?

Basically, courts often have enough flexibility to rule in the direction the equities point—finding that contribution is or isn't available. The need to balance the harms from imposition of unexpected costs on cotenants out of possession with the harms to the property's value from negligent co-owners also gives courts flexibility. Ultimately, because partition is always available to cotenants who truly can't agree, it makes sense for courts to point them towards partition if they're fighting over maintenance and repairs.

In *Martin*, when calculating Garis and Peggy's 1/8 share of the “net rent,” what expenses should be deducted? Can they be required to pay a share of the

costs of developing the mobile home park, such as putting in sewage lines and electrical connections? Note that a cotenant is generally not entitled to contribution from other cotenants for the costs of improving the property (see note 14.9 below). But, on partition, the improver is entitled to the part of the property that's been improved, or in case of sale to the lesser of (1) the increase in value due to the improvement or (2) the cost of the improvement. Should that rule be applied in an accounting as well?

Lewis suggests that courts use ouster to engage in the "equitable second-guessing that so often blurs crystalline rules." *Compare Spiller v. Mackereth*, 334 So. 2d 859 (Ala. 1976) (lock change wasn't ouster), *with Morga v. Friedlander*, 680 P.2d 1267 (Ariz. Ct. App. 1984) (lock change was ouster). In effect, courts use ouster, plus the majority rule allowing offset of the value of an occupying cotenant's possession in an action for contribution, to nullify the formal rule that any cotenant can occupy the land rent-free, regardless of the size of his or her share, and still seek contribution for necessary expenses.

14.8. Quasi-fiduciary duties of good faith. Cotenants are **fiduciaries** for each other, at least if they receive their interests in the same will or grant, or through the same inheritance. *Poka v. Holi*, 357 P.2d 100 (Haw. 1960) (cotenants have fiduciary obligation to give other cotenants adequate notice of adverse claims to the property); *but see Wilson v. S.L. Rey, Inc.*, 21 Cal. Rptr. 2d 552 (Ct. App. 1993) (cotenants who acquire interests at different times by different instruments have no fiduciary relationship).

If one cotenant buys the property at a tax sale or a foreclosure sale, the title is shared with the other cotenants: for these purposes, the cotenant is a fiduciary for the other cotenants. *Johnson v. Johnson*, 465 S.W.2d 309 (Ark. 1971); *but cf. Stevenson v. Boyd*, 96 P. 284 (Cal. 1908) (finding assertion of cotenant's claim barred by laches after four-year delay). However, the purchasing cotenant can seek contribution from the others, so that they bear their fair share of the cost of removing the lien or mortgage. Why would the courts create such a fiduciary duty? What is the abusive practice that they fear?

14.9. Improvements. Any cotenant has the right to make improvements to the property, but other cotenants are not required to contribute. See *Knight v. Mitchell*, 240 N.E.2d 16 (Ill. Ct. App. 1968) (cotenant couldn't seek contribution for developing and running oil wells, though he could set off necessary operating expenses in other cotenant's action for accounting of his profits); Johnnie L. Price, *The Right of a Cotenant to Reimbursement for Improvements to the Common Property*, 18 BAYLOR L. REV. 111 (1966).

In most states, the interests of the improver will be protected if that won't

harm the interests of the other cotenants. This usually allows the improver to recoup the added value, if any, resulting from his improvements on partition, or in accounting for rents and profits. *Graham v. Inlow*, 790 S.W.2d 428 (Ark. 1990). But if improvements fail to pay off, the improver is not compensated—he bears all the risk. A few cases limit recovery to the smaller of the amount of value added by an improvement or its costs. The risk is borne by the improver, but the rewards are shared. Which rule makes more sense?

14.10. **Waste.** If one cotenant damages the property or harms its value, other cotenants may have claims for **waste**. While the ordinary remedy for waste is treble damages, courts will normally just hold the tenant in possession accountable for net profits from exploiting the property, as explained above in the discussion of removing timber and similar resources. CASNER, AMERICAN LAW OF PROPERTY, § 6.15. What effects does that rule have on the use of land?

Waste claims are correspondingly difficult to win. *Davis v. Byrd*, 185 S.W.2d 866 (Mo. 1945) (mining by one cotenant isn't waste as long as the other cotenants aren't excluded and the miner doesn't willfully or negligently injure the land); *Hihn v. Peck*, 18 Cal. 640 (1861) (cotenant may remove valuable timber "to an extent corresponding to [his] share of the estate" without committing waste); *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (9th Cir. 1924) (cotenant can produce oil without other cotenants' consent, but cannot exclude other cotenants from exercising the same right). Consider whether time matters: should the standard for what constitutes waste vary depending on whether the other interest-holders have present interests (and could act now to reap their own benefits, albeit at greater cost than waiting) or future interests (and thus can only wait for their ownership interests to attach)?

14.11. **Adverse possession by cotenants against other cotenants.** Because each cotenant has the right to possession, it can be difficult for one cotenant to possess adversely to another. Under New York law, a cotenant must have exclusive possession for ten years before the statutory adverse possession can even begin to run against other cotenants. *Myers v. Bartholomew*, 697 N.E.2d 160 (N.Y. 1998). After all, the fact that someone else is living on and using the land lacks its ordinary significance to cotenants. *Ex parte Walker*, 739 So. 2d 3 (Ala. 1999) (cotenant's redemption of property at tax sale in 1934, payment of all property taxes, exclusive possession for over 50 years, demolition of old buildings, and harvesting of timber did not show adverse possession against other cotenants); *Tremayne v. Taylor*, 621 P.2d 408 (Idaho 1980) ("A cotenant who claims to have adversely possessed the interest of his cotenants must prove that the fact of adverse possession was 'brought home' to the cotenants."); *Hare v.*

Chisman, 101 N.E.2d 268 (Ind. 1951) (husband's sole possession of house after wife died was not adverse to his cotenants, her heirs, since it "was not an unnatural act of them to permit their father to occupy this property, collect the income, pay the expense, and enjoy the surplus"); *West v. Evans*, 175 P.2d 219 (Cal. 1946) (cotenant out of possession must have either actual or constructive notice of hostility; recordation of a deed isn't sufficient notice); Official Code Ga. Ann. § 44-6-123 (allowing cotenant to gain title by adverse possession if she "effects an actual ouster, retains exclusive possession after demand, or gives [her] cotenant express notice of adverse possession").

Adverse possession is, however, not entirely impossible in these circumstances. See *Johnson v. James*, 377 S.W.2d 44 (Ark. 1964) (presumption against adversity is even stronger when cotenants are related, though presumption was overcome through sole possession for 36 years, where cotenants knew of a will purportedly granting occupant sole possession and said nothing); *McCree v. Jones*, 430 N.E.2d 676 (Ill. Ct. App. 1981) (finding in favor of claimant who'd been in possession for thirty years under a quitclaim deed purporting to give title to the entire property).

14.12. Intangible assets. In the U.S., "joint authorship" occurs when two or more authors contribute to the creation of a unitary work of authorship, such as a song with music written by one author and lyrics written by another. (Here, "joint" doesn't mean what it means in real property. There is no right of survivorship, so the ownership rights behave more like what you know as tenancy in common.) Courts have interpreted copyright law to impose a default rule, absent explicit agreement, that each joint author owns an equal share of the resulting work, even if her contribution was substantially less than that of other authors. This rule, which is not mandated by the statute, has led courts to be extremely reluctant to find joint authorship when there is one clear "dominant" author and someone else seeks to be recognized as a co-author. Because copyrights are intangible, they cannot be partitioned, nor can there be an ouster of one co-author by another. Instead, each co-owner can grant a nonexclusive license to other people to use the work—whether that means putting a song on a record, using a sample of it in a new song, or using it in a television show. This right to license is subject only to a duty to account to the other co-owners for their shares of the resulting profits. An exclusive license requires the agreement of all the co-owners acting together.

Suppose one co-author, angry at her co-author, grants Quentin Tarantino a nonexclusive license to turn their book into a movie for \$1, and duly gives her co-author fifty cents. Because of this license, no other moviemaker will buy the

rights, fearing competition from Tarantino's movie. Has the licensor committed waste? Would it matter if, instead of acting out of malice, the co-author granted the \$1 license because she believed in Tarantino's vision for the film and only a low price would induce him to take on the book as his next project? Do tenancy in common rules work for property that can't be exclusively possessed?

14.13. **Concluding thoughts: crystals and mud.** Transaction costs—the costs of managing the property and getting cotenants to agree—can be very high among cotenants, as compared to the costs of having a manager with authority to make decisions for the group. (For example, consider the issue of approving a particular tenant who wishes to rent the property and have exclusive possession.) The actively engaged cotenant who rents to a third party gets only some of the gain, but takes most of the risk. After all, if the renter turns into a nightmare who trashes the place, the cotenant who rented the property will be liable for any harm; but the other cotenants might sue to share in any gains that materialize. Professor Carol Rose argues that courts sometimes impose equitable duties—muddy rules—on parties in order to replicate the results that would have occurred had they trusted each other and behaved fairly and decently towards one another. Thus, our rules about co-ownership are not just rules about economic efficiency, but about how people should behave. See generally Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). Does this help you make any sense of the co-ownership rules?

14.2.2 Partition

Delfino v. Vealencis
436 A.2d 27 (Conn. 1980)

ARTHUR H. HEALEY, Associate Justice.

The central issue in this appeal is whether the Superior Court properly ordered the sale, pursuant to General Statutes § 52-500,¹ of property owned

¹General Statutes § 52-500 states: "Sale of Real or Personal Property Owned by Two or More. Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any estate, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners. . . . A conveyance made in pursuance of a decree ordering a sale of such land shall vest the title in the purchaser thereof, and shall bind the person entitled to the life estate and his legal heirs and any other person having a remainder interest in the lands; but the court passing such decree shall make such order in relation to the investment of the avails of

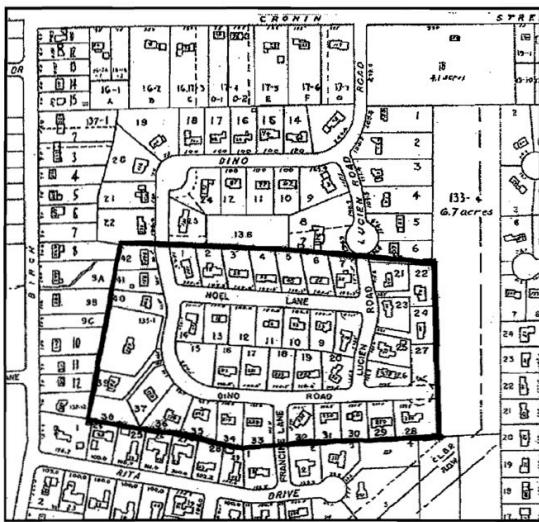


Figure 5-1
Subdivision plot plan for the 20.5 acre parcel

Figure 14.1: Subdivision plot plan for the 20.5 acre parcel

by the plaintiffs and the defendant as tenants in common.

The plaintiffs, Angelo and William Delfino, and the defendant, Helen C. Vealencis, own, as tenants in common, real property located in Bristol, Connecticut. The property consists of an approximately 20.5 acre parcel of land and the dwelling of the defendant thereon. The plaintiffs own an undivided 99/144 interest in the property, and the defendant owns a 45/144 interest. The defendant occupies the dwelling and a portion of the land, from which she operates a rubbish and garbage removal business.³ Apparently, none of the parties is in actual possession of the remainder of the property. The plaintiffs, one of whom is a residential developer, propose to develop the property, upon partition, into forty-five residential building lots.

In 1978, the plaintiffs brought an action in the trial court seeking a par-

such sale as it deems necessary for the security of all persons having any interest in such land."

³The defendant's business functions on the property consist of the overnight parking, repair and storage of trucks, including refuse trucks, the repair, storage and cleaning of dumpsters, the storage of tools, and general office work. No refuse is actually deposited on the property.

tition of the property by sale with a division of the proceeds according to the parties' respective interests. The defendant moved for a judgment of in-kind partition and the appointment of a committee to conduct said partition. The trial court, after a hearing, concluded that a partition in kind could not be had without "material injury" to the respective rights of the parties, and therefore ordered that the property be sold at auction by a committee and that the proceeds be paid into the court for distribution to the parties.

On appeal, the defendant claims essentially that the trial court's conclusion that the parties' interests would best be served by a partition by sale is not supported by the findings of subordinate facts, and that the court improperly considered certain factors in arriving at that conclusion. In addition, the defendant directs a claim of error to the court's failure to include in its findings of fact a paragraph of her draft findings.

General Statutes § 52-495 authorizes courts of equitable jurisdiction to order, upon the complaint of any interested person, the physical partition of any real estate held by tenants in common, and to appoint a committee for that purpose.⁷ When, however, in the opinion of the court a sale of the jointly owned property "will better promote the interests of the owners," the court may order such a sale under § 52-500.

It has long been the policy of this court, as well as other courts, to favor a partition in kind over a partition by sale. . . . Due to the possible impracticality of actual division, this state, like others, expanded the right to partition to allow a partition by sale under certain circumstances. The early decisions of this court that considered the partition-by-sale statute emphasized that "[t]he statute giving the power of sale introduces . . . no new principles; it provides only for an emergency, when a division cannot be well made, in any other way." The court later expressed its reason for preferring partition in kind when it stated: "(A) sale of one's property without his consent is an extreme exercise of power warranted only in clear cases." *Ford v. Kirk*, 41 Conn. 9, 12 (1874). Although under General Statutes § 52-500 a court is no longer required to order a partition in kind even in cases of extreme difficulty or hardship; it is clear that a partition by sale should be ordered only when two conditions are satisfied: (1) the physical attributes of the land are such that a partition in kind is impracticable or

⁷If the physical partition results in unequal shares, a money award can be made from one tenant to another to equalize the shares.

inequitable; and (2) the interests of the owners would better be promoted by a partition by sale. Since our law has for many years presumed that a partition in kind would be in the best interests of the owners, the burden is on the party requesting a partition by sale to demonstrate that such a sale would better promote the owners' interests.

The defendant claims in effect that the trial court's conclusion that the rights of the parties would best be promoted by a judicial sale is not supported by the findings of subordinate facts. We agree.

Under the test set out above, the court must first consider the practicability of physically partitioning the property in question. The trial court concluded that due to the situation and location of the parcel of land, the size and area of the property, the physical structure and appurtenances on the property, and other factors, a physical partition of the property would not be feasible. An examination of the subordinate findings of facts and the exhibits, however, demonstrates that the court erred in this respect.

It is undisputed that the property in question consists of one 20.5 acre parcel, basically rectangular in shape, and one dwelling, located at the extreme western end of the property. Two roads, Dino Road and Lucien Court, abut the property and another, Birch Street, provides access through use of a right-of-way. Unlike cases where there are numerous fractional owners of the property to be partitioned, and the practicability of a physical division is therefore drastically reduced; in this case there are only two competing ownership interests: the plaintiffs' undivided 99/144 interest and the defendant's 45/144 interest. These facts, taken together, do not support the trial court's conclusion that a physical partition of the property would not be "feasible" in this case. Instead, the above facts demonstrate that the opposite is true: a partition in kind clearly would be practicable under the circumstances of this case.

Although a partition in kind is physically practicable, it remains to be considered whether a partition in kind would also promote the best interests of the parties. In order to resolve this issue, the consequences of a partition in kind must be compared with those of a partition by sale.

The trial court concluded that a partition in kind could not be had without great prejudice to the parties since the continuation of the defendant's business would hinder or preclude the development of the plaintiffs' parcel for residential purposes, which the trial court concluded was the highest and best use of the property. The court's concern over the possible adverse economic effect upon the plaintiffs' interest in the event of a parti-

tion in kind was based essentially on four findings: (1) approval by the city planning commission for subdivision of the parcel would be difficult to obtain if the defendant continued her garbage hauling business; (2) lots in a residential subdivision might not sell, or might sell at a lower price, if the defendant's business continued; (3) if the defendant were granted the one-acre parcel, on which her residence is situated and on which her business now operates, three of the lots proposed in the plaintiffs' plan to subdivide the property would have to be consolidated and would be lost; and (4) the proposed extension of one of the neighboring roads would have to be rerouted through one of the proposed building lots if a partition in kind were ordered. The trial court also found that the defendant's use of the portion of the property that she occupies is in violation of existing zoning regulations. The court presumably inferred from this finding that it is not likely that the defendant will be able to continue her rubbish hauling operations from this property in the future. The court also premised its forecast that the planning commission would reject the plaintiffs' subdivision plan for the remainder of the property on the finding that the defendant's use was invalid. These factors basically led the trial court to conclude that the interests of the parties would best be protected if the land were sold as a unified unit for residential subdivision development and the proceeds of such a sale were distributed to the parties.

. . . The defendant claims that the trial court erred in finding that the defendant's use of a portion of the property is in violation of the existing zoning regulations, and in refusing to find that such use is a valid non-conforming use. . . . [T]he court's finding in this regard must be stricken as unsupported by sufficient competent evidence. We are left, then, with an unassailed finding that the defendant's family has operated a "garbage business" on the premises since the 1920s and that the city of Bristol has granted the defendant the appropriate permits and licenses each year to operate her business. There is no indication that this practice will not continue in the future.

Our resolution of this issue makes it clear that any inference that the defendant would probably be unable to continue her rubbish hauling activity on the property in the future is unfounded. We also conclude that the court erred in concluding that the city's planning commission would probably not approve a subdivision plan relating to the remainder of the property. Any such forecast must be carefully scrutinized as it is difficult to project what a public body will decide in any given matter. . . . The court's

finding indicates that only garbage trucks and dumpsters are stored on the property; that no garbage is brought there; and that the defendant's business operations involve "mostly containerized . . . dumpsters, a contemporary development in technology which has substantially reduced the odors previously associated with the rubbish and garbage hauling industry." These facts do not support the court's speculation that the city's planning commission would not approve a subdivision permit for the undeveloped portion of the parties' property.

The court's remaining observations relating to the effect of the defendant's business on the probable fair market value of the proposed residential lots, the possible loss of building lots to accommodate the defendant's business¹³ and the rerouting of a proposed subdivision road, which may have some validity, are not dispositive of the issue. It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants. The trial court failed to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property for a substantial period of time; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years. A partition by sale would force the defendant to surrender her home and, perhaps, would jeopardize her livelihood. It is under just such circumstances, which include the demonstrated practicability of a physical division of the property, that the wisdom of the law's preference for partition in kind is evident.

. . . Since the property in this case may practicably be physically divided, and since the interests of all owners will better be promoted if a partition in kind is ordered, we conclude that the trial court erred in ordering a partition by sale, and that, under the facts as found, the defendant is entitled to a partition of the property in kind.

¹³It should be noted in this regard that a partition in kind would result in a physical division of the land according to the parties' respective interests. The defendant would, therefore, not obtain any property in excess of her beneficial share of the parties' concurrent estates.

Notes and Questions

14.14. **Oweltiy.**² Courts have the equitable power to order **oweltiy** payments when it is impractical to partition in kind according to exact shares, but when monetary payments can adjust for the variance in the value of the parcels from the interests held by the respective cotenants. See *Dewrell v. Lawrence*, 58 P.3d 223, 227 (Okla. Civ. App. 2002); CODE OF ALA. § 35-6-24 (2010); CAL. CIV. PROC. CODE § 873.250 (West 2009).

14.15. **Denouement.** Thomas Merrill and Henry Smith did some digging for their property casebook, *Property: Principles and Policies*. Apparently, Vealencis was a difficult client and antagonized the trial judge, which meant that her victory on the law did not translate to victory in the real world. In *Delfino*, Vealencis was awarded three lots, including her homestead, a total of about one acre worth \$72,000. (See lot 135-1 on far left of image.) She was also required to pay \$26,000 in oweltiy to the Delfinos to compensate them for the harm her garbage operation imposed on the proposed subdivision.

While Vealencis had a 5/16 interest in the land, her net benefit was only \$46,000, or less than one-fourth of what she was due. Three years later, the Delfinos sold their roughly 19 acres to a developer for \$725,000. The developer separated Vealencis' lot from the rest of the subdivision by a two-foot-wide strip of land (see lots 39 and 40). This deprived her of access to Dino Road and its sewer and water connections, as well as preventing her trucks from entering the subdivision (even though she'd already paid for diminishing the value of the homes in the subdivision). Vealencis' only access to the land was a 16.5 foot easement over lot 9C. She was required to use an artesian well and a septic tank. See Manel Baucells & Steven A. Lippman, *Justice Delayed Is Justice Denied: A Cooperative Game Theoretic Analysis to Hold-up in Coownership*, 22 CARDENZO L. REV. 1191 (2001). Vealencis died in 1990, still running the garbage business.

Why was she required to pay oweltiy up-front rather than waiting to see if the harm materialized and allowing the Delfinos to recover in an action for nuisance later? Is there anything the court could have done in its division to avoid the unfairness to Vealencis? And what does this result suggest about the appropriate choice of remedies— injunction or damages—in nuisance cases?

14.16. **Implementing partition in kind.** In a partition in kind, how should the court determine who gets what land? See *Anderson v. Anderson*, 560 N.W.2d

²This charming term is followed in *Black's Legal Dictionary* by another winner. To quote Blackstone, “Owling, so called from its being usually carried on in the night, . . . is the offense of transporting sheep or wool out of this kingdom.”

729 (Minn. Ct. App. 1997) (cotenants awarded parcel on which they had a residence); *Barth v. Barth*, 901 P.2d 232 (Okla. Ct. App. 1995) (considering cotenant's ownership of adjacent land). In Louisiana, partition in kind is not allowed unless parcels of equal value can be created, and parcels must be drawn by lot. See *McNeal v. McNeal*, 732 So. 2d 663 (La. Ct. App. 1999). Is this a good idea? What about "I cut, you choose" as a way of implementing partition in kind? There's a large literature in game theory, mathematics, and computer science on these problems, dealing with more than two parties, heterogeneous resources, etc. Very little of this seems to have made its way into law. *But see Note, Cutting the Baby in Half*, 77 BROOK. L. REV. 263 (2011) (surveying some of the literature).

Some state laws also provide for allotment, in which the court allocates part of the property to a cotenant—which can include an oweltly payment if the allocated portion is more than the cotenant's share—and then sells the remainder. E.g., 25 DEL. CODE § 730; S.C. CODE ANN. § 15-61-50; VA. CODE ANN. § 8.01-83. Sometimes a cotenant must show an equitable claim to allotment in order to get it. HAW. REV. STAT. §§ 668-7(5)-(6).

14.17. Partition by sale as the default? Consider the court's claims about the preference for partition in kind. Partition in kind will essentially always diminish the market value of the land compared to partition by sale. Do other, intangible interests nonetheless adequately justify a preference for partition in kind?

Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004), suggests that a rule favoring maximization of market value "would permit commercial entities to always 'evict' pre-existing co-owners, because a commercial entity's interest in property will invariably increase its value."

Though partition in kind is supposedly favored by the law on the books, governing legal practice is different, as the Uniform Law Commission has written:

Despite the overwhelming statutory preference for partition in kind, courts in a large number of states typically resolve partition actions by ordering partition by sale which usually results in forcing property owners off their land without their consent. This occurs even in cases in which the property could easily have been divided in kind or an overwhelming majority of the cotenants had opposed partition by sale or even in some cases when the only remedy any cotenant petitioned the court to order was partition in kind and not partition by sale.

UNIFORM PARTITION OF HEIRS PROPERTY ACT 1 (Nat'l Conf. of Comm'r's on

Unif. State Ls. 2010), <https://www.uniformlaws.org/viewdocument/final-act-97?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d&tab=librarydocuments>. “Heirs’ property,” that is, property whose ownership is divided by intestate succession over several generations, has resulted in highly fractionated ownership of land in many African-American families. The ULC explains that “many of these owners [in possession] believe that their property ownership is secure because they pay property taxes, they live on the land, and they make productive use of the land. They also believe that their property may only be sold against their will if a majority or more of their cotenants agree, which gives some of these families with a large number of members with an interest in the property false confidence that their ownership is extremely secure.” But their rights are, in fact, highly insecure. “Unfortunately, the first time that many of these owners are informed about the actual legal rules governing partition is after a partition action has been filed, and often after critical, early court rulings have been made against them.”

When heirs’ property became valuable for development, third parties would often acquire the interest of a distant relative who has a fractional share and petition for partition. Given the often hundreds of people who own interests in a piece of heirs’ property, courts generally hold that partition in kind is impossible. The resulting sale can dispossess people who have lived on or used the land for decades; family members who would like to keep the land are rarely able to outbid developers, who nonetheless usually pay substantially below-market prices because of the forced nature of the sale. Ironically, once sale is ordered, courts will not overturn a sale price unless it “shocks the conscience,” even though the rationale for ordering the sale was that it would provide the cotenants with more benefit than partition in kind. Sales have been confirmed even though the property sold for twenty percent or less of its market value. In many states, family members who oppose partition by sale can even be required to pay the petitioner’s attorneys’ fees. Thomas Mitchell, a law professor at the University of Wisconsin-Madison, says, “It would be like if you owned incredibly small shares of Microsoft, and you were given the right to go to your local state court and file a motion to liquidate Microsoft at a fire sale.”

The problem is substantial:

According to the Land Loss Prevention Project, a Durham, N.C.-based organization that provides legal support to financially distressed farmers and landowners in the state, of the 15 million acres of land acquired by African-Americans after Emancipa-

tion, about 2 million remain owned by their descendants. Nationally, it's estimated that African-American land ownership has decreased from as much as 19 million acres in 1910 to 1.5 million acres in 1997, according to the Southern Coalition for Social Justice.

See Anna Stolley Persky, *In the Cross-Heirs*, ABA J. (May 2, 2009), http://www.abajournal.com/magazine/article/in_the_cross-heirs/.

The problem also occurs in urban areas, where a family home may have been passed down through several generations. Barriers to transfers by will include poverty, lack of knowledge, or an unwillingness to cause family conflict by picking specific heirs. Heirs property created significant problems in New Orleans after Hurricane Katrina, when many people who thought they were owners were unable to show title to their homes.

The common law operated under a presumption that grants to multiple grantees created a joint tenancy—precisely the opposite of the modern presumption in favor of a tenancy in common. Should we return to a presumption in favor of joint tenancy, at least for family homes where children are the heirs by intestacy?

Or should small fractional interests disappear over time? Recall that traditionally, one cotenant's possession is not adverse to any other cotenant's possession, unless there is an ouster. Although cotenants are due their share of rents or other income arising from use of the property, mere failure to pay them does not start the adverse possession clock running. Would it make sense to change these rules? What are the risks from doing so? (There would be due process and takings issues if legislatures tried to extinguish fractional interests outright.³)

³Due to previous legislation attempting to assimilate members of Indian tribes into (white) American society, combined with generations of inherited interests, reservation land has often become highly fractionated. Many allotments have several hundred owners. Fractional shares have been denominated in millions, billions, and even 54 trillion. For example, one tract of forty acres produced \$1080 in annual income. It had 439 owners, one-third of whom received less than five cents in annual rent and two-thirds of whom received less than a dollar. The largest interest holder received \$82.85 a year, while the smallest was entitled to one penny every 177 years. The administrative costs to the Bureau of Indian Affairs of managing this distribution were over \$17,000 per year. *Hodel v. Irving*, 481 U.S. 704 (1987). Fractionation makes productive use of land almost impossible. Indian Land Consolidation Act Amendment, S. REP. No. 98-632, at 82-83 (1984), reprinted in 1984 U.S.C.C.A.N. 5470. Allotment lands can only be leased or partitioned with the unanimous consent of all interest holders. The Indian Land Consolidation Act of 1983 attempted to solve these problems by mandating that extremely fractionated inter-

The Uniform Partition of Heirs' Property Act, enacted in six states as of 2015, provides co-owners with a right of first refusal to buy the petitioning co-owner's share, and, if they do not exercise that right, attempts to create a more competitive bidding process. The expectation is that even co-owners who can't raise enough money to buy the entire parcel at fair market value, as at a traditional partition sale, are more likely to be able to buy another cotenant's fractional share. Under the Act, courts can also consider the historical and cultural value of the land to the people living on it, not just the economic value of the land, in deciding whether to reject partition by sale. See, e.g., *Chuck v. Gomes*, 532 P.2d 657 (Haw. 1975) (Richardson, C.J., dissenting):

[T]here are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual's right to retain ancestral land in order to perpetuate the concept of the family homestead. Such right is derived from our proud cultural heritage. . . . [W]e must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land in a particular family line.

14.18. Contracting around partition rights. Should cotenants be able to waive their right to partition? See *Gore v. Beren*, 867 P.2d 330 (Kan. 1994) (cotenants agreed to a right of first refusal if any cotenant wished to sell; this agreement impliedly waived the right to partition and didn't violate the Rule Against Perpetuities because it was personal to the parties and would necessarily end during the lifetime of one of the parties); see also *Michalski v. Michalski*, 142 A.2d 645 (N.J. Super. 1958) (otherwise valid restriction on right to partition may be unenforceable when circumstances have changed so much that enforcement would be unduly harsh); *Reilly v. Sageser*, 467 P.2d 358 (Wash. Ct. App. 1970) (option to purchase from cotenant at cost of cotenant's investment in land and improvements was valid unless both parties agreed or one party substantially

ests would escheat to the relevant tribe, without compensation to the fractional owners. The Supreme Court invalidated this law as an unconstitutional taking, *Hodel*, and likewise invalidated the attempted replacement, *Babbitt v. Youpee*, 519 U.S. 234 (1997).

The American Indian Probate Reform Act of 2004 tried again; the Department of the Interior runs a land consolidation program under which it buys back fractionated shares. Under the AIPRA, if Indian land would pass by intestate succession, the Department of the Interior can buy any interests in the land that are under 5%. This purchase can occur even if the heir objects, unless the heir is living on the land. Other heirs, co-owners, and the tribe on whose reservation the land is located can also buy the land, as long as they pay fair market value and have the consent of anyone holding more than a 5% interest.

breached other elements of agreement); *cf. Low v. Spellman*, 629 A.2d 57 (Me. 1993) (invalidating right of first refusal given to grantors, heirs, and assigns as in violation of the Rule Against Perpetuities; fixed price of \$6500 also created unreasonable restraint on alienation).

14.19. Partitioning a future interest. Can owners who own only a future interest seek partition of that interest? At common law, the answer was no because they lacked a present possessory interest, and some states still adhere to this rule. See, e.g., *Triebel v. Citizens State Bank*, 598 N.W.2d 96 (N.D. 1999). Many states, however, allow co-owners of vested future interests to seek partition of that interest. See, e.g., ARK. CODE § 18-60-401.

14.20. Partitioning personal property. Are there circumstances in which a physical partition of personal property would make sense? How would you divide up a photo album with hundreds of photographs? Cf. *In re Estate of McDowell*, 345 N.Y.S.2d 828 (Sur. Ct. 1973) (custody of rocking chair desired by both heirs should be divided in six-month increments, remainder to the survivor); Ro-nen Perry & Tal Zarsky, *Taking Turns*, 43 FLA. ST. U. L. REV. (2015). This solution raises a more general question: why don't we see more co-ownership of real property on the time-share model?

14.3 Joint Tenancy

Joint tenancy (in some jurisdictions called a “joint tenancy with right of survivorship” and abbreviated “JTWROS”) is a form of ownership that can be unilaterally severed and turned into a tenancy in common. Its distinctive feature is the right of survivorship: If a joint tenancy is not severed before a joint tenant’s death, that joint tenant’s interest disappears and the remaining tenant continues to own an undivided interest, allowing the survivor to avoid probate. Thus, joint tenancy is most widely used today as a substitute for a will.⁴

In modern times, tenancy in common is preferred to other kinds of co-ownership. A conveyance “to Alice and Beth” therefore creates a tenancy in common by default, though it’s relatively standard to include “as tenants in common” to avoid all uncertainty. The creation and continuation of a joint tenancy is beset with traps, even though it may well be most co-owners’ preferred

⁴Note that the federal government does not follow the fiction that nothing passes at death to the surviving joint tenant; the decedent’s interest will be taxed as if it were transferred to the survivor, though if the joint tenants are married no tax will be due.

form of ownership for residential property. Some states have statutes that appear to abolish the joint tenancy, but they will often find joint tenancies with a right of survivorship if the intent to create them is clear enough. See, e.g., *McLeroy v. McLeroy*, 40 S.W.2d 1027 (Tenn. 1931).

14.3.1 Creating a Joint Tenancy

The traditional test for the creation and continuation of a joint tenancy depended upon the presence of the four “unities”: (1) time—the joint tenants’ interests were all acquired at the same time; (2) title—the interests were all acquired by the same document or by joint adverse possession; (3) interest—the tenants’ shares must all be equal and undivided; and (4) possession—all joint tenants must have equal rights to possess the whole (in the absence of an agreement to the contrary⁵):

Unless the unities existed at the tenancy’s inception, or if they were broken at any subsequent point, the joint tenancy was automatically severed, and the owners became tenants in common. This requirement meant, for example, that the owner of property could not create a joint tenancy in himself and others without first making use of a straw man. Because all joint tenants had to receive their interest in the property at the same time and by the same title, the owner had first to convey to a third party, who would in turn convey the property back to the grantor and the other tenants. They would then take in joint tenancy. Without this purely formal step, however, they would be only tenants in common.

R. H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1 (1998). Today (as was already largely true in the 1950s), the necessity for using a straw man to create a joint tenancy has been largely eliminated from American law, sometimes by judicial decision but more often by statutory enactment. We will examine this issue further below, when we discuss severance of a joint tenancy.

⁵At common law, joint tenants could not hold unequal shares, and attempting to create such a tenancy would create a tenancy in common. However, modern courts are increasingly willing to accept a clearly shown intent to hold unequal shares. See *Moat v. Ducharme*, 555 N.E.2d 897 (Mass. App. 1990) (unequal contributions); *Jezo v. Jezo*, 127 N.W.2d 246 (Wis. 1964) (evidence of contrary intent can override presumption of equal shares).

A conveyance “to Alice and Beth as joint tenants, and not as tenants in common,” will create a joint tenancy in most states. See *Kurpiel v. Kurpiel*, 271 N.Y.S.2d 114 (N.Y. Sup. Ct. 1966) (joint tenancy created). Most states consider that this language confirms the grantor’s intent—“joint” alone might have been misunderstood by a layperson who thinks that tenants in common are joint owners in a general sense, though some states accept “to Alice and Beth jointly” as sufficient to create a joint tenancy. Compare *Downing v. Downing*, 606 A.2d 208 (Md. 1992) (“to A and B as joint tenants” creates a joint tenancy where the state statute provides that a tenancy in common is created unless a written instrument “expressly provides that the property granted is to be held in joint tenancy”), and *Germaine v. Delaine*, 318 So. 2d 681 (Ala. 1975) (“jointly as tenants in common” created a joint tenancy where the deed indicated a clear intent for survivorship), with *Taylor v. Taylor*, 17 N.W.2d 745 (Mich. 1945) (“jointly,” absent circumstantial evidence of intent to create the legal effect of a joint tenancy, does not suffice to create a joint tenancy); *Montgomery v. Clarkson*, 585 S.W.2d 483 (Mo. 1979) (“jointly” is not “express declaration” of joint tenancy, as required by state statute); *Overheiser v. Lackey*, 100 N.E. 738 (N.Y. 1913) (where the layman who prepared a will used “jointly,” the will created a tenancy in common), and *Householter v. Householter*, 164 P.2d 101 (Kan. 1945) (“jointly,” used five times in a will prepared by a person who had served as a probate judge, created a joint tenancy).

In some states, precedents require more, usually specific invocation of a right of survivorship. Compare *Germaine v. Delaine*, 318 So. 2d 681 (Ala. 1975) (deed to A and B “jointly, as tenants in common and to the survivor thereof” created joint tenancy because of survivorship language), with *Hoover v. Smith*, 444 S.E.2d 546 (Va. 1994) (“to A and B as joint tenants, and not as tenants in common” was insufficient to create a joint tenancy because it was not explicit about the right of survivorship).

In other states, however, use of that same language will cause problems. See, e.g., *Hunter v. Hunter*, 320 S.W.2d 529 (Mo. 1959) (will devising property to A and B “as joint tenants with the right of survivorship” created life estates with remainder to the survivor); *Snover v. Snover*, 502 N.W.2d 370 (Mich. Ct. App. 1993) (“to A and B as joint tenants with full rights of survivorship and not as tenants in common” created life estate in tenancy in common with remainder to survivor). Be sure you understand what the problem is: under what circumstances will it make a difference whether A and B have a joint tenancy, with right of survivorship, or instead have a tenancy in common in life estate, with the remainder to the survivor? Courts sometimes refer to the latter as an “indestructible” re-

remainder, which is confusing language – the remainder can't be destroyed by the *other* cotenant, whereas a right of survivorship in a joint tenancy can be unilaterally destroyed.

It is vitally important to consult your state's statutes and precedent before drafting a conveyance to more than one owner. *James v. Taylor*, 969 S.W.2d 672 (Ark. App. Ct. 1998), is an example of how the law can lay traps for the well-intentioned but poorly advised. The issue in the case was whether a deed conveyed property from a mother to her three children as tenants in common or as joint tenants. The court of appeals reversed an initial ruling that the conveyance created a joint tenancy. The deed named the three children "jointly and severally, and unto their heirs, assigns and successors forever," and the mother retained a life estate. Two of the three children subsequently died, and then the mother died. Melba Taylor, the surviving child, sought a declaration that she was the sole owner, while the heirs of the other two children opposed her. Arkansas, like most states, provides that every shared interest in land "shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy." ARK. CODE ANN. § 18-12-603 (1987).

The heirs argued that any ambiguity therefore pointed to a tenancy in common, whereas Taylor argued that her mother's intent to create a joint tenancy could be determined from the surrounding circumstances. The evidence of such intent was relatively strong: Taylor testified that her mother told her lawyer that she wanted the deed drafted so that, if one of her children died, the property would belong to the other two children, and so on; and that her mother was upset when she learned, just before her death, that there was a problem with the deed. In addition, after the first child died, the mother drafted a new will splitting her property between her two living children and giving nothing to the dead child's heirs, and the mother deleted the names of each dead child from bank accounts payable on death, leaving only Taylor's name.

The court of appeals nonetheless held that the policy of the statute, favoring tenancy in common unless a joint tenancy was expressly granted, overrode any inquiry into the mother's intent. While the words "joint tenancy" didn't need to be used, some intent to convey a survivorship estate needed to appear in the grant. The words "jointly and severally" were insufficient, contradictory, and therefore meaningless in the context of estates.

Assuming a court looked for extrinsic evidence of the drafter's intent in a case involving ambiguous language, what would constitute persuasive evidence of an intent to create a joint tenancy?

14.3.2 Severance of a Joint Tenancy

Severance is any act that destroys one or more of the four unities required to maintain a joint tenancy. The legal consequence of severance is that the joint tenancy is converted to a tenancy in common. (For those rare joint tenancies involving three or more joint tenants, one joint tenant may sever the joint tenancy as to his interest, but the others remain joint tenants with each other.) The traditional rule for severance required either that all the tenants expressly agree to hold as tenants in common, or that one of the tenants convey to a third person in order to destroy the unities (particularly the unities of time and title), to turn a joint tenancy into a tenancy in common. In modern times, a conveyance from oneself as joint tenant to oneself as tenant in common is likely to succeed just as well as a conveyance by one tenant to a straw owner plus a reconveyance from the straw. See *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n*, 161 N.W.2d 688 (Minn. 1968); *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980); see also *Countrywide Funding Corp. v. Palmer*, 589 So. 2d 994 (Fla. Dist. Ct. App. 1991) (one joint tenant forged the other's signature in purported conveyance to himself; court held that his act severed the tenancy). *But see Krause v. Crossley*, 277 N.W.2d 242 (Neb. 1979) (rejecting this modern trend and requiring conveyance to a third party for an effective severance); L.B. 694, § 11, 1980 NEB. LAWS 577 (codified as NEB. REV. STAT. § 76-118(4) (Reissue 1996)) (reversing result in *Krause* and allowing self-conveyance to sever).

The largest problem in severance is one of surprise, which can occur whether or not a third party straw is required to participate in the severance. As Helmholz explains:

Since one joint tenant has always been able to sever the tenancy without the concurrence or even the knowledge of the other, the possibility of a severance that is unfair to the other has long existed. It can take several forms, as where the joint tenant who has contributed nothing to the purchase of the assets then severs unilaterally, thereby upsetting the normal expectations of the other joint tenant. Its most extreme form is the secret severance. If the tenant who severs secretly is the first to die, the heirs or successors produce the severing document and take half of the property. It accrues to them under the tenancy in common that was the result of the severance. If the severing tenant survives, however, the severing document is suppressed and the survivor takes the whole. The

heirs or successors of the first to die get nothing. It is what the economists call “strategic behavior.”

Helmholz, *supra*, at 25-26.

Why not impose a notice requirement for a deliberate severance? What about imposing a requirement that a severing instrument be timely recorded in the public land records? See CAL. CIV. CODE § 683.2 (West 1998) (if a joint tenancy is recorded, severance is only effective against the non-severing tenant if the severance is recorded either before the severing tenant's death or, in limited circumstances, recorded within seven days after death; the severing tenant's right of survivorship is cut off even without recording); MINN. STAT. ANN. § 500.19-5 (West 1997) (requiring recording to make unilateral severance valid); N.Y. REAL PROP. LAW § 240-c(2) (similar). Does a recording requirement solve the problem of surprise?

Joint tenants may also take acts that are more ambiguous with respect to their rights. Courts then have to decide what kinds of acts are sufficient to work a severance.

Harms v. Sprague
473 N.E.2d 930 (Ill. 1984)

Thomas J. MORAN, Justice.

Plaintiff, William H. Harms, filed a complaint to quiet title and for declaratory judgment in the circuit court of Greene County. Plaintiff had taken title to certain real estate with his brother John R. Harms, as a joint tenant, with full right of survivorship. The plaintiff named, as a defendant, Charles D. Sprague, the executor of the estate of John Harms and the devisee of all the real and personal property of John Harms. Also named as defendants were Carl T. and Mary E. Simmons, alleged mortgagees of the property in question. Defendant Sprague filed a counterclaim against plaintiff, challenging plaintiff's claim of ownership of the entire tract of property and asking the court to recognize his (Sprague's) interest as a tenant in common, subject to a mortgage lien. At issue was the effect the granting of a mortgage by John Harms had on the joint tenancy. Also at issue was whether the mortgage survived the death of John Harms as a lien against the property.

The trial court held that the mortgage given by John Harms to defendants Carl and Mary Simmons severed the joint tenancy. Further, the court

found that the mortgage survived the death of John Harms as a lien against the undivided one-half interest in the property which passed to Sprague by and through the will of the deceased. The appellate court reversed, finding that the mortgage given by one joint tenant of his interest in the property does not sever the joint tenancy. Accordingly, the appellate court held that plaintiff, as the surviving joint tenant, owned the property in its entirety, unencumbered by the mortgage lien. . . .

Two issues are raised on appeal: (1) Is a joint tenancy severed when less than all of the joint tenants mortgage their interest in the property? and (2) Does such a mortgage survive the death of the mortgagor as a lien on the property?

A review of the stipulation of facts reveals the following. Plaintiff, William Harms, and his brother John Harms, took title to real estate located in Roodhouse, on June 26, 1973, as joint tenants. The warranty deed memorializing this transaction was recorded on June 29, 1973, in the office of the Greene County recorder of deeds.

Carl and Mary Simmons owned a lot and home in Roodhouse. Charles Sprague entered into an agreement with the Simmons whereby Sprague was to purchase their property for \$25,000. Sprague tendered \$18,000 in cash and signed a promissory note for the balance of \$7,000. Because Sprague had no security for the \$7,000, he asked his friend, John Harms, to co-sign the note and give a mortgage on his interest in the joint tenancy property. Harms agreed, and on June 12, 1981, John Harms and Charles Sprague, jointly and severally, executed a promissory note for \$7,000 payable to Carl and Mary Simmons. The note states that the principal sum of \$7,000 was to be paid from the proceeds of the sale of John Harms' interest in the joint tenancy property, but in any event no later than six months from the date the note was signed. The note reflects that five monthly interest payments had been made, with the last payment recorded November 6, 1981. In addition, John Harms executed a mortgage, in favor of the Simmonses, on his undivided one-half interest in the joint tenancy property, to secure payment of the note. William Harms was unaware of the mortgage given by his brother.

John Harms moved from his joint tenancy property to the Simmons property which had been purchased by Charles Sprague. On December 10, 1981, John Harms died. By the terms of John Harms' will, Charles Sprague was the devisee of his entire estate. The mortgage given by John Harms to the Simmonses was recorded on December 29, 1981.

Prior to the appellate court decision in the instant case no court of this State had directly addressed the principal question we are confronted with herein—the effect of a mortgage, executed by less than all of the joint tenants, on the joint tenancy. Nevertheless, there are numerous cases which have considered the severance issue in relation to other circumstances surrounding a joint tenancy. All have necessarily focused on the four unities which are fundamental to both the creation and the perpetuation of the joint tenancy. These are the unities of interest, title, time, and possession. The voluntary or involuntary destruction of any of the unities by one of the joint tenants will sever the joint tenancy.

In a series of cases, this court has considered the effect that judgment liens upon the interest of one joint tenant have on the stability of the joint tenancy. In *Peoples Trust & Savings Bank v. Haas* (1927), 328 Ill. 468, 160 N.E. 85, the court found that a judgment lien secured against one joint tenant did not serve to extinguish the joint tenancy. As such, the surviving joint tenant “succeeded to the title in fee to the whole of the land by operation of law.”

. . . Clearly, this court adheres to the rule that a lien on a joint tenant's interest in property will not effectuate a severance of the joint tenancy, absent the conveyance by a deed following the expiration of a redemption period. It follows, therefore, that if Illinois perceives a mortgage as merely a lien on the mortgagor's interest in property rather than a conveyance of title from mortgagor to mortgagee, the execution of a mortgage by a joint tenant, on his interest in the property, would not destroy the unity of title and sever the joint tenancy.

Early cases in Illinois, however, followed the title theory of mortgages. In 1900, this court recognized the common law precept that a mortgage was a conveyance of a legal estate vesting title to the property in the mortgagee. Consistent with this title theory of mortgages, therefore, there are many cases which state, in dicta, that a joint tenancy is severed by one of the joint tenants mortgaging his interest to a stranger. Yet even the early case of *Lightcap v. Bradley*, cited above, recognized that the title held by the mortgagee was for the limited purpose of protecting his interests. The court went on to say that “the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous, and exists only between him and the mortgagor . . .” *Lightcap v. Bradley* (1900), 186 Ill. 510, 522-23, 58 N.E. 221.

Because our cases had early recognized the unique and narrow char-

acter of the title that passed to a mortgagee under the common law title theory, it was not a drastic departure when this court expressly characterized the execution of a mortgage as a mere lien . . .

[A] joint tenancy is not severed when one joint tenant executes a mortgage on his interest in the property, since the unity of title has been preserved. As the appellate court in the instant case correctly observed: "If giving a mortgage creates only a lien, then a mortgage should have the same effect on a joint tenancy as a lien created in other ways." Other jurisdictions following the lien theory of mortgages have reached the same result.

. . . An inherent feature of the estate of joint tenancy is the right of survivorship, which is the right of the last survivor to take the whole of the estate. Because we find that a mortgage given by one joint tenant of his interest in the property does not sever the joint tenancy, we hold that the plaintiff's right of survivorship became operative upon the death of his brother. As such plaintiff is now the sole owner of the estate, in its entirety.

Further, we find that the mortgage executed by John Harms does not survive as a lien on plaintiff's property. A surviving joint tenant succeeds to the share of the deceased joint tenant by virtue of the conveyance which created the joint tenancy, not as the successor of the deceased. The property right of the mortgaging joint tenant is extinguished at the moment of his death. While John Harms was alive, the mortgage existed as a lien on his interest in the joint tenancy. Upon his death, his interest ceased to exist and along with it the lien of the mortgage. Under the circumstances of this case, we would note that the mortgage given by John Harms to the Simmonses was only valid as between the original parties during the lifetime of John Harms since it was unrecorded. In addition, recording the mortgage subsequent to the death of John Harms was a nullity. As we stated above, John Harms' property rights in the joint tenancy were extinguished when he died. Thus, he no longer had a property interest upon which the mortgage lien could attach

Notes and Questions

14.21. The result in *Harms*, in which the mortgage disappears if the joint tenant who granted it predeceases the other joint tenant, is the most common result in **lien theory** states, which represent the vast majority of states today. However, for the reasons discussed in *Harms*, the results in **title theory** states

are mixed. Compare *Downing v. Downing*, 606 A.2d 208 (Md. 1992) (no automatic severance although Maryland is a “title” state), with *Schaefer v. Peoples Heritage Savings Bank*, 669 A.2d 185 (Me. 1996) (mortgage severs joint tenancy), and *General Credit Co. v. Cleck*, 609 A.2d 553 (Pa. Sup. Ct. 1992) (same); Taylor Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U. L.J. 27.

Suppose we adopted an intent-based standard to determine whether the joint tenancy was severed. How would we have determined John Harms’ intent after his death?

14.22. Is the result in *Harms* fair? Suppose John had instead survived William. Would the mortgage burden half the interest in the property, or the whole interest? See *People v. Nogarr*, 330 P.2d 858 (Cal. Ct. App. 1958) (if the mortgaging joint tenant survives the nonmortgaging joint tenant, the lien attaches to the entire interest). Wouldn’t the mortgagees get a windfall if the value of their secured interest suddenly jumped in value? On the other hand, isn’t that just the flip side of the loss they suffer if William survives John? Should we create a hybrid that would protect the lender, and burden William’s interest after John’s death, even without severing?

Suppose the mortgage had worked a severance. If John had paid the mortgage off before dying, should the severance be undone and the joint tenancy restored? What would the parties likely have expected?

14.23. Given the result in *Harms*, how will lenders behave when one co-owner seeks to take out a loan? Sophisticated lenders make mistakes, see *Texas American Bank v. Morgan*, 733 P.2d 864 (N.M. 1987), but mostly the lenders at risk are ordinary people, often relatives or friends of the borrower.

What about a creditor who has a judgment against one joint tenant—what should she do to make sure she can get access to the property to satisfy the judgment? In practice, the creditor must act during the debtor’s life to attach a lien to the property and foreclose on that lien. See, e.g., *Rembe v. Stewart*, 387 N.W.2d 313 (Iowa 1986); *Jamestown Terminal Elev., Inc. v. Knopp*, 246 N.W.2d 612 (N.D. 1976) (judgment lien on joint tenancy property did not survive when debtor cotenant died before execution sale); *Jackson v. Lacy*, 97 N.E.2d 839 (Ill. 1951) (severance doesn’t occur at foreclosure, but only on expiration of the redemption period after foreclosure sale); see also *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984) (a creditor may do what the debtor could do, so a creditor of one joint tenant could convert a joint tenancy into a tenancy in common, as long as the other cotenant’s interest wouldn’t be otherwise prejudiced; an example of prejudice would be the loss of a favorable interest rate on a mortgage due to

the timing of the creditor's act).

14.24. According to Charles Sprague's lawyer, Charles and John were romantically involved. If the events underlying the case occurred today, they could have married before John's death. Would that have changed anything?

In *Riccelli v. Forcinito*, 595 A.2d 1322 (Pa. Super. Ct. 1991), discussed above, Sam Riccelli and Carmen Pirozek had a joint tenancy. Four years later, Sam Riccelli married Rita Riccelli. Carmen Pirozek lived in the Riccelli–Pirozek property until her death in 1984. Her son lived in the house until Sam Riccelli died in 1987; Rita Riccelli then sued to kick him out, claiming to be the sole owner because Sam had inherited the whole property by right of survivorship. Did the marriage sever the joint tenancy? It might seem that the marriage, which gave Rita at least a potential interest in the property, severed the unities of time, title, interest, and possession. However, the court held that marriage of one joint tenant did not sever the joint tenancy. What's the best argument against severance? Is it the same as the argument in *Harms* against allowing a mortgage given by only one joint tenant to sever the joint tenancy?

Compare the case of *Goldman v. Gelman*, 77 N.E.2d 200 (N.Y. 2000). Before a divorce decree became final, the wife gave her divorce attorney a mortgage on the marital home, which was owned by the entirety, in order to secure her debt to her attorney. The husband was awarded exclusive title to the whole marital home. New York's highest court held that the divorce did not destroy the mortgage, because the wife's interest was valid until the final divorce decree, which turned the tenancy by the entirety into a tenancy in common. The mortgage still burdened the wife's interest, and survived when the wife's interest was transferred to the husband. Who ultimately has to pay the wife's divorce lawyer?

14.25. **Other acts that might work a severance.** Technical breaches of the four unities are unlikely to work a severance. For example, when one joint tenant is adjudged an incompetent and the legal title to the incompetent's property is assigned to a guardian, courts hold that no severance occurred. See, e.g., *Moses v. Butner (In re Estate and Guardianship of Wood)*, 14 Cal. Rptr. 147 (Cal. Ct. App. 1961). Cases are divided on whether the grant of a lease by one joint tenant works a severance. Compare *Tenhet v. Boswell*, 554 P.2d 330 (Cal. 1976) (lease by one joint tenant does not sever joint tenancy, though lease is terminated by death of leasing joint tenant), with *Estate of Gulatedge*, 673 A.2d 1278 (D.C. 1996) (lease to third person severs joint tenancy); see also *In re Estate of Johnson*, 739 N.W.2d 493 (Iowa 2007) (adopting intent-based approach to severance). Some cases even suggest that a lease only works a temporary severance, and the joint tenancy is automatically reformed when the lease ends. Isn't that a ridiculous

rule? Are the four unities doing any real work here?

The traditional rule was that, when property is held jointly by spouses, divorce did not sever the joint tenancy. Unlike entireties property, jointly held property need not be held by spouses, so the four unities remain intact even after divorce. Does this make sense? Some states now presume severance upon divorce. See e.g., OHIO REV. CODE ANN. § 5302.20(c)(5) (Anderson 1996). Others require courts to deal with the status of property as part of the divorce decree. See, e.g., *Johnson v. Johnson*, 169 N.W.2d 595 (Minn. 1969). The majority rule is that divorce works a severance, though the cases are divided; Helmholz argues that the results turn not on the four unities but on the courts' best understanding of the parties' intent. In a divorce case, both parties are alive, so it may seem possible to determine that intent. As Helmholz points out, matters get dicey when a divorce or a sale is pending and one of the spouses dies:

Most of these disputes arose where the parties were not thinking at all about what would happen if one of them died. Why would they? They assumed that the divorce would be completed or that the contract for sale would be fulfilled. In most situations that is exactly what did happen. But not all. Where the unexpected does happen and one party dies, litigation all too easily ensues. In it, the courts have been left with the task of discovering the intent of the parties from what are very often the slenderest of indications.

Helmholz, *supra*, at 25. Given that "intent" may be an unworkable standard, is a formalist approach looking only to the four unities preferable in that it at least provides courts with an answer?

Finally, where joint tenants have sought partition but the partition hasn't yet occurred, the almost universal rule is that there is no severance until a court has granted the partition, or at least until only the barest formalities remain to finalize it. See, e.g., *Heintz v. Hudkins*, 824 S.W.2d 139 (Mo. Ct. App. 1992). Helmholz again:

Although it may be said in favor of this rule that the parties might always have changed their mind before the final decree, that seems a poor justification in the face of their clearly expressed intent to sever and the untimely death of one of them. The true reason for the rule must be a formal one: the rule is necessary in order to safeguard the integrity of the underlying action for partition. Partition cannot be effective before it is obtained. One

cannot secure the results of a judicial action simply by asking for it.

Helmholz, *supra*, at 30.

14.26. What shares exist after severance? The general assumption is that joint tenants have equal shares after severance—after all, the unity of interest requires that all joint tenants have equal shares *before* severance. However, if the equities strongly favored unequal shares, courts might well bend the rules. *Compare Cunningham v. Hastings*, 556 N.E.2d 12 (Ind. Ct. App. 1990) (though one cotenant paid the purchase price, the creation of a joint tenancy entitles each party to an equal share of the proceeds on partition; equitable adjustments to cotenants' equal shares are allowed for tenancies in common, not joint tenancies), *with Moat v. Ducharme*, 555 N.E.2d 897 (Mass. App. Ct. 1990) (presumption of equal shares is rebuttable because partition must be equitable), and *Jezo v. Jezo*, 127 N.W.2d 246 (Wis. 1964) (presumption of equal shares is rebuttable).

14.27. Joint tenants who kill. The general rule is that a person who intentionally causes another's death loses any inheritance rights he otherwise would have had from his victim's estate. In *Estate of Castiglioni*, 47 Cal. Rptr. 2d 288 (Ct. App. 1995), the surviving spouse petitioned for half of the property she held in joint tenancy with her deceased husband, of whose murder she was subsequently convicted. California Probate Code Section 251 provides in part: "A joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship." Thus, there was no question that she could not inherit the entire property through a right of survivorship; her husband's share went to her husband's heir, a daughter.

However, years before the murder, the husband put his separate property in joint tenancy with the wife. The question was therefore whether the husband's share was an undivided half of the former joint tenancy property, or whether equitable tracing rules should apply to increase that share. The court of appeals held the latter, and that it was error to give the killer half of the joint tenancy property. The court noted that, had the tenancy been severed by divorce rather than by murder, the widow/murderer wouldn't have received any of the property at issue, because under California's community property regime the husband would have been reimbursed by tracing his contributions to their joint property. CAL. FAMILY CODE § 2640(b). Thus, equitable principles dictated that she should not be allowed to benefit from her crime, and her share would be

reduced by the amount necessary to reflect his contribution.

What should have happened if the couple had lived in a state without community property rules, the source of the court's equitable tracing principle? Suppose section 251 instead read: "If a joint tenant feloniously and intentionally kills another joint tenant, the share of the decedent passes as though the killer had predeceased the decedent." What would the result be in *Estate of Castiglioni* in that situation?

14.28. **Simultaneous death.** What happens when two joint tenants die in the same accident, or the order of their death can't be determined? The Uniform Simultaneous Death Act initially provided that, without sufficient evidence of the order of death, half of the property should be distributed as if the first joint tenant had died first, and the other half as if the other joint tenant had died first. This rule led to some unpleasant litigation and "gruesome" attempts by heirs to prove that a specific joint tenant died first. The 1993 revision of the USDA states that, unless a governing instrument such as a will specifies otherwise, the half-and-half approach will be used in the absence of "clear and convincing" evidence that one joint tenant survived the other by 120 hours.

14.29. **Joint accounts with rights of survivorship.** "Joint accounts" are bank accounts generally held by couples, children and parents, or business partners. Each account holder has the ability to draw on the account. Many joint accounts come with a right of survivorship: If a joint account owner dies, the survivor(s) get all the money—creating another way around the delays involved in probating a will.

In many states, joint account-holders do not have the same undivided interest and rights to the use and enjoyment of the deposits that joint owners of real property do. That is, the donee/non depositor isn't entitled to the funds unless she survives the donor/depositor. See *UNIFORM PROBATE CODE* § 6-211 (2008). On the donor/depositor's death, the majority rule is that the surviving joint tenant takes the balance in a joint account unless there is clear and convincing evidence that the depositor's intent was to create a "convenience account," that is, an account that was supposed to be used by the non depositor—usually a younger relative—to take care of the depositor's business affairs. Some jurisdictions conclusively presume that the surviving joint tenant should receive the balance. See *Wright v. Bloom*, 635 N.E.2d 31 (Ohio 1994).

What should happen if Orlando deposits \$10,000 in a joint bank account with Abbie, and Abbie then withdraws \$5000 from the account while Orlando is alive, without his permission or later agreement? Orlando can force Abbie to return the money. Why not presume that Orlando intended a present gift to Ab-

bie? By the same logic, her creditors can't reach all the money to satisfy their claims against her unless and until she survives the donor/depositor. N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970).

However, the presumption against a present gift can be overcome by clear and convincing evidence. In a minority of jurisdictions, joint account owners have equal shares in the account during their lifetimes, as in a joint tenancy in land.

Joint accounts with a right of survivorship can be used as a will substitute, but there are potential tax consequences, not to mention risks of dispute during the time the person who put the money in the account is alive, or disputes after death when alternate heirs argue that the account was never intended to benefit the survivor. If the depositor's intent is to give whatever money is in the account to the non-depositing joint account holder when the depositor dies but not before, many states allow accounts to be designated "payable on death," preventing the non-depositing account holder from withdrawing the money while the depositor is alive. In the alternative, a revocable inter vivos trust will also provide the desired results. As for an elderly parent who wants her child to use money for her care, a better solution would be a power of attorney, making her child into her agent with the power to act on her behalf. This power of attorney would end with the parent's death.

14.30. Why not allow severance by will? If a joint tenant can sever without constraint during her lifetime, why not by will? Courts will not recognize such a transfer. See, e.g., *Gladson v. Gladson*, 800 S.W.2d 709 (Ark. 1990). There is an easy formalist explanation: by definition, the joint tenant's interest ends at her death and ownership automatically passes to the survivor, so there is nothing for her to pass by will. But isn't this just playing with definitions? A number of cases have allowed severance by will when the joint owners make joint wills, indicating a clear intent to sever at death, on the theory that it's the agreement to make the joint will that severs the joint tenancy.

The best explanation for the "no severance by will" rule is that it is about the operation of the system of wills, and preserves the use of joint tenancy as a device to avoid probate, even if it frustrates the intent of the testator. In addition, a joint tenant who severs by will is playing a no-lose game at the other tenant's expense. If she dies first, her designated heir takes her share. If she survives the other tenant, she takes all. If she has to sever during her lifetime, the severance occurs, whether that ends up benefiting her or not. This rule may not matter much given the cavalier way states allow secret severances, but still, severance

by will is so contrary to the sharing spirit of joint tenancies that the rule requiring joint wills makes sense.

14.4 Marital Interests

14.4.1 Tenancy by the Entirety

United States v. Craft
535 U.S. 274 (2002)

Justice O'CONNOR delivered the opinion of the Court.

This case raises the question whether a tenant by the entirety possesses “property” or “rights to property” to which a federal tax lien may attach. Relying on the state law fiction that a tenant by the entirety has no separate interest in entireties property, the United States Court of Appeals for the Sixth Circuit held that such property is exempt from the tax lien. We conclude that, despite the fiction, each tenant possesses individual rights in the estate sufficient to constitute “property” or “rights to property” for the purposes of the lien, and reverse the judgment of the Court of Appeals.

I

In 1988, the Internal Revenue Service (IRS) assessed \$482,446 in unpaid income tax liabilities against Don Craft, the husband of respondent Sandra L. Craft, for failure to file federal income tax returns for the years 1979 through 1986. When he failed to pay, a federal tax lien attached to “all property and rights to property, whether real or personal, belonging to” him. 26 U.S.C. § 6321.

At the time the lien attached, respondent and her husband owned a piece of real property in Grand Rapids, Michigan, as tenants by the entirety. After notice of the lien was filed, they jointly executed a quitclaim deed purporting to transfer the husband’s interest in the property to respondent for one dollar. When respondent attempted to sell the property a few years later, a title search revealed the lien. The IRS agreed to release the lien and allow the sale with the stipulation that half of the net proceeds be held in escrow pending determination of the Government’s interest in the property.

Respondent brought this action to quiet title to the escrowed proceeds.

The Government claimed that its lien had attached to the husband's interest in the tenancy by the entirety. It further asserted that the transfer of the property to respondent was invalid as a fraud on creditors. The District Court granted the Government's motion for summary judgment, holding that the federal tax lien attached at the moment of the transfer to respondent, which terminated the tenancy by the entirety and entitled the Government to one-half of the value of the property.

Both parties appealed. The Sixth Circuit held that the tax lien did not attach to the property because under Michigan state law, the husband had no separate interest in property held as a tenant by the entirety. It remanded to the District Court to consider the Government's alternative claim that the conveyance should be set aside as fraudulent.

On remand, the District Court concluded that where, as here, state law makes property exempt from the claims of creditors, no fraudulent conveyance can occur. It found, however, that respondent's husband's use of nonexempt funds to pay the mortgage on the entireties property, which placed them beyond the reach of creditors, constituted a fraudulent act under state law, and the court awarded the IRS a share of the proceeds of the sale of the property equal to that amount. . . .

We granted certiorari to consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached.

II

Whether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes "property and rights to property" for the purposes of the federal tax lien statute, is ultimately a question of federal law. The answer to this federal question, however, largely depends upon state law. The federal tax lien statute itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." Accordingly, "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."

A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle.

Whether those sticks qualify as “property” for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien. In *Drye v. United States*, 528 U.S. 49 (1999), we considered a situation where state law allowed an heir subject to a federal tax lien to disclaim his interest in the estate. The state law also provided that such a disclaimer would “creat[e] the legal fiction” that the heir had predeceased the decedent and would correspondingly be deemed to have had no property interest in the estate. We unanimously held that this state law fiction did not control the federal question and looked instead to the realities of the heir’s interest. We concluded that, despite the State’s characterization, the heir possessed a “right to property” in the estate—the right to accept the inheritance or pass it along to another—to which the federal lien could attach.

III

We turn first to the question of what rights respondent’s husband had in the entireties property by virtue of state law. . . .

In determining whether respondent’s husband possessed “property” or “rights to property” within the meaning of 26 U.S.C. § 6321, we look to the individual rights created by these state law rules. According to Michigan law, respondent’s husband had, among other rights, the following rights with respect to the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent’s consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent’s consent, and the right to block respondent from selling or encumbering the property unilaterally.

IV

We turn now to the federal question of whether the rights Michigan law granted to respondent’s husband as a tenant by the entirety qualify as “property” or “rights to property” under § 6321. The statutory language au-

thorizing the tax lien “is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have.” “Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.” We conclude that the husband’s rights in the entireties property fall within this broad statutory language.

Michigan law grants a tenant by the entirety some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (“[T]he right to exclude others” is “‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’”). These rights alone may be sufficient to subject the husband’s interest in the entireties property to the federal tax lien. They gave him a substantial degree of control over the entireties property, and, as we noted in *Drye*, “in determining whether a federal taxpayer’s state-law rights constitute ‘property’ or ‘rights to property,’ [t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.”

The husband’s rights in the estate, however, went beyond use, exclusion, and income. He also possessed the right to alienate (or otherwise encumber) the property with the consent of respondent, his wife. It is true, as respondent notes, that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. There is no reason to believe, however, that this one stick—the right of unilateral alienation—is essential to the category of “property.” . . .

Excluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would, moreover, exempt a rather large amount of what is commonly thought of as property. . . . Community property States often provide that real community property cannot be alienated without the consent of both spouses. Accordingly, the fact that respondent’s husband could not unilaterally alienate the property does not preclude him from possessing “property and rights to property” for the purposes of § 6321.

Respondent’s husband also possessed the right of survivorship—the right to automatically inherit the whole of the estate should his wife predecease him. Respondent argues that this interest was merely an expectancy, which we suggested in *Drye* would not constitute “property” for the purposes of a federal tax lien. 528 U.S., at 60, n. 7 (“[We do not mean to suggest] that an expectancy that has pecuniary value . . . would fall within § 6321 prior to the time it ripens into a present estate”). *Drye* did not de-

cide this question, however, nor do we need to do so here. As we have discussed above, a number of the sticks in respondent's husband's bundle were presently existing. It is therefore not necessary to decide whether the right to survivorship alone would qualify as "property" or "rights to property" under § 6321.

That the rights of respondent's husband in the entireties property constitute "property" or "rights to property" "belonging to" him is further underscored by the fact that, if the conclusion were otherwise, the entireties property would belong to no one for the purposes of § 6321. Respondent had no more interest in the property than her husband; if neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system.

Justice SCALIA's and Justice THOMAS' dissents claim that the conclusion that the husband possessed an interest in the entireties property to which the federal tax lien could attach is in conflict with the rules for tax liens relating to partnership property. This is not so. As the authorities cited by Justice THOMAS reflect, the federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets. As a holder of this lien, the Federal Government is entitled to "receive . . . the profits to which the assigning partner would otherwise be entitled," including predissolution distributions and the proceeds from dissolution. . . .

There is, however, a difference between the treatment of entireties property and partnership assets. The Federal Government may not compel the sale of partnership assets (although it may foreclose on the partner's interest). It is this difference that is reflected in Justice SCALIA's assertion that partnership property cannot be encumbered by an individual partner's debts. This disparity in treatment between the two forms of ownership, however, arises from our decision in *United States v. Rodgers*, [416 U.S. 677 (1983)] (holding that the Government may foreclose on property even where the co-owners lack the right of unilateral alienation), and not our holding today. In this case, it is instead the dissenters' theory that departs from partnership law, as it would hold that the Federal Government's lien does not attach to the husband's interest in the entireties property at all, whereas the lien may attach to an individual's interest in partnership property

We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, "'exempt status under state law does not bind the federal collector.'" . . .

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

. . . I write separately to observe that the Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.

Justice THOMAS, with whom Justice STEVENS and Justice SCALIA join, dissenting.

. . . The Court does not contest that the tax liability the IRS seeks to satisfy is Mr. Craft's alone, and does not claim that, under Michigan law, real property held as a tenancy by the entirety belongs to either spouse individually. Nor does the Court suggest that the federal tax lien attaches to particular "rights to property" held individually by Mr. Craft. Rather, borrowing the metaphor of "property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations constitute property," the Court proposes that so long as sufficient "sticks" in the bundle of "rights to property" "belong to" a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer.

This amorphous construct ignores the primacy of state law in defining property interests

I

Title 26 U.S.C. § 6321 provides that a federal tax lien attaches to “all property and rights to property, whether real or personal, belonging to” a delinquent taxpayer. It is uncontested that a federal tax lien itself “creates no property rights but merely attaches consequences, federally defined, to rights created under state law.” Consequently, the Government’s lien under § 6321 “cannot extend beyond the property interests held by the delinquent taxpayer,” under state law

A

. . . As the Court recognizes, pursuant to Michigan law, as under English common law, property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. Neither spouse has “any separate interest in such an estate.” An entireties estate constitutes an indivisible “sole tenancy.” Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it did not “belong” to either respondent or her husband individually when the IRS asserted its lien for Mr. Craft’s individual tax liability. Thus, the property was not property to which the federal tax lien could attach for Mr. Craft’s tax liability.

Drye . . . was concerned not with whether state law recognized “property” as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created. *Drye* held only that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held, and that a federal lien therefore attached to the taxpayer’s interest in the estate. 528 U.S., at 61 (recognizing that a disclaimer does not restore the status quo ante because the heir “determines who will receive the property—himself if he does not disclaim, a known other if he does”). . . .

B

. . . Rather than adopt the majority’s approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular “rights to property” to which the federal tax lien could attach. He did not.⁵ . . . With such

⁵Even such rights as Mr. Craft arguably had in the Grand Rapids property bear no resemblance to those to which a federal tax lien has ever attached. See W. Elliott, *Federal*

rights subject to lien, the taxpayer's interest has "ripen[ed] into a present estate" of some form and is more than a mere expectancy, and thus the taxpayer has an apparent right "to channel that value to [another]."

In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. See 4 G. Thompson, *Real Property* § 37.14(a) (D. Thomas ed. 1994) (noting that a married person's power to devise one-half of the community property is "consistent with the fundamental characteristic of community property": "community ownership means that each spouse owns 50% of each community asset").

It is clear that some of the individual rights of a tenant in entireties property are primarily personal, dependent upon the taxpayer's status as a spouse, and similarly not susceptible to a tax lien. For example, the right to use the property in conjunction with one's spouse and to exclude all others appears particularly ill suited to being transferred to another, and to lack "exchangeable value."

Nor do other identified rights rise to the level of "rights to property" to which a § 6321 lien can attach, because they represent, at most, a contingent future interest, or an "expectancy" that has not "ripen[ed] into a present estate." By way of example, the survivorship right wholly depends upon one spouse outliving the other, at which time the survivor gains "substantial rights, in respect of the property, theretofore never enjoyed by [the] survivor." . . .

Similarly, while one spouse might escape the absolute limitations on

Tax Collections, Liens, and Levies ¶¶ 9.09[3][a]–[f] (2d ed. 1995 and 2000 Cum. Supp.) (listing examples of rights to property to which a federal tax lien attaches, such as the right to compel payment; the right to withdraw money from a bank account, or to receive money from accounts receivable; wages earned but not paid; installment payments under a contract of sale of real estate; annuity payments; a beneficiary's rights to payment under a spendthrift trust; a liquor license; an easement; the taxpayer's interest in a timeshare; options; the taxpayer's interest in an employee benefit plan or individual retirement account).

individual action with respect to tenancy by the entirety property by obtaining the right to one-half of the property upon divorce, or by agreeing with the other spouse to sever the tenancy by the entirety, neither instance is an event of sufficient certainty to constitute a “right to property” for purposes of § 6321. Finally, while the federal tax lien could arguably have attached to a tenant’s right to any “rents, products, income, or profits” of real property held as tenants by the entirety, the Grand Rapids property created no rents, products, income, or profits for the tax lien to attach to

Ownership by “the marriage” is admittedly a fiction of sorts, but so is a partnership or corporation. There is no basis for ignoring this fiction so long as federal law does not define property, particularly since the tenancy by the entirety property remains subject to lien for the tax liability of both tenants

Notes and Questions

14.31. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), reached a different result under state law. *Sawada* allowed a transfer of entireties property (the family home) by a husband and wife to their children, in order to avoid the risk that the home would be vulnerable to claims by Masako and Helen Sawada, who’d been injured when they were struck by a car operated by the husband, and who eventually became judgment creditors as a result of the lawsuits they filed against the husband, Kokichi Endo. Given that any lien against the house could only attach to the husband’s interest and that the house couldn’t be sold without the wife’s consent, what exactly was the risk to the Endos’ ownership of the house?

The Endos conveyed the house to their children, for no valuable consideration, after the accident and after the first complaint was filed. The parents continued to live in the house, though they had no legal interest in it. After trial, both Sawadas were awarded a total of roughly \$25,000. The wife, Ume Endo, died shortly thereafter, survived by Kokichi. The Sawadas, unable to recover against Kokichi Endo’s personal property, sought to invalidate the transfer of the family home to the children as fraudulent.

The Hawaii Supreme Court found that a spouse’s interest in property held by the entireties was not subject to levy and execution by that spouse’s individual creditors, even though some states do allow seizure and sale by creditors, subject to the other spouse’s contingent right of survivorship. The Hawaii Supreme

Court reasoned that the Married Women's Property Acts equalized husband and wife, creating a unity of equals who both had the right to use and enjoy the whole estate. This insulated the wife's interest in the estate from the separate debts of her husband, and vice versa. "A joint tenancy may be destroyed by voluntary alienation, or by levy and execution, or by compulsory partition, but a tenancy by the entirety may not. The indivisibility of the estate, except by joint action of the spouses, is an indispensable feature of the tenancy by the entirety." Creditors of one spouse could not even attach that spouse's right of survivorship, because that would make a conveyance by both spouses too uncertain, harming the other spouse's interest.

The Hawaii Supreme Court continued, "there is obviously nothing to prevent [a] creditor from insisting upon the subjection of property held in tenancy by the entirety as a condition precedent to the extension of credit. Further, the creation of a tenancy by the entirety may not be used as a device to defraud existing creditors." That's all well and good for voluntary creditors, but what about involuntary creditors like the Sawadas? They weren't offered any options before they extended "credit" to Kokichi Endo in the form of the injuries he inflicted on them. Is this rule fair to them? (Is the proper comparison a world in which Kokichi Endo didn't own a house at all when he hit them, or a world in which he owned a house jointly or in common when he hit them? Does it matter that the law is less directly involved in whether Endo owned a house than in the rules of co-ownership?)

The Hawaii Supreme Court concluded that public policy supported its holding, because tenancy by the entirety protected an interest in family solidarity:

When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate. This would not be possible where a third party has become a tenant in common or a joint tenant with one of the spouses, or where the ownership of the contingent right of survivorship of one of the spouses in a third party has cast a cloud upon the title of the marital estate, making it virtually impossible to utilize the estate for these purposes.

561 P.2d at 1297. A dissent pointed out that, under the Married Women's Property Acts, what was required was equality as between spouses, not any particular rule about creditors. At common law, "the interest of the husband in an estate by the entireties could be taken by his separate creditors on execution against him, subject only to the wife's right of survivorship." Thus, the dissent reasoned, equal treatment merely required that both spouses be subjected to this rule.

One way of looking at the matter: entireties property is specifically designed, at least in its modern incarnation, to protect the interest of one spouse against the other's independent acts. If that's the case, then aren't the *Craft* dissents correct? If a state may choose this objective in its property law, why shouldn't this choice be respected? Or are there special concerns relating to federal tax that justify overriding this choice? If so, should the government be able to force the sale of entireties property, or should it be forced to wait to see which spouse survives the other?

14.32. **Forfeiture.** What about criminal forfeiture of property involved in a crime, such as a house in which a drug transaction occurred? Some forfeiture statutes exempt property used without the consent or knowledge of its owner. Under those statutes, some courts allow the innocent spouse to retain use and possession of entirety property during her lifetime, as well as her right of survivorship. *Compare United States v. 1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir. 1991) (guilty spouse's interest is forfeited, subject to innocent spouse's possession and survivorship rights), *with United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990) (not allowing current forfeiture, but allowing government to file lis pendens preserving its right to guilty spouse's interest upon death of innocent spouse or severance of estate). What if a forfeiture statute doesn't protect innocent owners? In that case, the government can seize the entire property, including the innocent spouse's interest. *Bennis v. Michigan*, 516 U.S. 442 (1996) (rejecting takings and due process claims).

14.33. **Homestead acts as an alternative?** Many states have so-called "homestead" acts, protecting the family home (up to a certain value or size) from many creditors' claims, though not against foreclosure of a mortgage on that home. California provides for \$50,000 for a single person, \$75,000 for a "family unit," and \$150,000 for people 65 or older, disabled, or 55 or older with an annual income under \$15,000. CAL. CODE CIV. PROC. § 704.730 (2003). Washington provides for protections for \$40,000 real property or \$15,000 personal property. WASH. REV. CODE § 6.13.030 (1999). Should the tenancy by the entirety be abolished in favor of homestead exemptions? Compare the protections for

mortgagors which we will discuss in Chapter 20.

14.34. Creating a tenancy by the entirety. Traditionally, a tenancy by the entirety was created by granting property “to X and Y, husband and wife, as tenants by the entirety.” Today, X and Y can be any spouses, and states that recognize tenancies by the entirety often presume that a transfer “to A and B, [spouses],” creates that estate. See, e.g., *Constitution Bank v. Olson*, 620 A.2d 1146 (Pa. Super. Ct. 1993). Other states always presume a tenancy in common even when the co-owners are married, so a clear expression of the requisite intent is required. See Miss. CODE ANN. § 89-11-7. As a rule, the magic words “tenants by the entirety” should be used.

If the cotenants are not married, the magic words will not work. In *Riccelli v. Forcinito*, 595 A.2d 1322 (Pa. Super. Ct. 1991), Sam Riccelli and Carmen Pirozek bought property in 1962 “as tenants by the entireties with the right of survivorship.” However, they weren’t married at the time of the purchase, and so they couldn’t have a tenancy by the entirety. What kind of tenancy did they have? The court reasoned: “The appropriate form of tenancy is to be determined by the intention of the parties, ‘the ultimate guide by which all deeds must be interpreted.’ . . . [J]oint tenancy with the right of survivorship best effectuates their intention to the extent legally permissible, that being the form of tenancy for unmarried persons most nearly resembling the tenancy by the entireties enjoyed by husband and wife, since in both instances the survivor takes the whole.” The modern presumption in favor of tenancy in common yielded to a clearly expressed contrary intent. See also *Funches v. Funches*, 413 S.E.2d 44 (Va. 1992) (“tenancy by the entirety” with express survivorship language that was given to unmarried parties created a joint tenancy because of the survivorship language). But see *Smith v. Stewart*, 596 S.W.2d 346 (Ark. Ct. App. 1980) (deed “to A and B, his wife,” when A and B were unmarried, failed to create a joint tenancy; the relevant state statute required an express declaration of joint tenancy with right of survivorship), aff’d, 601 S.W.2d 837 (Ark. 1980).

14.35. Divorce. Because marriage is a requirement for a tenancy by the entirety, divorce ends that form of ownership. What should replace it? The modern preference is for tenancy in common as a general rule, and many states follow that rule with tenancies by the entireties that end by divorce. See, e.g., MICH. COMP. LAWS ANN. § 552.102. A few states presume that a tenancy by the entirety is converted to a joint tenancy unless the parties otherwise agree. See, e.g., *Estate of Childress v. Long*, 588 So. 2d 192 (Miss. 1991).

14.36. Common law marriage. Common law marriage was widely recognized when access to formal marriage was sometimes difficult, particularly in

rural areas. However, it is now recognized only in 11 states and the District of Columbia. Where it is recognized, the parties must manifest an intent to be married and hold themselves out as husband and wife. If they do so, they have exactly the same rights as any other married couple. Is this a kind of “adverse possession” of the benefits of marriage?

Many states abolished common law marriage on the theory that it was no longer required, given the ease of accessing a marriage license, and that it encouraged people to lie about whether they’d held themselves out as husband and wife. Moreover, a marriage license makes it easy to understand who is entitled to pensions and other benefits, which became more important as those types of assets became more significant throughout the twentieth century.

14.4.2 Community Property

Nine states, representing roughly 30% of the population of the U.S., recognize community property for married people: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Under **community property** regimes, marital property belongs to each spouse equally. Each spouse has a right to pass on his or her share to anyone by will, making community property different from joint tenancy; however, it is also possible to hold community property with a right of survivorship, highly similar to joint tenancy. In the absence of a right of survivorship, a surviving spouse is typically entitled to some of the community property when the other spouse dies intestate; his or her share generally depends on whether there are surviving issue (children and other descendants), and how many there are.

The basic idea of community property is that a marriage is a cooperative endeavor, and each spouse contributes to gains, whether directly or indirectly. Except for Alaska, which requires an explicit agreement, ALASKA STAT. § 34.77.090 (2002), the default rule under a community property regime is that property earned by a spouse during marriage belongs to the marital community, and each spouse owns half of the community property as an equal undivided interest. This includes property purchased with income earned during the marriage. This contrasts to common law states, in which property belongs by default to the spouse who acquires it during the marriage.

Community versus separate property. Property owned before marriage, as well as property acquired by inheritance or gift during the marriage, remains **separate property** in most states. States are divided about whether

and when income from separate property, such as interest, royalties, and rent, becomes part of the community property. Idaho, Louisiana, Texas and Wisconsin treat the income from all property as community property, while the other states allow such income to remain separate property. Classification may prove complicated: for example, is an award of damages from a bike accident involving one spouse community property? The answer may depend on whether the award represents economic harm such as lost earnings (community property) or pain and suffering (separate property). What if the award is for loss of a limb, which has both earnings-related and quality of life-related aspects? What if the award is for loss of consortium—the caretaking and intimate relations shared between spouses?

In general, spouses are free to take property as separate property by agreement, and to convert property from one regime to the other by agreement. If community and separate property are commingled, **tracing** the shares may prove very difficult, and the party with the burden of showing that the property is separate may have a hard time prevailing. Carefully kept records may allow a tracing spouse to overcome the presumption that assets held during marriage are community property. Under the “family expense presumption,” family expenses are presumed to have come from community assets in a commingled account. If such expenses exceeded deposits of community funds, the balance will be separate property. See *v. See*, 415 P.2d 776 (Cal. 1966). As for outstanding debt paid off in part with community property, California apportions community and separate property according to the contributions made. Thus, a person who has a house subject to a mortgage before she marries, and then pays the remainder of the mortgage with money earned during marriage, will own the house partly as separate property and partly as community property. Other states use an “inception” theory and consider the house entirely separate property because the purchase was made before the marriage. And other states use a “vesting” theory and consider the house entirely community property because title didn’t vest until the mortgage was paid off.

Management. In most cases, either spouse may manage community property. However, if title is in only one spouse’s name, that spouse may be the only one who can manage the property. In addition, a spouse who runs a business that is community property may have exclusive control. The controlling spouse has a kind of fiduciary duty: she must act in good faith towards her spouse, but she is not required to act with good judgment. Transferring or mortgaging community property, unlike day-to-day management, requires the consent of both spouses in a number of community property states, though not all.

See J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & CONTEMP. PROBS. 99 (1993). The fact that a deed says that property is separate property is not controlling, because the law prevents a spouse from converting community property to separate property unilaterally. In some states, such as Texas, the controlling spouse can make reasonable gifts of community property, while California and Washington allow any gift by the managing spouse to be set aside by the other spouse. In most states, a bona fide purchaser from any managing spouse is protected against invalidation of the sale.

Liability. In some states, creditors can reach whatever property a spouse is entitled to manage. If the spouses share the family car, for example, then a creditor of either spouse could seize the car to satisfy one spouse's debt (after following the appropriate procedures). Others only allow creditors to reach community property if both spouses consented to the relevant debt, and others limit the amount of community property creditors of only one spouse can reach.

Termination. A spouse may dispose of half of the community property at his or her death. There is no right of survivorship, but the other half belongs to the survivor. The decedent can allocate the property however she wants in a will; if there is no will, then some community property states make the other spouse the heir, while others give the decedent's issue priority.

There is no such thing as a tenancy by the entireties in a community property state; there can be joint tenancy or tenancy in common, but property held in those forms is separate property. Like a tenancy by the entireties, community property can only exist between married people. Moreover, neither spouse alone can convey his or her undivided share to another person, except to the other spouse. Community property is not subject to partition. Without agreement, the spouse's only option to separate the couple's undivided interests is divorce, which will result in an equal or "equitable" division of community property, depending on the state. California, New Mexico, and Louisiana divide community property and debts equally,⁶ while courts use the more flexible equitable division in the other community property states. In California, absent a written agreement to the contrary, a spouse who contributes separate property to acquiring community property must be reimbursed for the contribution at divorce, though the spouse can't get interest or an adjustment for a change in

⁶In the absence of agreement to the contrary or deliberate misappropriation of community property by one spouse.



Figure 14.2: Source: John C. Bullas, CC-NC-ND, Nov. 6, 2009, <https://www.flickr.com/photos/johnbullas/4081360430/>.

the value of the property, and the reimbursement can't exceed the net value of the property at the time the property was acquired. CAL. FAMILY CODE § 2640(b). Can you see why the legislature felt it necessary to impose the net value cap? What kind of unsavory activities might result if the rule were different?

If a married couple moves to a non-community property state, community property retains its character, which can lead to some complicated situations.

A family law course will cover the significant differences between community property and joint tenancy in more detail, including tax implications. The regimes reward careful planning, especially for people with substantial assets. See Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDENZO L. REV. 1925 (2009) (arguing that marital property rules, particularly in community property states, create perverse incentives toward divorce).

14.4.3 Divorce

Property issues arise again and again in family law practice. Property rights within marriage are typically not that significant when the spouses function as an economic unit. But the details matter (a) when there are creditors (i.e. the Cross/Sawada situation, considered above), (b) on divorce, and (c) at death. The law of wills and estates deals with the last situation. Here, we will focus on divorce in states that have not adopted a community property regime.

Modern American divorce law is no-fault: one or both spouses can get a divorce simply because they want one, without having to show any misbehavior by the other spouse. But should fault matter in the distribution of property at divorce? If so, what kind of fault should matter—infidelity? Physical abuse? Neglect and indifference? Gambling away most of the family's money? Does it matter if the wealthier spouse was the one at fault?

Alimony. In the past, courts in common law states divided property based on who held title, which often favored men over women. However, courts would award alimony on divorce when it was deemed necessary to support an ex-spouse. Alimony required periodic ongoing payments by one ex-spouse to another. Only a fraction of women ever received alimony. See LENOORE J. WEITZMAN, THE DIVORCE REVOLUTION 144 (1985). It is even less likely to be awarded now. The Uniform Marriage and Divorce Act, § 308(a), allows alimony only if the spouse seeking it lacks sufficient property to provide for his reasonable needs and is also unable to support himself through employment, or is the custodian of a child “whose conditions or circumstances make it appropriate that the custodian not be required to seek employment outside the home.” Under 20% of women receive alimony in modern divorce cases, and only for a short period, after which the recipient is supposed to find a job and become self-sufficient. See Mary E. O’Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988).

The New Jersey Supreme Court explained the pressures that led to a change in the old common law rules in *Rothman v. Rothman*, 320 A.2d 496 (1974):

Hitherto future financial support for a divorced wife has been available only by grant of alimony. Such support has always been inherently precarious. It ceases upon the death of the former husband and will cease or falter upon his experiencing financial misfortune disabling him from continuing his regular payments. This may result in serious misfortune to the wife and in some cases will compel her to become a public charge. An allocation of property to the wife at the time of the divorce is at least some protection against such an eventuality. [The new regime] seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of

property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute.

The *Rothman* court refused to presume that an even split of marital property was the appropriate starting point, however. Instead, courts are supposed to conduct an equitable analysis in each case.

The common law states now use a model very similar to community property in treating most property acquired during marriage as marital property to be divided between the spouses at divorce. Such “equitable distribution” is an attempt to be fair to both parties, recognizing that family relations are complicated and that the fact that one partner earned most of the money during a marriage doesn’t necessarily mean that he should take most of the assets out. Nor does equitable distribution require an equal split. James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn’t Equal Equal*, 72 LA. L. REV. 21 (2011) (participation in asset generation and perceived need are primary factors that cause courts to depart from strictly equal division).

The family home. The most significant asset in most divorce cases is a family house. If the house is to be sold, then a fair means of dividing the proceeds must be found. The departing spouse’s interest in the house must be addressed in some way, for example by giving her more of the other marital assets. See generally Melissa J. Avery, *The Marital Residence and Other Black Holes: Dealing With Real Estate in Divorce*, 53 RES GESTAE 30 (Oct. 2009) (discussing partition sales, buy-outs, and auction sales); David W. Griffin, *It’s Nearly Always About the House: Grasping the Givens of Real Property Interests, Considerations, and Concerns*, 32 FAM. ADVOC. 8 (Spring 2010) (addressing titling issues, forms of ownership, and ways to secure future payments of equitable distribution amounts); Marcia Soto, *A House Divided*, 31 FAM. ADVOC. 10 (Summer 2008) (considering, among other issues, the tax consequences of selling a home as a single person versus as a married couple).

The facts in individual cases may be complicated, and the issues around the family home are often especially emotional. As a general rule, however, a custodial parent generally retains the family home. *In re Marriage of King*, 700 P.2d 591 (Mont. 1985) (awarding family home to wife over husband’s objection

when remaining in the home was in the best interests of the minor children, and the husband's income from professional gambling wasn't steady enough to ensure regular child support payments). *But see Ramsey v. Ramsey*, 546 N.E.2d 1280 (Ind. Ct. App. 1989) (upholding the trial judge's order that the family house should be sold over the objections of both parties, even though the couple had been married for twenty years and wanted the wife to stay in the home with their five children, allowing the father daily visits); *Stolow v. Stolow*, 540 N.Y.S.2d 484 (App. Div. 1989) (ordering the sale of the family's "mini-mansion" because of its extravagance, allowing the husband to get his share of its value, even though the husband was wealthy enough to afford the payments and even though exclusive possession of a marital residence is generally awarded to a custodial spouse with minor children); *Behrens v. Behrens*, 532 N.Y.S.2d 893 (App. Div. 1988) (ordering the family house sold because neither party had sufficient individual resources to afford the mortgage, despite the wife's objection that the sale would force her and her children to leave the community where they'd established strong ties); *In re Marriage of Stallworth*, 237 Cal. Rptr. 829 (Ct. App. 1987) (economic, emotional, and social impact on a child from being forced to move out of the family home would be minimal, even though the child was under psychiatric care and in a special education program; harm to the child was outweighed by the husband's economic interest in having the home sold). As you should be able to see from a review of these summaries, divorce provides an opportunity for courts to opine on the moral merits or demerits of the spouses, and many courts take it, despite the formal abolition of fault-based divorce.

Religious and cultural issues. Are there instances in which cultural differences should determine distribution of property at divorce? Some cultures systematically disadvantage women on divorce; one concern for allowing religious control of divorce is for the resultant inequality in property division. Secular courts may attempt to use property law to induce better behavior by spouses. Most notably, Orthodox Jews hold that a woman is not divorced unless her husband gives her a document known as a "get." Divorcing husbands may withhold a get out of spite or in order to induce the wife to agree to a favorable property distribution. See Jessica Davidson Miller, *The History of the Agunah in America: A Clash of Religious Law and Social Progress*, 19 WOMEN'S RIGHTS L. RPTR. 1 (1997).

The New York legislature responded by changing the law. To get a divorce, each party must file an affidavit stating "(i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision."

N.Y. DOM. REL. L. § 253. Further, divorce courts must take a refusal to “remove all barriers to the other party’s remarriage” into account in dividing marital property. N.Y. DOM. REL. L. § 256. Some recalcitrant husbands have received zero in marital property as a result, and have even been held in contempt for withholding a get. *Fischer v. Fischer*, 237 A.2d 559 (N.Y. App. Div. 1997). Conservative⁷ Jews now use a ketubah (a religious marriage contract) providing that a man who refuses to provide a get must appear before a Bet Din, a Jewish court, which will strongly encourage him to give his wife the get. At least one civil court has enforced the ketubah, rejecting First Amendment arguments against enforcement. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983). What should happen if the husband claims that he has converted to Catholicism, and that to give his wife a get would violate his religious principles?

In *Estate of Bir*, 83 Cal. App. 2d 256 (1948), the decedent and his two wives were married in Punjab. He died in California. The trial court refused the wives’ petition for an equal division of the property on public policy grounds, but the appellate court reversed, since he hadn’t attempted to cohabit with them in California and they were the only interested parties. If this case occurred today, when nonmarital and polyamorous cohabitation is not illegal, should the court treat both women as widows, or does the continuing prohibition on bigamy matter?

Are you aware of other distinctive cultural traditions around marriage that should be provided for in law? Cf. Vickie Enis, Comment, *Yours, Mine, Ours? Renovating the Antiquated Apartheid in the Law of Property Division in Native American Divorce*, 35 AM. INDIAN L. REV. 661 (2011) (discussing special considerations when Native Americans who own property distributed to tribal members divorce non-Natives).

General principles for dividing property. Most states leave the determination of what is equitable or just division of marital property to the family court’s discretion, but there is usually a statutory list of relevant factors for the court to consider, as well as some attempt to define what marital property is. Here are portions of Missouri’s code:

1. In a proceeding for dissolution of the marriage or legal separation, or in a proceeding for disposition of property fol-

⁷One major branch of Judaism. Other branches include Reconstruction, Reform, and Orthodox; in general, Reform and Reconstruction Jewish women would not consider themselves bound to get a get before remarriage. The standard Orthodox ketubah says nothing about the husband’s obligation to provide a get in case of divorce.

lowing dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and marital debts in such proportions as the court deems just after considering all relevant factors including:

- (1) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children;
- (2) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (3) The value of the nonmarital property set apart to each spouse;
- (4) The conduct of the parties during the marriage; and
- (5) Custodial arrangements for minor children.

2. For purposes of sections 452.300 to 452.415 only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

- (1) Property acquired by gift, bequest, devise, or descent;
- (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) Property acquired by a spouse after a decree of legal separation;
- (4) Property excluded by valid written agreement of the parties; and
- (5) The increase in value of property acquired prior to the marriage or pursuant to subdivisions (1) to (4) of this subsection, unless marital assets including labor, have contributed to such increases and then only to the extent of such contributions.

3. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolu-

tion of marriage is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2 of this section.

4. Property which would otherwise be nonmarital property shall not become marital property solely because it may have become commingled with marital property.

Mo. Stat. Ann. 452.330.1–4. Under this regime, can courts take one spouse's infidelity or abuse into account in dividing property? Other states use a rebuttable presumption that an equal division is equitable, especially for a marriage of long duration.

Special kinds of property. How should courts deal with property whose greatest value is sentimental? In *M.R. v. E.R.*, the parties divorced after more than 20 years of marriage. They agreed on how to divide the marital home and their retirement accounts, and they agreed on child custody, but couldn't agree on more than 7000 photos. At one point, they agreed that the husband would keep the albums and split the cost of scanning them for the wife, but the quality of the reproductions became a sticking point. Accepting the husband's argument that he was the one responsible for creating a meticulous photo catalog and that the wife was generally apathetic about the photographic process during the marriage, the judge awarded him 75% of the photos. How should the photos the wife receives be selected? See *M.R. v. E.R.*, 27 Misc.3d 1206 (N.Y. Sup. Ct. 2010).

What marital assets count as property?

In *O'Brien v O'Brien*, 489 N.E.2d 712 (N.Y. 1985), the parties' "only asset of any consequence" was the husband's newly acquired license to practice medicine. The wife had supported him throughout his medical education, contributing 76% of their income and giving up her own opportunity to obtain certification as a teacher, only to have him file for divorce just after he obtained his medical license. The New York Court of appeals held that his medical license was "marital property" subject to equitable distribution. Expert testimony was used to establish the present value of a medical degree. The majority commented:

As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's eco-

nomic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career, that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property.

The majority rejected the argument that "a professional license is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer." Statutes can create new species of property, and "[a]professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law. That a professional license has no market value is irrelevant." The limits on its alienation merely meant that the other spouse was entitled to an award sharing in its value.

A concurrence cautioned against "the potential for unfairness involved in distributive awards based upon a license of a professional still in training," arguing that a professional in training could be "locked into a particular kind of practice simply because the monetary obligations imposed by the distributive

award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative."

Notes and Questions

14.37. As of 2014, Dr. O'Brien was apparently still practicing emergency medicine.

In 2016, an amendment to New York law became effective, prohibiting treating professional licenses and enhanced earnings as a marital asset. However, the new law specified that, "in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse." Of course, if the only asset is the license or earning potential, that won't help, and that was the exact situation addressed in *O'Brien*. Why do you think the New York legislature made this change?

14.38. Are lump-sum payments or periodic payments better means of handling the property division issues here?

14.39. How would the *O'Brien* rule influence the husband's choices post-divorce? What *should* happen if he switches to a less lucrative specialty? Would it matter if the switch were made out of spite, versus if there were no demand for his specialty and he switched as a matter of economic rationality? What should happen if he switches to a more lucrative specialty? What if he leaves the field entirely—could the court order him to work? What should happen if he wins \$50 million in the lottery and quits working?

Even without all these possibilities, the present value of a lengthy career can be hard to predict. Valuation of things like pensions (if there ever are any again) or other non-vested rights (such as potential stock options) may likewise be very complicated, but nonetheless they may form a significant part of a couple's assets.

14.40. Should the wife's post-divorce choices matter? What if she finds a web startup that makes her three times as much money as he has? What if, during the pendency of the divorce proceedings, the startup is doing wonderfully, but five years later her business partner embezzles the cash and leaves her responsible for a \$250,000 debt? What if she dies before the support period ends – should her estate receive the remaining money due?

Suppose, instead of earning a degree, the husband had simply lain around all day, allowing his wife to support him. Would she be entitled to support to compensate her for her lost years? Would he be entitled to support because his

skills had deteriorated over time? Would it matter if the divorce occurred before the husband received a degree and a license to practice?

Do your answers give you any insight into whether the label “property” is helpful in this case?

14.41. The majority view is that a degree is not “property.” See *In re Marriage of Graham*, 574 P.2d 75 (Colo. 1978):

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of “property.” It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

However, even in majority-rule states, principles of equitable division include considerations such as each party’s contribution to the acquisition of the property, including contributions that assisted one spouse in developing the other’s earning power. See *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994); *Schaefer v. Schaefer*, 642 N.W.2d 792 (Neb. 2002) (graduate degree isn’t property, but one spouse’s support of the other’s education is a factor to be considered in dividing the marital assets, as well as in determining whether to award alimony). As the New Jersey Supreme Court stated in *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982):

[E]very joint undertaking has its bounds of fairness. Where a partner to marriage takes the benefits of his spouse’s support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

. . . . In effect, through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed,

as it were, present consumption and a higher standard of living, for the future prospect of greater support and material benefits. The supporting spouse's sacrifices would have been rewarded had the marriage endured and mutual expectations of both of them been fulfilled In this sense, an award that is referable to the spouse's monetary contribution to her partner's education significantly implicates basic considerations of marital support and standard of living-factors that are clearly relevant in the determination and award of conventional alimony.

Under *Mahoney*, courts can't make a permanent distribution of the value of professional degrees and licenses, because of the "potential for inequality to the failed professional or one who changes careers" and the difficulty of valuation. However, New Jersey courts may award reimbursement alimony, based on the contributions received from the supporting spouse, because marriage shouldn't be a "free ticket" to education and training. See *Guy v. Guy*, 736 So.2d 1042 (Miss. 1999) (professional degrees are not marital property, but former husband would be entitled to some reimbursement if he paid for former wife's education).

Similarly, California law presumes that reimbursement is appropriate for contributions to a spouse's education that substantially enhance her earning potential. This presumption can be overcome, and reimbursement reduced or eliminated, if the couple has already substantially benefited from the education; California further presumes this substantial benefit has occurred after ten years of marriage; if the supporting spouse received similar support for his own education; or if the education allows the supported spouse to get employment that reduces support to which she would otherwise be entitled. CAL. FAM. CODE § 2641.⁸

Is a reimbursement theory sufficient? Should housekeeping and childcare services, if provided by the supporting spouse, be factored into the necessary reimbursement? What about emotional support, such as a counselor or "life coach" might provide?

14.42. If most gifts between people who are engaged, except for the engagement ring, are unrecoverable donative transfers, why should the result be any

⁸Contribution to education that increases a spouse's earning potential is also relevant to whether a court should award alimony, along with other factors such as the extent to which each person's earning capacity is sufficient to maintain the marital standard of living, the length of the marriage, and the needs of the parties. CAL. FAM. CODE §§ 4320, 4330.

different after marriage? Consider the Pennsylvania Supreme Court's reasoning in *Bold v. Bold*, 524 Pa. 487, 574 A.2d 552 (Pa. 1990):

While we agree . . . that marriage is not a business enterprise in which strict accountings are to be had for moneys spent by one spouse for the benefit of the other, it appears to us that this case does not involve strict accountings, but gross accountings. Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, "jettisoned" as soon as the need for their sacrifice, albeit in part a legal obligation, comes to an end. In retrospect, perhaps unintentionally, the supporting spouse in such a case can be said to have been "used." At least this is the perception of the supporting spouse, and we believe that this perception is not totally without foundation in all cases . . . [T]he supporting spouse in a case such as this should be awarded equitable reimbursement to the extent that his or her contribution to the education, training or increased earning capacity of the other spouse exceeds the bare minimum legally obligated support

What about the earning power of a celebrity—should that be “property” divisible at divorce? After all, no one needs a license to be a celebrity (even if they should). See *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991) (finding that a performing career and celebrity status are marital property subject to equitable distribution “to the extent the defendant’s contributions and efforts led to an increase in the value of the plaintiff’s career”); *Piscopo v. Piscopo*, 555 A.2d 1190 (N.J. Super.), *aff’d*, 557 A.2d 1040 (celebrity goodwill enhanced during marriage was marital property subject to equitable distribution even if it came from innate talent); see also Paloma Peracchio, Comment, *The Value of Creative Professionals in the Entertainment Capital of the World: Why “Celebrity Goodwill” Should Be a Divisible Community Property Interest in California Divorces*, 28 Loy. L.A. ENT. L. REV. 129 (2008).

14.43. Relatedly, goodwill is a concept designed to capture the ongoing value of a business due to its reputation and other intangibles, over and above the value of its equipment, cash in the bank, accounts receivable, etc. Earning capacity itself is not goodwill, but a reputation that makes future business more likely is, and many states treat goodwill earned during the marriage as property subject to equitable distribution. *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983) (good-

will of a solo law practice was subject to equitable distribution, even though the goodwill could not be sold separate from the ex-spouse's own services); *Mace v. Mace*, 818 So. 2d 1130 (Miss. 2002) (husband's medical practice, as income-producing enterprise made possible by his professional degree, was subject to equitable division). *But see Prahinski v. Prahinski*, 582 A.2d 784 (Md. 1990) (goodwill of a solo law practice is not subject to equitable distribution).

Goodwill intrinsic to a spouse's business is usually deemed to be marital property. *Finch v. Finch*, 825 S.W.2d 218 (Tex. Ct. App. 1992); *Nicholson v. Nicholson*, 669 S.W.2d 514 (Ark. Ct. App. 1984). But goodwill attributable to the spouse's continued involvement in the business is usually considered to be separate property. *Thompson v. Thompson*, 576 So. 2d 267 (Fla. 1991) ("If goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity, which . . . is not a proper consideration in dividing the personal property."). How would you tell the difference? Suppose one spouse runs the beloved local bakery Mother's Macaroons. She greets her customers by name and uses recipes handed down from her grandmother. However, it would be perfectly legal for her to transfer the premises, the name, and the recipes to someone else. Is the goodwill of Mother's Macaroons personal to her or intrinsic to the business? If the latter, does the rule discriminate in favor of professionals like doctors (and, not surprisingly, lawyers)?

14.44. The American Law Institute (ALI), an often-influential organization that seeks to create coherent bodies of law, follows the majority position that earning capacity, skills, education, and the like are not marital property. **PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS** § 4.07 (2002). But it also holds that business and professional goodwill earned during marriage are marital property "to the extent that they have value apart from the value of spousal earning capacity, spousal skills, or post-dissolution labor." The ALI also states that spouses should be compensated for lower earning capacity due to taking on a disproportionate share of childcare; for loss of a standard of living due to divorce when one spouse makes significantly more than another; and for reimbursement for financial contributions to the ex-spouse's education or training. §§ 5.05-.04, 5.12.

Results in the New York courts with other types of careers have been mixed. *Hougie v. Hougie*, 689 N.Y.S.2d 490 (App. Div. 1999) (applying O'Brien to investment banker's earning capacity); *but see Bystricky v. Bystricky*, 677 N.Y.S.2d 443

(Sup. Ct. 1998) (refusing to apply *O'Brien* to career police officer who passed the civil service exam and was promoted to sergeant).

Which is better, the New York approach or the alternate approaches? How, if at all, should courts account for educational attainment and career success in a community property state, which mandates equal or equitable division of community property and bars distribution of one spouse's separate property to the other on divorce?

14.45. Other kinds of marital “property.” In one actual case, the husband donated a kidney to his wife. When they later divorced, he argued that he should be allowed to count the value of the kidney as part of her share of the marital estate. Is he right?

What about human sperm, eggs, or embryos created by assisted reproduction techniques? See Steven H. Snyder, “*I'm a Divorce Lawyer! So Why Should I Read About ART?*,” 34 FAM. Advoc. 6 (Fall 2011) (“[o]ne in five couples seeking a divorce has an assisted reproduction issue”; some courts have treated embryos and stored sperm as property). As with professional degrees, courts generally decline to treat gametes and the like as property, but still account for them in some way in a divorce. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (fertilized pre-embryos were not property, but ex-husband’s desire to avoid parenthood outweighed ex-wife’s desire to donate them to another couple, so he was allowed to control their disposition); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (upholding couple’s agreement that, if they no longer wanted to begin a pregnancy or couldn’t agree on the disposition of stored frozen pre-zygotes, the IVF program should dispose of them by allowing them to be used in research); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) (decedent had right to leave his frozen sperm to his female companion; his children and former spouse were not entitled to have the sperm destroyed). Does the label “property” actually matter here?

14.46. Enforcement of divisions. Once a relationship has broken down, things can almost always get worse. Divorcing spouses may refuse to follow the rules laid down by a court. As a result, an extensive legal framework has developed to enforce these rules, with varying amounts of success. Courts may enter support orders requiring an ex-spouse to provide a certain amount of monetary support; if the ex-spouse doesn’t pay voluntarily, a court may order garnishment of his wages or attachment of her bank accounts. Civil and criminal contempt, in which the contemnor is jailed for nonpayment, have even been used to coerce payment. Wealthier ex-spouses often have an easier time avoiding payment than poorer ones, because they may have an easier time conceal-

ing bank accounts or arranging their affairs so there are no wages to garnish.

14.47. Prenuptial agreements. Lawyers sometimes get involved before things go wrong, rather than after. Although they were initially resisted—at this point, you should be able to make the basic arguments about the incompatibility of love and hardhearted economic rationality—most states now accept them, at least where there are no children involved and no undue influence. Still, many people with significant assets enter marriage without a prenuptial agreement. Given the benefits of prenuptial agreements for simply and cheaply dividing property at divorce, why do so many people resist them? See John B. Burns, *The Prenup as Estate Planning Tool or Trap?*, 33 FAM. ADVOC. 7 (Winter 2011); Cheryl I. Foster, *When a Prenup & Religious Principles Collide*, 33 FAM. ADVOC. 7 (Winter 2011); Melvyn B. Frumkes, *Why a Prenuptial Agreement?*, 33 FAM. ADVOC. 7 (Winter 2011).

Under the Uniform Premarital Agreement Act § 6(a) (1983), adopted in more than 20 states, a premarital agreement isn't enforceable if the person against whom enforcement is sought proves (1) that her agreement wasn't voluntary; or (2) that the agreement was unconscionable when it was executed *and* that she (a) wasn't provided fair and reasonable disclosure of the other person's property or financial obligations; (b) didn't voluntarily and expressly waive her right to disclosure in writing; and (c) didn't have, and couldn't reasonably have had, adequate knowledge of the other person's property or financial obligations. See also *Mamot v. Mamot*, 813 N.W.2d 440 (Neb. 2012) (finding agreement involuntary when fiance demanded it a few days before the wedding, and fiancee could not reasonably have consulted a lawyer); CAL. FAM. CODE § 1612(c) (restrictions on spousal support are allowed only if the party waiving rights consulted with independent counsel).

Why shouldn't either nondisclosure or unconscionability be sufficient to invalidate a prenuptial agreement? A premarital agreement will also not be enforced to the extent it would leave one spouse eligible for public assistance, and child support rights may not be "adversely affected" by any premarital agreement. After marriage, the agreement may be ended or changed only by a written agreement signed by both parties, but no consideration is required to end or change it.

Some states evaluate the agreements for fairness. See, e.g., *Ansin v. Cravens-Ansin*, 929 N.E.2d 955 (Mass. 2010) (courts will uphold agreements that are "fair and reasonable"). The majority rule assesses unconscionability or fairness as of the date the agreement was signed. See, e.g., VA. CODE § 20-151; N.J. Stat. § 37:2-38(c). But a not inconsiderable minority may refuse to enforce an agreement

that is unconscionable when enforcement is sought, especially if the parties' circumstances have changed substantially. See, e.g., CONN. GEN. STAT. § 46b-36g(a)(2).

14.48. What if the parties don't have a premarital agreement, but make an agreement after marriage? In *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993), a stroke victim promised his wife that he'd leave her a significant amount of his separate property, and pay for the education of her daughter by a prior marriage, if she took care of him at home instead of putting him in institutional care. After he died, his widow discovered that he had not fulfilled his promise, and sued. The court refused to enforce the parties' oral agreement because consideration was absent. The court reasoned that the marital relationship already included a "duty of support," which "includes caring for a spouse who is ill." The fact that the wife personally performed the caretaking didn't constitute new consideration. Do you agree?

More generally, the trend of American law has been to allow people in intimate relationships more freedom in selecting the property rules applied to them. No state requires married people to hold by the entireties, or jointly. Prenuptial agreements are regularly enforced. Legal forms developed to protect the interests of same-sex couples, though now supplemented by the option of marriage, remain available to people who choose not to marry. Careful planners have choices even on death. See Katherine D. Black et al., *Community Property for Non-Community Property States*, 24 QUINNIPAC PROB. L.J. 260 (2011) (describing ways in which a testator may choose what state's property laws will control and how to enter into community property agreements in non-community property jurisdictions).

14.4.4 Nonmarital Relations

Marriage is deeply embedded in American culture. Currently, 86% of young men and 89% of young women are projected to marry at some point in their lives. However, it is increasingly common for people to spend significant amounts of time in nonmarital arrangements.⁹ This means that property law

⁹In 2011, there were 56 million households with married couples at the head, out of a total of about 76 million family households, and 115 million households total. Five million households were headed by single men, and 15 million by single women. According to U.S. Census data, 66% of households in 2012 were family households, down from 81% in 1970. During that period, the share of households comprised of married couples with children under 18 halved from 40% to 20%. Of family groups living together, 71% were married couples, down from 74%

regularly faces disputes related to such arrangements. When, if at all, should courts shift property rights around as a result of a nonmarital relationship?

Posik v. Layton
695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

Nancy Layton was a doctor practicing at the Halifax Hospital in Volusia County and Emma Posik was a nurse working at the same facility when Dr. Layton decided to remove her practice to Brevard County. In order to induce Ms. Posik to give up her job and sell her home in Volusia County, to accompany her to Brevard County, and to reside with her "for the remainder of Emma Posik's life to maintain and care for the home," Dr. Layton agreed that she would provide essentially all of the support for the two, would make a will leaving her entire estate to Ms. Posik, and would "maintain bank accounts and other investments which constitute non-probatable assets in Emma Posik's name to the extent of 100% of her entire non-probatable assets." Also, as part of the agreement, Ms. Posik agreed to loan Dr. Layton \$20,000 which was evidenced by a note. The agreement provided that Ms. Posik could cease residing with Dr. Layton if Layton failed to provide adequate support, if she requested in writing that Ms. Posik leave for any reason, if she brought a third person into the home for a period greater than four weeks without Ms. Posik's consent, or if her abuse, harassment or abnormal behavior made Ms. Posik's continued residence intolerable. In any such event, Dr. Layton agreed to pay as liquidated damages the sum of \$2,500 per month for the remainder of Ms. Posik's life.

It is apparent that Ms. Posik required this agreement as a condition of accompanying Dr. Layton to Brevard. The agreement was drawn by a lawyer and properly witnessed. Ms. Posik, fifty-five years old at the time

in 2003. Of family groups with children under 18, 63% had married couples at the head, down from 67% in 2003. Five percent of family groups were unmarried couples with children. Unmarried people in opposite-sex relationships who were living together were just as likely as married opposite-sex couples to have children under 18 in their households (40-41% of both groups), while 16% of same-sex couples had children under 18 present. Among opposite-sex married couples who had children, however, almost 90% had children who were the biological offspring of both spouses, whereas that percentage dropped to 51% of unmarried couples living together with children. See JONATHAN VESPA, JAMIE M. LEWIS, & ROSE M. KREIDER, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012 (Aug. 2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

of the agreement, testified that she required the agreement because she feared that Dr. Layton might become interested in a younger companion. Her fears were well founded. Some four years after the parties moved to Brevard County and without Ms. Posik's consent, Dr. Layton announced that she wished to move another woman into the house. When Ms. Posik expressed strong displeasure with this idea, Dr. Layton moved out and took up residence with the other woman.

Dr. Layton served a three-day eviction notice on Ms. Posik. Ms. Posik later moved from the home and sued to enforce the terms of the agreement and to collect on the note evidencing the loan made in conjunction with the agreement. . . . Dr. Layton counterclaimed for a declaratory judgment as to whether the liquidated damages portion of the agreement was enforceable.

The trial judge found that because Ms. Posik's economic losses were reasonably ascertainable as to her employment and relocation costs, the \$2,500 a month payment upon breach amounted to a penalty and was therefore unenforceable. The court further found that although Dr. Layton had materially breached the contract within a year or so of its creation, Ms. Posik waived the breach by acquiescence. Finally, the court found that Ms. Posik breached the agreement by refusing to continue to perform the house work, yard work and cooking for the parties and by her hostile attitude which required Dr. Layton to move from the house. Although the trial court determined that Ms. Posik was entitled to quantum meruit, it also determined that those damages were off-set by the benefits Ms. Posik received by being permitted to live with Dr. Layton. The court did award Ms. Posik a judgment on the note executed by Dr. Layton.

Although neither party urged that this agreement was void as against public policy, Dr. Layton's counsel on more than one occasion reminded us that the parties had a sexual relationship. Certainly, even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement entered into by two parties that the state prohibits from marrying. But even though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. . . . But the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and

contract rights.

Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations. Other states have approved such individual agreements. In *Marvin v. Marvin*, 557 P.2d 106 (1976), the California Supreme Court held:

[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose.

... In a case involving unmarried heterosexuals, a Florida appellate court has passed on the legality of a non-marital support agreement. In *Crossen v. Feldman*, 673 So.2d 903 (Fla. 2d DCA 1996), the court held:

Without attempting to define what may or may not be “palimony,”* this case simply involves whether these parties entered into a contract for support, which is something that they are legally capable of doing.

Addressing the invited issue, we find that an agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services. Certainly prostitution, heterosexual or homosexual, cannot be condoned merely because it is performed within the confines of a written agreement. The parties, represented by counsel, were well aware of this prohibition and took pains to assure that sexual services were not even mentioned in the agreement. That factor would not be decisive, however, if it could be determined from the contract or from the conduct of the parties that the primary reason for the agreement was to deliver and be paid for sexual services. This contract

*“Palimony” is a lay term with no real legal meaning. It is a portmanteau of “pal” and “alimony,” representing the concept that unmarried partners may have interests sufficient to treat their breakup as similar to a divorce in terms of one partner’s right to some form of compensation from the other, although not necessarily in the form of periodic alimony payments. Is enforcement of a contract, either express or implied, really similar to alimony, a mandated division of property that occurs because of the legal relationship of the parties even if they never agreed to it? —Eds.

and the parties' testimony show that such was not the case here. Because of the potential abuse in marital-type relationships, we find that such agreements must be in writing. . . .

The obligations imposed on Ms. Posik by the agreement include the obligation "to immediately commence residing with Nancy L.R. Layton at her said residence for the remainder of Emma Posik's life." This is very similar to a "until death do us part" commitment. And although the parties undoubtedly expected a sexual relationship, this record shows that they contemplated much more. They contracted for a permanent sharing of, and participating in, one another's lives. We find the contract enforceable.

We disagree with the trial court that waiver was proved in this case. Ms. Posik consistently urged Dr. Layton to make the will as required by the agreement and her failure to do so was sufficient grounds to declare default. And even more important to Ms. Posik was the implied agreement that her lifetime commitment would be reciprocated by a lifetime commitment by Dr. Layton-and that this mutual commitment would be monogamous. When Dr. Layton introduced a third person into the relationship, although it was not an express breach of the written agreement, it explains why Ms. Posik took that opportunity to hold Dr. Layton to her express obligations and to consider the agreement in default.

We also disagree with the trial court that Ms. Posik breached the agreement by refusing to perform housework, yard work, provisioning the house, and cooking for the parties. This conduct did not occur until after Dr. Layton had first breached the agreement. One need not continue to perform a contract when the other party has first breached. Therefore, this conduct did not authorize Dr. Layton to send the three-day notice of eviction which constituted a separate default under the agreement.

We also disagree that the commitment to pay \$2,500 per month upon termination of the agreement is unenforceable as a penalty. We agree with Ms. Posik that her damages, which would include more than mere lost wages and moving expenses, were not readily ascertainable at the time the contract was created. Further, the agreed sum is reasonable under the circumstances of this case. It is less than Ms. Posik was earning some four years earlier when she entered into this arrangement. It is also less than Ms. Posik would have received had the long-term provisions of the contract been performed. She is now in her sixties and her working opportunities are greatly reduced.

We recognize that this contract, insisted on by Ms. Posik before she

would relocate with Dr. Layton, is extremely favorable to her. But there is no allegation of fraud or overreaching on Ms. Posik's part. This court faced an extremely generous agreement in *Carnell v. Carnell*, 398 So.2d 503 (Fla. 5th DCA 1981). In *Carnell*, a lawyer, in order to induce a woman to become his wife, agreed that upon divorce the wife would receive his home owned by him prior to marriage, one-half of his disposable income and one-half of his retirement as alimony until she remarried. Two years after the marriage, she tested his commitment. We held:

The husband also contends that the agreement is so unfair and unreasonable that it must be set aside. "The freedom to contract includes the right to make a bad bargain." The controlling question here is whether there was overreaching and not whether the bargain was good or bad.

Contracts can be dangerous to one's well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously. Dr. Layton's comment that she considered the agreement a sham and never intended to be bound by it shows that she did not take it seriously. That is regrettable.

We affirm that portion of the judgment below which addresses the promissory note and attorney's fees and costs associated therewith. We reverse that portion of the judgment that fails to enforce the parties' agreement.

AFFIRMED in part; REVERSED in part and REMANDED for further action consistent with this opinion.

PETERSON, C.J., concurs specially, with opinion.

. . . Each and every term of this agreement could have been included in one between a single invalid or an elderly married couple who seek the companionship and household services of a housekeeper, cook or a practical or professional nurse, in which no sexual relationship was involved

Notes and Questions

14.49. The court's reasoning at some points suggests that, because the parties could not legally marry even if they wanted to, they should in fairness be allowed to recreate by agreement as many of the rights and obligations of mar-

ried couples as possible. Now that lesbian couples can marry at will, is the basis of the decision undermined? If it's possible to recreate the legal incidents of marriage without marriage, won't that undermine the state's preference for marriage when couples live together, which was an important aspect of *Obergefell v. Hodges*, 2015 WL 213646 (2015), the Supreme Court decision holding that same-sex marriage is a constitutional right?

14.50. What if there is no explicit agreement? As it became more common for unmarried couples to live together without holding themselves out as married, lawyers searched for theories that could replace common law marriage when a long-standing nonmarital relationship ended. The Supreme Court of California, relying on a theory of unjust enrichment, held that a contract for property division or support could be implied from the conduct of the parties. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). A number of states have followed *Marvin*, at least in part. *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980) (court may divide property based on contract and equitable principles); *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986) (implied contract); *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (equitable principles); *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990) (express or implied contract, or constructive trust); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987) (allowing courts to divide property between unmarried people who lived together under theories such as breach of contract, constructive trust, and quantum meruit).

14.51. New York requires a written or oral express contract to share earnings and assets between unmarried partners, but will enforce express contracts. *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980). Likewise, *In re Estate of Roccamonte*, 808 A.2d 838 (N.J. 2002), enforced a man's promise to provide for a woman "financially for the rest of her life," even though he was married to another woman when he made that promise. The court directed the trial court to award her a lump sum payment based on her life expectancy, diminishing the amount inherited by his wife and children. Roccamonte's estate was valued at \$1.4 million, and the claimant was entitled to receive \$450,000 from the estate based on her life expectancy. The New Jersey legislature overturned the result, providing that all such "palimony" agreements must be in writing to be enforceable.

14.52. Was *In re Estate of Roccamonte* a step too far, given the indefinite language of the promise? If we construed the decedent's words as a promise to make a will, that promise would be unenforceable, at least absent estoppel. *Williams v. Mason*, 556 So. 2d 1045 (Miss. 1990) (refusing to enforce an oral promise to devise property to his cohabitant in return for her promise to live in

his home and “do his bidding”). The *Williams* court wrote:

Though a party may satisfy the court of the existence of an unwritten agreement to devise, the statute precludes specific performance as a remedy our courts may decree. This is so even though the promisee has done all he was expected to do under the agreement. Holmes put the point well a century ago in *Bourke v. Callahan*, 160 Mass. 195, 35 N.E. 460 (1893):

... [T]he statute of frauds may be made an instrument of fraud. But this is always true, whenever the law prescribes a form for an obligation. The very meaning of such a requirement is that a man relies at his peril on what purports to be such an obligation without that form

Notwithstanding these well settled principles [that contracts or promises to make a will are unenforceable], experience has taught that gross unfairness may result where one acts in good faith and lives up to an oral agreement to provide services for another under circumstances such as today's. Our law has seen in such situations a potential for unjust enrichment, if not fraud. In recognition of these practical realities, the positive law of this state directs that a person, who provides services to another in good faith and in consequence of an oral agreement to devise property in exchange for the services, is not without enforceable rights. These rights arise not out of the agreement but the conduct of the parties

When the parties have so acted with respect one to the other, that is, when one has provided services for the other in reasonable reliance upon a promise to give consideration therefor, our cases are legion that, upon the death of the promisor, the promisee may recover of and from the estate on a quantum meruit basis. In such cases the amount of recovery is limited to the monetary equivalent of the reasonable value of the services rendered to the decedent for which payment has not been received

Our law recognizes an additional basis upon which—assuming proper proof—a person such as Mason may recover. Where parties live together without benefit of marriage and

where, through their joint efforts, accumulate real property or personal property, or both, a party having no legal title nevertheless acquires rights to an equitable share enforceable at law

In so holding, we well realize that we hold enforceable rights predicated upon the conduct of the parties but unattended by any writing. Although neither the statute of frauds nor the statute of wills per se preclude quantum meruit recovery in such circumstances, we are not unaware that the policy considerations supporting the existence and enforcement of those statutes may be present nevertheless. Because the decedent is not available to provide his version of the matter, courts must view with a touch of skepticism claims for services rendered asserted only at death. We have in the past suggested that the party alleging such an agreement must prove its existence by something more than the ordinary preponderance of the evidence. . . .

Is this a fair compromise of the relevant interests? Can Carol Rose's theory of crystals and mud in property law (presented later), and the courts' solicitude for dupes and sad sacks, help explain the results in this area of the law?

14.53. The ALI's Principles of the Law of Family Dissolution also deals with domestic partners, holding that obligations may arise from the parties' conduct, even without a formal agreement. § 6.02. Under the ALI approach, if domestic partners share a primary residence and a life together as a couple for a significant period of time, the couple's property should be divided as if they were married. If one partner dies, however, the survivor's rights depend on the decedent's will or, if there is no will, the state's law of intestate succession.

14.54. A minority of states still refuses to recognize legal obligations growing from extended cohabitation. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (holding that to recognize mutual property rights in unmarried cohabitants under a contract theory would contravene the state's policy of strengthening and preserving the integrity of marriage, because cohabitation was unlawful and state refused to recognize common-law marriage); see also *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994) (rejecting a breach of implied contract claim against a Catholic archbishop; stating that "[m]eretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor"); *Tapley*

v. Tapley, 449 A.2d 1218 (N.H. 1982) (rejecting claim because personal services are frequently provided by two people living together because they value each other, not because of an agreement to pay); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008). Even in states that recognize some form of “palimony,” an agreement that includes sexual services may be unenforceable. See *Kastil v. Carro*, 536 N.Y.S.2d 63 (App. Div. 1988) (breach of oral contract claim failed because illicit sexual relations can’t provide consideration for a contract).

14.55. Given that making cohabitation illegal is clearly unconstitutional under current law, see *Lawrence v. Texas*, 539 U.S. 558 (2003), should the result in *Hewitt* remain the same on the theory that it is still acceptable for law to prefer marriage to cohabitation and thus to give legal incentives to cohabitants to marry? *Hewitt* has been strongly criticized. Among other things, other courts have understood that their refusal to enforce promises that seem credible to the parties may cause great injustice, and won’t in fact discourage other people from living together. Also, at least one person in most couples would prefer the *Hewitt* rule and thus experience it as a *disincentive* to marry.

14.56. Ultimately, should marriage matter to property law, and if so, in what ways? There is an extremely large literature on these subjects. See, e.g., MARTHA ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015); Charlotte K. Goldberg, *Opting In, Opting Out: Autonomy in the Community Property States*, 72 LA. L. REV. 1 (2011) (discussing formal and informal mechanisms to avoid community property rules, such as cohabiting without marriage or creating a prenuptial agreement); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565 (2009) (arguing against the equalization of obligations between married and cohabiting couples); Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407 (2011) (addressing claims of cohabitants to property that is acquired jointly and exploring the equitable bases on which courts apportion such property).

14.57. **Is there anything special about romantic couples?** Suppose an adult child supports a parent for several decades after the parent loses her job and decides not to seek another, based on his belief that the parent will leave her estate to the child. If the parent disinherits the child, would he have any claim for reimbursement against the parent’s estate? What if the parent promised, orally or in writing, to leave her estate to the child? See HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE*

(2012) (discussing numerous lawsuits throughout American history following this pattern and finding that young men who gave up potential careers to help their parents often succeeded in their claims, while young women who gave up potential marriages to do the same failed).

14.4.5 Review Problems

14.58. Amara and Babar are an unmarried couple who would like to buy a house together. They want the protections available to tenants by the entirety. How would you write the deed to create an estate that was as much like tenancy by the entirety as is legally possible? Would you advise them to do this, or would you advise them to do something else? If so, what?

14.59. Abbie and Jenny Mills are sisters who wish to share all their property. Each wants to retain the ability to leave with a fair share of the assets if their relationship breaks down or either of them forms a pair bond. Jenny, who has been unable to find a long-term job after her graduation from college, agrees to take care of housekeeping, while Abbie agrees to work as an FBI agent in order to bring in money. Jenny knows that, if this arrangement persists for a long time, it may be even harder for her to get a job later, because she won't have much work history. Abbie wants to make sure that, if she needs to move for work, she will be able to sell their shared house and buy another. Other than their family home and Abbie's retirement account, they have very few assets. Draft an agreement between them. What is reasonable to protect Jenny's interests? What is reasonable to protect Abbie's interests?

14.60. Wanda and Pietro own equal shares in a house as tenants in common, but Wanda is traveling the world while Pietro lives in the house, whose fair rental value is \$2500 per month. Wanda refuses to contribute to the mortgage, property taxes, and insurance. If Pietro sues Wanda for an accounting and contribution to these costs, what will be the result if the carrying costs are \$1000 per month? What if they're \$3000 per month?

Suppose Pietro adds a screened porch to the house at a cost of \$10,000. Later, Wanda and Pietro sell the house for \$250,000. How should the proceeds be divided if the screened porch enhances the value of the property by \$15,000? What if it only increased the value of the property by \$5000?

Chapter 15

Trusts and Corporations

This section considers the two dominant forms of artificial entities that own and manage property: trusts and corporations.

15.1 Trusts

Note on Trusts

The origin of the trust lies in medieval tax estate planning and tax evasion. (Arguably, nothing has changed in the last six hundred years.) Imagine Osbert, a minor lord in the 15th century, who holds Blackacre as a tenant of Leonard, a slightly less minor lord. Osbert is getting on in years and has started to worry about the future of his family. His elder son, Aylwin, is not showing promising signs of maturity, and Osbert has come to think that Aylwin may be better suited to religious orders than the duties of managing a great estate. But Osbert's younger son Bartholomew appears to be a fine young gentleman: athletic, patient, and wise in the ways of men. Osbert would like to provide for Aylwin, but would prefer to have Blackacre go to Bartholomew. Osbert's problem is that the available conveyancing devices don't work for him. If he does nothing, then Blackacre goes to Aylwin at Osbert's death under the rule of primogeniture in effect in England at the time, according to which the eldest son receives any land his father owned at his death (was "seised of," in contemporary terminology). A will leaving Blackacre to Bartholomew doesn't work because land could not be devised by will until the Statute of Wills in 1540. And Osbert doesn't want to convey Blackacre (or a future interest in Blackacre) to Bartholomew now, be-

cause Bartholomew might die before him, or Aylwin might get his act together, or something else could come along to force a change in plan.

The solution hit on by contemporary lawyers was the “use.” Osbert conveys Blackacre to his friend Theobald “to the use of Osbert and his heirs.” Then he writes a letter to Theobald, instructing Theobald to convey Blackacre to Bartholomew at Osbert’s death. This works. When Osbert dies, Theobald owns Blackacre, so primogeniture never kicks in. Then Theobald conveys to Bartholomew while they are both alive, so again the conveyance is perfectly good. What’s more, Osbert can change his instructions to Theobald at any time by writing a new letter. And as an added bonus, because the land never passes by intestacy, the “feudal incidents”—effectively taxes payable to Leonard when a new tenant inherits—never become due. Uses became highly popular for solving numerous similar problems created by the inflexibility of the medieval system of interests in land.

But there was a fly in the ointment. As far as the law courts could see—or rather, as far as they were willing to look—the “to the use of” language was a superfluous, meaningless, and ineffective addition to an otherwise valid conveyance. On their view of the situation, Theobald owns Blackacre in fee simple once Osbert conveys to him. Osbert’s subsequent letter is a worthless piece of paper; much as if you wrote to Bill Gates telling him to convey to you some lakefront property in Washington. So if Theobald turned out to be untrustworthy and held on to Blackacre for himself or conveyed it to Aylwin contrary to Osbert’s instructions, Osbert’s plan would come to ruin. In such cases, Osbert and Bartholomew could obtain relief from the Chancellor, who would hold that Theobald was under a duty in equity and good conscience to follow Osbert’s instructions.

The use thus created what we would today call an “equitable interest” in land. Theobald remained the *legal* owner of Blackacre while he held it to the use of Osbert and his heirs, but Osbert was the *equitable* owner, since he could enforce his claims and instructions in a court of equity. Over time a variety of similar situations, in which Chancery would enforce interests in land legally owned by another, gave rise to a reasonably coherent body of equitable jurisdiction, equitable doctrine, and equitable interests in property.

The use is long gone, along with the medieval doctrines that necessitated it, but the modern **trust** shares its essential characteristics. A trust requires three people and one thing. The people are the **settlor**, who creates the trust; the **trustee**, who holds legal title to the trust property and is responsible for following the settlor’s instructions, and the **beneficiary**, who is entitled to receive dis-

tributions from the trust in accordance with the settlor's instructions but does not directly control it. The thing is the trust *property* (or sometimes *res*, Latin for "thing," or *corpus*, Latin for "body"), whose ownership is split between the trustee (with legal title) and the beneficiary (with equitable title).

Rothko v. Reis (In re Estate of Rothko)

372 N.E.2d 291 (N.Y. 1977)

COOKE, Judge.

Mark Rothko, an abstract expressionist painter whose works through the years gained for him an international reputation of greatness, died testate on February 25, 1970. The principal asset of his estate consisted of 798 paintings of tremendous value, and the dispute underlying this appeal involves the conduct of his three executors in their disposition of these works of art. In sum, that conduct as portrayed in the record and sketched in the opinions was manifestly wrongful and indeed shocking.

Rothko's will was admitted to probate on April 27, 1970 and letters testamentary were issued to Bernard J. Reis, Theodoros Stamos and Morton Levine. Hastily and within a period of only about three weeks and by virtue of two contracts each dated May 21, 1970, the executors dealt with all 798 paintings.

By a contract of sale, the estate executors agreed to sell to Marlborough A.G., a Liechtenstein corporation (hereinafter MAG), 100 Rothko paintings as listed for \$1,800,000, \$200,000 to be paid on execution of the agreement and the balance of \$1,600,000 in 12 equal interest-free installments over a 12-year period. Under the second agreement, the executors consigned to Marlborough Gallery, Inc., a domestic corporation (hereinafter MNY), "approximately 700 paintings listed on a Schedule to be prepared," the consignee to be responsible for costs covering items such as insurance, storage restoration and promotion. By its provisos, MNY could sell up to 35 paintings a year from each of two groups, pre-1947 and post-1947, for 12 years at the best price obtainable but not less than the appraised estate value, and it would receive a 50% commission on each painting sold, except for a commission of 40% on those sold to or through other dealers.

Petitioner Kate Rothko, decedent's daughter and a person entitled to share in his estate by virtue of an election under [New York Estates, Powers and Trusts Law (EPTL)] 5-3.3, instituted this proceeding to remove the

executors, to enjoin MNY and MAG from disposing of the paintings, to rescind the aforesaid agreements between the executors and said corporations, for a return of the paintings still in possession of those corporations, and for damages. She was joined by the guardian of her brother Christopher Rothko, likewise interested in the estate, who answered by adopting the allegations of his sister's petition and by demanding the same relief. The Attorney-General of the State, as the representative of the ultimate beneficiaries of the Mark Rothko Foundation, Inc., a charitable corporation and the residuary legatee under decedent's will, joined in requesting relief substantially similar to that prayed for by petitioner. . . .

Following a nonjury trial covering 89 days and in a thorough opinion, the Surrogate found:^{*}

- that Reis was a director, secretary and treasurer of MNY, the consignee art gallery, in addition to being a coexecutor of the estate;
- that the testator had a 1969 *inter vivos* contract with MNY to sell Rothko's work at a commission of only 10% and whether that agreement survived testator's death was a problem that a fiduciary in a dual position could not have impartially faced;
- that Reis was in a position of serious conflict of interest with respect to the contracts of May 21, 1970 and that his dual role and planned purpose benefited the Marlborough interests to the detriment of the estate;
- that it was to the advantage of coexecutor Stamos as a "not-too-successful artist, financially," to curry favor with Marlborough and that the contract made by him with MNY within months after signing the estate contracts placed him in a position where his personal interests conflicted with those of the estate, especially leading to lax contract enforcement efforts by Stamos;
- that Stamos acted negligently and improvidently in view of his own knowledge of the conflict of interest of Reis;
- that the third coexecutor, Levine, while not acting in self-interest or with bad faith, nonetheless failed to exercise ordinary prudence in

^{*}The list formatting has been added to improve readability. —Eds.

the performance of his assumed fiduciary obligations since he was aware of Reis' divided loyalty, believed that Stamos was also seeking personal advantage, possessed personal opinions as to the value of the paintings and yet followed the leadership of his coexecutors without investigation of essential facts or consultation with competent and disinterested appraisers, and

- that the business transactions of the two Marlborough corporations were admittedly controlled and directed by Francis K. Lloyd.

It was concluded that the acts and failures of the three executors were clearly improper to such a substantial extent as to mandate their removal under SCPA 711 as estate fiduciaries. The Surrogate also found

- that MNY, MAG and Lloyd were guilty of contempt in shipping, disposing of and selling 57 paintings in violation of the temporary restraining order dated June 26, 1972 and of the injunction dated September 26, 1972;
- that the contracts for sale and consignment of paintings between the executors and MNY and MAG provided inadequate value to the estate, amounting to a lack of mutuality and fairness resulting from conflicts on the part of Reis and Stamos and improvidence on the part of all executors;
- that said contracts were voidable and were set aside by reason of violation of the duty of loyalty and improvidence of the executors, knowingly participated in and induced by MNY and MAG;
- that the fact that these agreements were voidable did not revive the 1969 inter vivos agreements since the parties by their conduct evinced an intent to abandon and abrogate these compacts.

The Surrogate held that the present value at the time of trial of the paintings sold is the proper measure of damages as to MNY, MAG, Lloyd, Reis and Stamos. He imposed a civil fine of \$3,332,000 upon MNY, MAG and Lloyd, same being the appreciated value at the time of trial of the 57 paintings sold in violation of the temporary restraining order and injunction. It was held that Levine was liable for \$6,464,880 in damages, as he was not in a dual position acting for his own interest and was thus liable only for

the actual value of paintings sold MNY and MAG as of the dates of sale, and that Reis, Stamos, MNY and MAG, apart from being jointly and severally liable for the same damages as Levine for negligence, were liable for the greater sum of \$9,252,000 "as appreciation damages less amounts previously paid to the estate with regard to sales of paintings." The cross petition of the Attorney-General to reopen the record for submission of newly discovered documentary evidence was denied. The liabilities were held to be congruent so that payment of the highest sum would satisfy all lesser liabilities including the civil fines and the liabilities for damages were to be reduced by payment of the fine levied or by return of any of the 57 paintings disposed of, the new fiduciary to have the option in the first instance to specify which paintings the fiduciary would accept. [The Appellate Division affirmed.]

In seeking a reversal, it is urged that an improper legal standard was applied in voiding the estate contracts of May, 1970, that the "no further inquiry" rule applies only to self-dealing and that in case of a conflict of interest, absent self-dealing, a challenged transaction must be shown to be unfair. The subject of fairness of the contracts is intertwined with the issue of whether Reis and Stamos were guilty of conflicts of interest.² [Austin W. Scott Jr., *Scott on Trusts*] is quoted to the effect that "(a) trustee does not necessarily incur liability merely because he has an individual interest in the transaction"

These contentions should be rejected. First, a review of the opinions of the Surrogate and the Appellate Division manifests that they did not rely solely on a "no further inquiry rule," and secondly, there is more than an adequate basis to conclude that the agreements between the Marlborough corporations and the estate were neither fair nor in the best interests of the estate. This is demonstrated, for example, by the comments of the Surrogate concerning the commissions on the consignment of the 698 paintings and those of the Appellate Division concerning the sale of the 100 paintings. The opinions under review demonstrate that neither the Surrogate nor the Appellate Division set aside the contracts by merely applying the no further inquiry rule without regard to fairness. Rather they determined, quite properly indeed, that these agreements were neither fair nor

²In New York, an executor, as such, takes a qualified legal title to all personality specifically bequeathed and an unqualified legal title to that not so bequeathed; he holds not in his own right but as a trustee for the benefit of creditors, those entitled to receive under the will and, if all is not bequeathed, those entitled to distribution under the EPTL.

in the best interests of the estate.

To be sure, the assertions that there were no conflicts of interest on the part of Reis or Stamos indulge in sheer fantasy. Besides being a director and officer of MNY, for which there was financial remuneration, however slight, Reis, as noted by the Surrogate, had different inducements to favor the Marlborough interests, including his own aggrandizement of status and financial advantage through sales of almost one million dollars for items from his own and his family's extensive private art collection by the Marlborough interests. Similarly, Stamos benefited as an artist under contract with Marlborough and, interestingly, Marlborough purchased a Stamos painting from a third party for \$4,000 during the week in May, 1970 when the estate contract negotiations were pending. The conflicts are manifest. Further, as noted in Bogert, *Trusts and Trustees* (2d ed.), "The duty of loyalty imposed on the fiduciary prevents him from accepting employment from a third party who is entering into a business transaction with the trust" (§ 543, subd. (S), p. 573). "While he (a trustee) is administering the trust he must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries" (*Bogert, Trusts (Hornbook Series 5th ed.)*, p. 343). Here, Reis was employed and Stamos benefited in a manner contemplated by Bogert. In short, one must strain the law rather than follow it to reach the result suggested on behalf of Reis and Stamos.

Levine contends that, having acted prudently and upon the advice of counsel, a complete defense was established. Suffice it to say, an executor who knows that his coexecutor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable even though he was acting on the advice of counsel. When confronted with the question of whether to enter into the Marlborough contracts, Levine was acting in a business capacity, not a legal one, in which he was required as an executor primarily to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence, accented by "(n)o^t honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)). Alleged good faith on the part of a fiduciary forgetful of his duty is not enough. He could not close his eyes, remain passive or move with unconcern in the face of the obvious loss to be visited upon the estate by participation in those business arrangements and then shelter himself behind the claimed counsel

of an attorney.

Further, there is no merit to the argument that MNY and MAG lacked notice of the breach of trust. The record amply supports the determination that they are chargeable with notice of the executors' breach of duty.

Notes and Questions

15.1. DAR WILLIAMS, MARK ROTHKO SONG (Razor & Tie 1993):

The blue it speaks so full

It's like the beauty, one can barely stand

Or too much things dropped in your hand

And there's a green like the peace in your heart sometimes

I met her at the funeral

She said, "I don't know what he meant to me

I just know he affected me

An effect not unlike his art, I believe"

15.2. As *Rothko* illustrates, trusts can arise in a variety of settings. The executor of a will and the administrator of an estate in intestacy act as trustees for the parties who are to receive the decedent's property. The estate of a bankrupt firm or individual is also managed by a trustee, who acts to maximize its value for the creditors.

There are many kinds of trusts. Private trusts have identifiable individual beneficiaries. There are also charitable trusts, which can serve broader social purposes and large classes of unidentified beneficiaries, and business trusts, in which trustees manage financial assets for specific purposes. Many retirement funds, for example, are organized as trusts with the employees who are entitled to pensions as beneficiaries. Another common distinction is between revocable trusts, which the settlor can terminate, and irrevocable trusts, which she cannot. Trusts can also be **inter vivos**, i.e. established by the settlor during her lifetime, or testamentary, i.e. created in the settlor's will.

15.3. The basic duties of a trustee are **obedience** to the instructions given by the settlor, **loyalty** to the interests of the beneficiaries (rather than the trustee's own interests), and **prudence** in managing the trust assets appropriately. Various subsidiary duties, such as the duty to **account** for the trust assets and how they have been used, ensure that the basic duties are carried out faithfully. Which of these duties did the different trustees in *Rothko* violate? Observe the different standards of care required for the trustees: why is the standard of

loyalty so much more stringent than the standard of prudence? Which of these duties should the settlor be able to waive when he or she sets up the trust? Which of them should the beneficiaries be able to waive? To make this more concrete, do you think that Mark Rothko wanted his executors to sell off his paintings quickly to Marlborough? If so, should he have been allowed to specify so, and how? On the other side, could Kate Rothko and the other heirs have given permission for the sale, and if so, what form of notice and consent would the trustees have needed to get?

15.4. In an omitted part of the opinion, the *Rothko* court discussed the proper measure of damages. It upheld the Surrogate's decision to award appreciation damages, i.e. the value of the wrongfully sold paintings as of the time of the Surrogate's decree. This ended up being an especially large sum because the price of Rothko works rose rapidly after his death (and continued rising well after *Rothko*). Although sometimes justified in deterrence terms, it is a bit of an anomalous remedy in trust law and has been criticized by trusts scholars: holding trustees accountable for increases in value *after* they sell off trust assets is unusual. Two other damage measures are more common. One is the familiar make-whole remedy of tort law: if the trustees' breach of trust has reduced the value of the trust corpus, they are liable for the difference between the trust's actual value and what it would have been if not for the breach. This damage measure makes evident sense against the trustee who imprudently sells a trust asset too cheaply, or who holds on to an asset after a prudent trustee would have sold it, or who imprudently fails to diversify a trust corpus that is concentrated in a single risky asset. But breach of the duty of loyalty often calls for something more. Take the trustee who withdraws \$50,000 from a trust then goes on a gambling spree in Las Vegas and wins an additional \$100,000. Letting the trustee deposit the original \$50,000 back in the trust and walk away with the \$100,000 in gambling winnings would make the trust whole, but it would also leave trustees with a temptation to gamble—literally and figuratively—with trust assets for their own gain. In these circumstances, the usual remedy is *restitution*: the trustee must disgorge her ill-gotten gains back to the trust. Even if this gives the beneficiaries a windfall, the trustee would be unjustly enriched were she allowed to keep the gains. (Do you see how appreciation damages go even further than either of these measures?)

Observe that the restitutionary remedy involves a kind of **tracing**: the beneficiaries are regarded as having a right to the property in the trust corpus, and they can reclaim that property even as the trustee modifies it or changes its form. So if the trustee buys a Picasso with the trust corpus, and the Picasso in-

creases in value, and the trustee then sells it, she will be required to pay back the full amount she received for the Picasso. Query: just the trustee? Why can't Kate Rothko et al. recover her father's paintings from the people Marlborough sold them to? What about the paintings sold to Marlborough but not yet resold by it?

15.5. A trust beneficiary has equitable title to trust assets. Equitable title is not legal title, as illustrated by spendthrift trusts. Suppose that the fabulously wealthy parents of Rick von Slonecker, currently 28 and never employed, decide that they want their son to enjoy a luxurious lifestyle, so they create in their wills a trust to pay Rick \$1 million a year for life, with the remainder to go either to his children, or if there are none, to various charitable causes. (Side note: observe the great flexibility provided by the trust form; equitable interests are almost always better alternatives to legal ones in any complicated property settlement, given the notorious inflexibility and troublesome traps of the system of estates in land.) They fear, not without reason, that Rick will run up gambling debts and want to pay off large legal settlements quietly. So they put a clause in the trust instrument making abundantly clear that the monthly payments are to go directly to Rick and no one else, and that Rick shall have no power to encumber the trust corpus. Now, in many states, when the casino comes calling and waving its bill, it must pursue Rick directly, even though he is penniless except for a few days immediately after each check arrives from the trust. It would be more convenient for the casino either to collect its debts from the trust corpus, or to obtain an order directing the trustee to pay it instead, but the casino has no more rights to the trust than Rick does, and *Rick holds only an equitable interest in the trust.*

Is it fair and just for Rick's parents to help Rick escape his debts in this way? One might think that there would be an obvious motivation for states to protect legitimate creditors against the various asset-shielding uses and abuses of trusts, but the trend has been in the other direction. Competition for trust business has induced numerous jurisdictions to adopt highly settlor-friendly trust law, such as validating spendthrift trusts like Rick's or weakening the Rule Against Perpetuities to attract long-lived dynastic trusts with beneficiaries spread out over many generations in a family. There are even asset-protection trusts, in which the settlor is also the principal beneficiary; the goal is that she can draw on the trust but her creditors cannot. These legal concessions to settlors can benefit state economies because trustees are entitled to compensation for managing trust assets, and many financial and legal service providers offer professional trust management services. But these benefits come at the ex-



Figure 15.1: Ad for Bessemer Trust, June 2014, New York Times Magazine: “At Bessemer Trust, we believe maintaining wealth from generation to generation is the true art of wealth management History is littered with family names once associated with great wealth that are now mere footnotes. Everything we do is designed to keep you from becoming one of them.”

pense of frustrated creditors and current generations bound by the dead-hand control of long-gone settlors. Is this a worthwhile trade for state legislatures to make?

15.6. There is at least one way in which courts do not pursue the legal fiction that the trustee has legal title to trust assets through to its logical conclusion. Suppose the *trustee* (rather than the beneficiary) has a gambling problem and racks up \$500,000 in personal gambling debts. Can the casino collect out of the trust corpus? Strict logic would say yes; they are the trustee’s property. But Section 507 of the Uniform Trust Code flatly says no: “Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.” See also 11 U.S.C. § 541(d) (exempting from a debtor’s estate in bankruptcy “[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest.”) Note that this rule cannot be justified using the usual principle that one is not bound by prior equitable interests of which one has no notice, since it affects even creditors who have no notice of the trust. Only if the trustee affirmatively commits breach of trust by withdrawing trust assets can she possibly be subjected to third-party claims. (Incidentally, what about the *settlor*’s creditors? Should they be able to reach trust assets?)

15.7. Recall *Eyerman v. Mercantile Trust Co.*, which invalidated Louise Johnston's attempt to instruct her executor to tear down her house. Could she have created The Louise Woodruff Johnston Testamentary Trust To Destroy My House and left her house to it in her will instead? Probably not. Section 404 of the Uniform Trust Code requires that a trust "must be for the benefit of its beneficiaries" and the comments condemn "frivolous or capricious" trust terms as violative of public policy. In *M'Caig v. University of Glasgow*, [1907] Sess. Cass 231, a Scottish court invalidated a testamentary trust whose assets were to be used "for the purpose of erecting monuments and statutes [of] myself, brothers, and sisters."

15.2 Corporations

Walkovszky v. Carlton
18 N.Y.2d 414 (1966)

FULD, Justice:

This case involves what appears to be a rather common practice in the taxicab industry of vesting the ownership of a taxi fleet in many corporations, each owning only one or two cabs.

The complaint alleges that the plaintiff was severely injured four years ago in New York City when he was run down by a taxicab owned by the defendant Seon Cab Corporation and negligently operated at the time by the defendant Marchese. The individual defendant, Carlton, is claimed to be a stockholder of 10 corporations, including Seon, each of which has but two cabs registered in its name, and it is implied that only the minimum automobile liability insurance required by law (in the amount of \$10,000) is carried on any one cab. Although seemingly independent of one another, these corporations are alleged to be "operated . . . as a single entity, unit and enterprise" with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants. The plaintiff asserts that he is also entitled to hold their stockholders personally liable for the damages sought because the multiple corporate structure constitutes an unlawful attempt "to defraud members of the general public" who might be injured by the cabs. . . .

The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the

privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil", whenever necessary "to prevent fraud or to achieve equity". In determining whether liability should be extended to reach assets beyond those belonging to the corporation, we are guided, as Judge Cardozo noted, by "general rules of agency". In other words, whenever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts "upon the principle of *respondeat superior* applicable even where the agent is a natural person". Such liability, moreover, extends not only to the corporation's commercial dealings but to its negligent acts as well.

In the *Mangan* case, the plaintiff was injured as a result of the negligent operation of a cab owned and operated by one of four corporations affiliated with the defendant Terminal. Although the defendant was not a stockholder of any of the operating companies, both the defendant and the operating companies were owned, for the most part, by the same parties. The defendant's name (Terminal) was conspicuously displayed on the sides of all of the taxis used in the enterprise and, in point of fact, the defendant actually serviced, inspected, repaired and dispatched them. These facts were deemed to provide sufficient cause for piercing the corporate veil of the operating company—the nominal owner of the cab which injured the plaintiff—and holding the defendant liable. The operating companies were simply instrumentalities for carrying on the business of the defendant without imposing upon it financial and other liabilities incident to the actual ownership and operation of the cabs. . . .

The individual defendant is charged with having "organized, managed, dominated and controlled" a fragmented corporate entity but there are no allegations that he was conducting business in his individual capacity. Had the taxicab fleet been owned by a single corporation, it would be readily apparent that the plaintiff would face formidable barriers in attempting to establish personal liability on the part of the corporation's stockholders. The fact that the fleet ownership has been deliberately split up among many corporations does not ease the plaintiff's burden in that respect. The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought. If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned

by their individual drivers who conduct their businesses through corporations organized pursuant to section 401 of the Business Corporation Law and carry the minimum insurance required by subdivision 1 (par. [a]) of section 370 of the Vehicle and Traffic Law. These taxi owner-operators are entitled to form such corporations, and we agree with the court at Special Term that, if the insurance coverage required by statute “is inadequate for the protection of the public, the remedy lies not with the courts but with the Legislature.” It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law.

This is not to say that it is impossible for the plaintiff to state a valid cause of action against the defendant Carlton. However, the simple fact is that the plaintiff has just not done so here. While the complaint alleges that the separate corporations were undercapitalized and that their assets have been intermingled, it is barren of any “sufficiently particular[ized] statements” that the defendant Carlton and his associates are actually doing business in their individual capacities, shuttling their personal funds in and out of the corporations “without regard to formality and to suit their immediate convenience.” Such a “perversion of the privilege to do business in a corporate form” would justify imposing personal liability on the individual stockholders. Nothing of the sort has in fact been charged, and it cannot reasonably or logically be inferred from the happenstance that the business of Seon Cab Corporation may actually be carried on by a larger corporate entity composed of many corporations which, under general principles of agency, would be liable to each other’s creditors in contract and in tort.

In point of fact, the principle relied upon in the complaint to sustain the imposition of personal liability is not agency but fraud. Such a cause of action cannot withstand analysis. If it is not fraudulent for the owner-operator of a single cab corporation to take out only the minimum required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations. The

plaintiff's injuries are the same regardless of whether the cab which strikes him is owned by a single corporation or part of a fleet with ownership fragmented among many corporations. Whatever rights he may be able to assert against parties other than the registered owner of the vehicle come into being not because he has been defrauded but because, under the principle of respondeat superior, he is entitled to hold the whole enterprise responsible for the acts of its agents.

In sum, then, the complaint falls short of adequately stating a cause of action against the defendant Carlton in his individual capacity. . . .

Notes and Questions

15.8. Corporate structure sharply distinguishes between two kinds of property. **Corporate assets**, like the cabs in *Walkovszky*, belong to the corporation. **Corporate shares** belong to the corporation's shareholders; they give the holders rights to share in the corporation's profits and to control the corporation's activities. So the shareholders own the corporation, which owns its assets—but the shareholders do not directly own or control the assets. Instead, in a business corporation (there are also nonprofit corporations, municipal corporations, and more), the shareholders elect a **board of directors**, which is responsible for operating the company. The board typically hires corporate officers and delegates day-to-day operations to them, but in theory it can take the reins when needed—and must do so for major corporate activities like mergers. If shareholders do not like how the board of directors are running the corporation, their two options are to sell their shares (if they can) or to elect new directors (if they can). Understanding this structure is crucial for understanding corporate law and the treatment of corporate property.

15.9. What purpose can possibly be served by allowing Carlton to escape liability for the injuries tortiously caused by the taxicab companies he owns and controls? Isn't limited liability an open invitation to pillage and lay waste? Should there perhaps be a distinction between (typically voluntary) contract creditors and (typically involuntary) tort creditors? Or between **closely held** corporations with one or a few shareholders and **public** corporations whose shares are traded on major stock markets and held by thousands or millions of shareholders?

15.10. The reverse of limited liability is **asset partitioning**: just as Seon's creditors can't reach outside the corporation to Carlton's personal assets, Carlton's personal creditors can't reach inside the corporation to Seon's corporate

assets. Is there anything his creditors can do to get at the wealth sitting inside Seon and its corporate siblings?

15.11. In the aftermath of *Walkovsky*, the New York legislature increased the required insurance coverage for taxicab operators, but it left alone the state's law of veil-piercing. Does this suggest that the case was rightly or wrongly decided?

15.12. How does *Walkovsky* encourage taxicab companies to structure their businesses? This is a recurring problem in corporate and commercial law (which will become apparent in the mortgage crisis section): parties will arrange a corporate or transactional form to gain specific advantages while isolating themselves from the associated legal risks. In **securitization**, for example, a group of assets is pushed into a separate legal entity, isolating them from claims against their corporate parent, and vice-versa. If the new entity defaults on its obligations, the company that loaded it up with toxic junk will avoid liability—or such is the plan, anyway.

Levandusky v. One Fifth Ave.

75 N.Y.2d 530 (1990)

KAYE, J.

This appeal by a residential cooperative corporation concerning apartment renovations by one of its proprietary lessees, factually centers on a two-inch steam riser and three air conditioners, but fundamentally presents the legal question of what standard of review should apply when a board of directors of a cooperative corporation seeks to enforce a matter of building policy against a tenant-shareholder. We conclude that the business judgment rule furnishes the correct standard of review.

In the main, the parties agree that the operative events transpired as follows. In 1987, respondent (Ronald Levandusky) decided to enlarge the kitchen area of his apartment at One Fifth Avenue in New York City. According to Levandusky, some time after reaching that decision, and while he was president of the cooperative's board of directors, he told Elliot Glass, the architect retained by the corporation, that he intended to realign or "jog" a steam riser in the kitchen area, and Glass orally approved the alteration. According to Glass, however, the conversation was a general one; Levandusky never specifically told him that he intended to move any particular pipe, and Glass never gave him approval to do so. In any

event, Levandusky's proprietary lease provided that no "alteration of or addition to the water, gas or steam risers or pipes" could be made without appellant's prior written consent.

Levandusky had his architect prepare plans for the renovation, which were approved by Glass and submitted for approval to the board of directors. Although the plans show details of a number of other proposed structural modifications, including changes in plumbing risers, no change in the steam riser is shown or discussed anywhere in the plans.

The board approved Levandusky's plans at a meeting held March 14, 1988, and the next day he executed an "Alteration Agreement" with appellant, which incorporated "Renovation Guidelines" that had originally been drafted, in large part, by Levandusky himself. These guidelines, like the proprietary lease, specified that advance written approval was required for any renovation affecting the building's heating system. Board consideration of the plans—appropriately detailed to indicate all structural changes—was to follow their submission to the corporation's architect, and the board reserved the power to disapprove any plans, even those that had received the architect's approval.

In late spring 1988, the building's managing agent learned from Levandusky that he intended to move the steam riser in his apartment, and so informed the board. Both Levandusky and the board contacted John Flynn, an engineer who had served as consulting agent for the board. In a letter and in a subsequent presentation at a June 13 board meeting, Flynn opined that relocating steam risers was technically feasible and, if carefully done, would not necessarily cause any problem. However, he also advised that any change in an established old piping system risked causing difficulties ("gremlins"). In Flynn's view, such alterations were to be avoided whenever possible.

At the June 13 meeting, which Levandusky attended, the board enacted a resolution to "reaffirm the policy—no relocation of risers." At a June 23 meeting, the board voted to deny Levandusky a variance to move his riser, and to modify its previous approval of his renovation plans, conditioning approval upon an acceptable redesign of the kitchen area.

Levandusky nonetheless hired a contractor, who severed and jogged the kitchen steam riser. In August 1988, when the board learned of this, it issued a "stop work" order, pursuant to the "Renovation Guidelines." Levandusky then commenced this article 78 proceeding, seeking to have the stop work order set aside. The corporation cross-petitioned for an or-

der compelling Levandusky to return the riser to its original position. . . .

As cooperative and condominium home ownership has grown increasingly popular, courts confronting disputes between tenant-owners and governing boards have fashioned a variety of rules for adjudicating such claims. In the process, several salient characteristics of the governing board homeowner relationship have been identified as relevant to the judicial inquiry.

As courts and commentators have noted, the cooperative or condominium association is a quasi-government—"a little democratic sub society of necessity." . . . The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces. Authority to approve or disapprove structural alterations, as in this case, is commonly given to the governing board.

Through the exercise of this authority, to which would-be apartment owners must generally acquiesce, a governing board may significantly restrict the bundle of rights a property owner normally enjoys. Moreover, as with any authority to govern, the broad powers of a cooperative board hold potential for abuse through arbitrary and malicious decision-making, favoritism, discrimination and the like.

On the other hand, agreement to submit to the decisionmaking authority of a cooperative board is voluntary in a sense that submission to government authority is not; there is always the freedom not to purchase the apartment. The stability offered by community control, through a board, has its own economic and social benefits, and purchase of a cooperative apartment represents a voluntary choice to cede certain of the privileges of single ownership to a governing body, often made up of fellow tenants who volunteer their time, without compensation. The board, in return, takes on the burden of managing the property for the benefit of the proprietary lessees. As one court observed: "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less."

It is apparent, then, that a standard for judicial review of the actions of

a cooperative or condominium governing board must be sensitive to a variety of concerns—sometimes competing concerns. Even when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercise, notwithstanding that the residents have, to an extent, consented to be regulated and even selected their representatives. At the same time, the chosen standard of review should not undermine the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit.

We conclude that these goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors. . . .

Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (*Auerbach v Bennett*, 47 N.Y.2d 619, 629.) So long as the corporation's directors have not breached their fiduciary obligation to the corporation, "the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." (*Pollitz v Wabash R. R. Co.*, 207 N.Y. 113, 124.)

Application of a similar doctrine is appropriate because a cooperative corporation is—in fact and function—a corporation, acting through the management of its board of directors, and subject to the Business Corporation Law. There is no cause to create a special new category in law for corporate actions by coop boards.

We emphasize that reference to the business judgment rule is for the purpose of analogy only. Clearly, in light of the doctrine's origins in the quite different world of commerce, the fiduciary principles identified in the existing case law—primarily emphasizing avoidance of self-dealing and financial self-aggrandizement—will of necessity be adapted over time in order to apply to directors of not-for-profit homeowners' cooperative corporations. For present purposes, we need not, nor should we determine the entire range of the fiduciary obligations of a cooperative board, other than to note that the board owes its duty of loyalty to the cooperative—that is, it must act for the benefit of the residents collec-

tively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available.

In reaching this conclusion, we reject the test seemingly applied by the Appellate Division majority and explicitly applied by Supreme Court in its initial decision. That inquiry was directed at the reasonableness of the board's decision; having itself found that relocation of the riser posed no "dangerous aspect" to the building, the Appellate Division concluded that the renovation should remain. Like the business judgment rule, this reasonableness standard—originating in the quite different world of governmental agency decision-making—has found favor with courts reviewing board decisions.

As applied in condominium and cooperative cases, review of a board's decision under a reasonableness standard has much in common with the rule we adopt today. A primary focus of the inquiry is whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld. The difference between the reasonableness test and the rule we adopt is twofold. First—unlike the business judgment rule, which places on the owner seeking review the burden to demonstrate a breach of the board's fiduciary duty—reasonableness review requires the board to demonstrate that its decision was reasonable. Second, although in practice a certain amount of deference appears to be accorded to board decisions, reasonableness review permits—indeed, in theory requires—the court itself to evaluate the merits or wisdom of the board's decision, just as the Appellate Division did in the present case.

The more limited judicial review embodied in the business judgment rule is preferable. In the context of the decisions of a for-profit corporation, "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments . . . by definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility." (*Auerbach v. Bennett*, 47 N.Y.2d, *supra*, at 630–631.) Even if decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at the least board members will possess experience of the peculiar needs of their building

and its residents not shared by the court.

Several related concerns persuade us that such a rule should apply here. As this case exemplifies, board decisions concerning what residents may or may not do with their living space may be highly charged and emotional. A cooperative or condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another, creating the prospect that board decisions will be subjected to undue court involvement and judicial second-guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which—generally without knowing the property—may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement.

Moreover, the prospect that each board decision may be subjected to full judicial review hampers the effectiveness of the board's managing authority. The business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority.

Levandusky failed to meet this burden, and Supreme Court properly dismissed his petition. His argument that having once granted its approval, the board was powerless to rescind its decision after he had spent considerable sums on the renovations is without merit. There is no dispute that Levandusky failed to comply with the provisions of the "Alteration Agreement" or "Renovation Guidelines" designed to give the board explicit written notice before it approved a change in the building's heating system. Once made aware of Levandusky's intent, the board promptly consulted its engineer, and notified Levandusky that it would not depart from a policy of refusing to permit the movement of pipes. That he then went ahead and moved the pipe hardly allows him to claim reliance on the board's initial approval of his plans. Indeed, recognition of such an argument would frustrate any systematic effort to enforce uniform policies.

Levandusky's additional allegations that the board's decision was motivated by the personal animosity of another board member toward him,

and that the board had in fact permitted other residents to jog their steam risers, are wholly conclusory. The board submitted evidence—unrefuted by Levandusky—that it was acting pursuant to the advice of its engineer, and that it had not previously approved such jogging. Finally, the fact that allowing Levandusky an exception to the policy might not have resulted in harm to the building does not require that the exception be allowed. Under the rule we articulate today, we decline to review the merits of the board's determination that it was preferable to adhere to a uniform policy regarding the building's piping system. . . .

Notes and Questions

15.13. *Levandusky* illustrates another variety of corporation: the residential cooperative. Each tenant in a co-op owns shares in the corporation; the corporation owns the building, and leases an individual dwelling unit back to the tenant. (Contrast a condominium, in which each owner of an individual unit also owns shares in a corporation that owns and manages the common areas.) Like a business corporation, the residential cooperative has a board elected by its shareholders.

15.14. *Levandusky* illustrates the standard for judicial review of corporate decisions by the board: the business judgment rule. Compare a corporate board's duties under the business judgment rule with a trustee's duties under the standards applied in *Rothko*. Which are more demanding? What accounts for the difference?

15.15. In an earlier era, corporations were charted by state legislatures for specific purposes: e.g., building a bridge. Today, incorporation is generally a matter of statutory right and a business corporation can be created for any lawful purpose. What are the purposes of business corporation—or put another way, to whom is it responsible and for what? Is the board under a legal or moral duty to maximize profits to the shareholders above all else? Compare, e.g., Milton Freedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 30, 1970, at SM17 (yes), with, e.g., LYNN STOUT, THE MYTH OF SHAREHOLDER VALUE, HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) (no). If so, how much of a duty is it, given the extreme latitude of the business judgment rule? Some courts, while strongly deferential to board decisions most of the time, apply a higher level of scrutiny in cases involving corporate mergers, when the only question the board faces is how much money shareholders will receive for their shares from someone

trying to buy up the corporation. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986). Bring these ideas back over to the co-op context of *Levandusky*: is profit maximization the goal of a residential cooperative? If so, what is? The court refers to the “benefit of the residents collectively.” What on earth does that mean, and is the business judgment rule in this context just a way of saying that the courts are not in a position to ascertain what the diverse and antagonistic residents of a co-op collectively want and need?

15.16. Shares in public corporations are paradigmatically freely alienable, but shares in close corporations often are not. If Lucky, Dusty, and Ned found a bakery together, they may not want to give each other an unlimited right to sell out to the El Guapo Bread Company. Co-ops, especially in New York City where *Levandusky* arose, are notorious for the vetting processes they impose on new residents who wish to move into the building by buying the shares of a current resident. Extensive personal interviews and stringent financial questionnaires are common. So are rejections that push the boundaries of rationality and legality. At the board interview in 1999 for an \$8 million apartment sale at 320 Central Park West from Barbra Streisand to Mariah Carey, one board member asked Carey whether “Mr. Biggie” would be visiting the building. “Mr. Biggie, he be dead,” was Carey’s reply. The board voted to reject her. Whether it was because they feared she would sing loudly, because she wore a navel-revealing top and brought three African-American bodyguards to the interview, because the board member who asked the question had confused Puff Daddy with the Notorious B.I.G., or for some other reason, is not recorded. See also STEVEN GAINES, THE SKY’S THE LIMIT: PASSION AND PROPERTY IN MANHATTAN 55 (2005) (quoting a real estate broker as saying, “There is one Jewish person on the board, and that Jewish person is the one who vetoes all the other Jewish people.”). If courts reviewing board decisions apply the business-judgment rule, how effective will they be at preventing violations of housing-discrimination law?

Chapter 16

Leasing Real Property

The law of concurrent ownership, discussed in Chapter 14, generally regulates relationships between intimates. Arrangements like the joint tenancy generally arise between individuals who know each other and remain locked in ongoing relationships. As a result, there's not much arms-length bargaining and relatively few disputes work their way into the court system.

The law of landlord-tenant is very different. It is the law of strangers—strangers who often have little in common and may never interact after the lease terminates. How the law responds to this difference is one of the central theoretical questions you will wrestle with in this chapter. More practically, in this section of the course you will learn about the types of leaseholds, tenant selection, transferring leases, ending leases, and the various rights and responsibilities of tenants and landlords during the course of the lease.

16.1 The Dual Nature of the Lease

In its simplest form, the **lease** is a transfer in which the owner of real property conveys exclusive possession to a tenant (generally in exchange for rent). Most law students know through personal experience that the process of renting generally entails signing a lease contract. Like other contracts, a lease's terms can be negotiated and they explicitly govern many of the rights and responsibilities of the parties involved. So why then are leases discussed in the property course rather than contracts?

The short response is that a lease is a property-contract hybrid. While it is surely a contract, it's a contract for a very particular kind of property interest.

The fuller answer, like so much in property, lies in the history of feudal land law. Under the traditional common law, a leasehold was understood primarily as a property interest, similar in nature to the estates covered in Chapter 11. A lord (often a baron) conveyed a possessory right to a tenant (usually a peasant) and retained for himself a future interest (typically a reversion). Importantly, once the landlord transferred the right to possession, he had few other obligations to the tenant.

This basic model survived until the 1960s, when many jurisdictions began to introduce general contract law principles (e.g. the implied duty of good faith and fair dealing) into the law of landlord-tenant. Importing contract theories into the lease has had two practical effects. First, parties to a lease now have the option to terminate in the case of *any* material breach; in the past tenants could only terminate if the landlord interfered with their possession. Second, modern tenants have far more protections from indifferent and unscrupulous landlords than their counterparts 50 years ago. Courts and legislatures have proven particularly eager to help residential tenants—whom they view as vulnerable—from predations of the free market.

16.2 Creating the Leasehold

16.2.1 A Lease or Something Else?

A lease is a transfer of the right of possession of specific property for a limited period of time. It's important to see that not all legal relationships that grant the use of an owner's property qualify as leaseholds. Take, for example, the case of Snow White and Seven Dwarfs. If the Dwarfs give Snow White sole possession of their cottage for 12 months in exchange for a monthly payment, they have almost certainly created a lease. If, however, the Dwarfs invite Snow White to sleep on their couch for a few nights while she evades the Queen, they probably have created something called a *license* (a revocable permission to use the property of another, which we'll study in greater detail later in the book) rather than a leasehold. This determination matters (as we'll soon see) because the law extends a number of protections to grantees who qualify as tenants. It affects, among other things, whether the grantee can exclude the owner from certain spaces, how the parties can terminate the interest, whether the grantee can invite outsiders onto the property, who has the obligation to perform maintenance, who is liable if the grantee suffers an injury on the property, and what

remedies the parties have if a disagreement arises.

To determine whether parties have created a leasehold or some other legal interest, courts have traditionally focused on whether a grantor has turned over exclusive possession or a more limited set of use rights. Possession, however, remains a slippery concept, difficult to define. Consider the following post from an internet message board:

wobble2847



► Add your comment

Two months ago we hired a nanny for our three children. In addition to his salary, we offered him lodging in a room in our house. His duties with the children begin very early in the morning and we thought it would be a convenient arrangement for everyone. He is great with our kids but it turns out that he's a terrible houseguest. There are some real hygiene and noise issues. Rather than fire him and disrupt his (great) relationship with the kids, I thought I'd tell him he has to move out immediately because we're going to remodel the room. Can I do that legally? Is he our tenant?

Does the nanny have a lease? Do we need any other information? Should courts look beyond mere facts of possession and consider the policy considerations of extending landlord-tenant protections to the parties in the case? What might those policy considerations entail? As you read through the materials, you may want to revisit this question.

16.2.2 Types of Leasehold

As we have seen throughout this course, property interests come in a limited number of forms, many of which we have inherited directly from feudal England. This theme holds in landlord-tenant. The common law developed three types of leaseholds that our modern property system still recognizes: the term of years, the periodic tenancy, and the tenancy at will.

The Term of Years. The **term of years** is a leasehold measured by any fixed period of time. The most familiar term of years lease is the residential one-year lease. The actual term, however, may vary greatly. In 2001, the U.S. government signed a 99-year lease for an embassy in Singapore. Leases of hundreds or even thousands of years are not unheard of, either. See *Monbar v. Monaghan*, 18 Del. Ch. 395 (1932) (two thousand year lease). At the other end of the spectrum, vacation properties like beach condos and lake houses commonly rent for one-week periods.

Whatever the duration, a term of years automatically ends when the stated term expires. For example, imagine L leases Blackacre to T "from September 1,

2015 to August 31, 2016.” Neither party is required to give the other notice of termination. The tenant must simply surrender possession to the landlord by midnight on August 31. The death of either contracting party does not affect a term of years lease, unless the landlord and tenant have agreed otherwise. If the tenant dies, the law requires her estate to carry out the lease.

The Periodic Tenancy. The **periodic tenancy** is a lease for some fixed duration that automatically renews for succeeding periods until either the landlord or tenant gives notice of termination. This automatic renewal is the chief practical difference between the periodic tenancy and the term of years. The most common type of periodic tenancy is the month-to-month lease. As the name suggests, a month-to-month lease lasts for a month and then continues for subsequent months, until either the landlord or tenant ends the lease. Periodic tenancies have no certain end date; some residential tenants with month-to-month leases stay in their apartments for decades.

Termination requires one party to give advance notice to the other. These notice requirements are now heavily regulated by statute in most jurisdictions. Under the common law (which is still the basis for many state regulations), for year-to-year periodic leases (or any periodic lease with a longer initial duration), parties must give notice at least six months before the period ends. For leases less than a year, the minimum notice equals the length of the lease period. Additionally, unless the parties make an agreement to the contrary, the lease must terminate on the final day of a period. Assume, for example, that T signs a month-to-month lease that begins May 1. On August 20, T gives notice of termination to her landlord. When will the lease end? T must give the landlord a minimum of one month notice. That pushes T’s obligations under the lease to September 19. A periodic tenancy, however, must end on the last day of a period. Thus, T’s lease will terminate on September 30 at midnight.

The death of either the landlord or tenant does not end a periodic tenancy. If, for example, the tenant dies before the lease terminates, the law vests the tenant’s estate with the responsibility to fulfill the remaining obligations under the lease.

The Tenancy at Will. The **tenancy at will** has no fixed duration and endures so long as both of the parties desire. For example, if the landlord and tenant sign a document that reads, “Tenant will pay the Landlord \$500 on the first of the month and the lease will endure as long as both of us wish” they have created a tenancy at will. Under the common law, either party could end such a lease at any moment. Today, most states have enacted statutes that establish minimum notice periods—30 days is common. Tenancies at will also terminate

if the landlord sells the property, the tenant abandons the unit, or either party dies.¹

Tenancies at will can arise as a result of the clear intention of the parties—the ease of termination is a valued feature in some negotiations. But note, the tenancy at will is also the catchall lease category. If a leasehold doesn't qualify as either a term of years or periodic tenancy, the law crams it into the tenancy at will box—even if that clearly violates the goals of the parties. This occasionally creates real hardship for individuals with sloppily drafted leases.

Effel v. Rosberg
360 S.W.3d 626 (Tex. App. 2012)

MORRIS, Justice.

This is an appeal from the trial court's judgment awarding Robert G. Rosberg possession of property in a forcible detainer action. Appellant Lena Effel brings seventeen issues generally contending the trial court . . . erred in concluding Rosberg was entitled to possession of the property. After examining the record on appeal and reviewing the applicable law, we conclude appellant's arguments are without merit. We affirm the trial court's judgment.

I.

[On March 1, 2006, Robert G. Rosberg filed suit against Lena Effel's nephews, Henry Effel and Jack Effel. The parties settled the dispute out of court and signed a compromise settlement agreement. As part of the settlement, Rosberg received a piece of land owned by Henry and Jack Effel. The property contained the home where Lena Effel lived. The settlement agreement between the Effels and Rosberg stated that Lena Effel] "shall continue to occupy the property for the remainder of her natural life, or until such time as she voluntarily chooses to vacate the premises." The settlement agreement further stated that a lease agreement incorporating the terms of the settlement agreement would be prepared before the closing date of the purchase. . . .

The property in question was deeded to Rosberg with no reservation of a life estate. A lease for appellant was prepared by the Effels' attorney.

¹In jurisdictions that require 30-day notice periods before the termination of a tenancy at will, this is one of the key remaining differences between the month-to-month periodic lease and the tenancy at will.

The term of the lease was “for a term equal to the remainder of the Lessee’s life, or until such time that she voluntarily vacates the premises.” The lease also contained various covenants relating to payment of rent and charges for utilities as well as the use and maintenance of the grounds. The lease provided that if there was any default in the payment of rent or in the performance of any of the covenants, the lease could be terminated at the option of the lessor. The lease was signed by Rosberg as lessor and by Henry Effel on behalf of appellant under a power of attorney as lessee.

Three years later, on February 24, 2010, Rosberg, through his attorney, sent a letter to appellant both by regular mail and certified mail stating that he was terminating her lease effective immediately. The reason for the termination, according to the letter, was Rosberg’s discovery that appellant had installed a wrought iron fence in the front yard of the property in violation of two covenants of the lease. The letter stated that appellant was required to leave and surrender the premises within ten days and, if she did not vacate the premises, Rosberg would commence eviction proceedings. Appellant did not vacate the property.

On April 29, 2010, Rosberg filed this forcible detainer action in the justice court. The justice court awarded possession of the property to Rosberg, and appellant appealed the decision to the county court at law. The county court held a trial de novo without a jury and, again, awarded the property to Rosberg. The court concluded the lease created a tenancy at will terminable at any time by either party. The court further concluded that Rosberg was authorized to terminate the lease, whether because it was terminable at will or because appellant violated the terms of the lease, and the lease was properly terminated on February 24, 2010. Appellant now appeals the county court’s judgment.

II.

. . . In appellant’s remaining issues, she challenges the findings of fact and conclusions of law made by the county court. In her tenth issue, appellant challenges the county court’s first conclusion of law in which it stated “[t]he lease, which purported to be for the rest of Lena Effel’s life, created only a tenancy at will terminable at any time by either party.” Appellant argues that the lease must be read together with the settlement agreement and the court must give effect to the intent of the parties. Appellant was not a party to the settlement agreement, however. Appellant was a party only to the lease. It is the lease, and not the settlement agreement, that forms

the basis of this forcible detainer action. Accordingly, we look solely to the lease to determine appellant's rights in this matter.

The lease states that appellant was a lessee of the property "for a term equal to the remainder of Lessee's life, or until such time as she voluntarily vacates the premises." It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will. *See Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307, 310 (1935). Courts that have applied this rule to leases that state they are for the term of the lessee's life have concluded that the uncertainty of the date of the lessee's death rendered the lease terminable at will by either party.

Appellant argues the current trend in court decisions is away from finding a lease such as hers to be terminable at will. Appellant relies on the 1982 decision of *Philpot v. Fields*, 633 S.W.2d 546 (Tex. App. 1982). In *Philpot*, the court stated that the trend in law was away from requiring a lease to be of a definite and certain duration. In reviewing the law since *Philpot*, however, we discern no such trend. *See Kajo Church Square, Inc. v. Walker*, 2003 WL 1848555, at *5 (Tex. App. 2003). The rule continues to be that a lease for an indefinite and uncertain length of time is an estate at will. *See Providence Land Servs., L.L.C. v. Jones*, 353 S.W.3d 538, 542 (Tex. App. 2011). In this case, not only was the term of the lease stated to be for the uncertain length of appellant's life, but her tenancy was also "until such time that she voluntarily vacates the premises." If a lease can be terminated at the will of the lessee, it may also be terminated at the will of the lessor. Because the lease at issue was terminable at will by either party, the trial court's first conclusion of law was correct. We resolve appellant's tenth issue against her.

In her fourth issue, appellant contends the trial court erred in concluding that Rosberg sent her a proper notice to vacate the premises under section 24.005 of the Texas Property Code. Section 24.005 states that a landlord must give a tenant at will at least three days' written notice to vacate before filing a forcible detainer suit unless the parties contracted for a longer or shorter notice period in a written lease or agreement. TEX. PROP. CODE ANN. § 24.005(b) (West Supp. 2011). The section also states that the notice must be delivered either in person or by mail at the premises in question. Id. § 24.005(f). If the notice is delivered by mail, it may be by regular mail, registered mail, or certified mail, return receipt requested, to the premises in question.

The undisputed evidence in this case shows that Rosberg, through his

attorney, sent appellant a written notice to vacate the premises by both regular mail and certified mail on February 24, 2010. The notice stated that appellant had ten days to surrender the premises. Nothing in the lease provided for a longer notice period. Henry Effel testified at trial that appellant received the notice and read it. Rosberg did not bring this forcible detainer action until April 29, 2010. The evidence conclusively shows, therefore, that Rosberg's notice to vacate the property complied with section 24.005. . . .

Because Rosberg had the right to terminate appellant's tenancy at any time and properly notified her of the termination under section 24.005 of the Texas Property Code, the trial court did not err in awarding the property at issue to Rosberg. Consequently, it is unnecessary for us to address the remainder of appellant's issues.

We affirm the trial court's judgment.

Notes and Questions

16.1. **The parties' intent?** When Henry and Jack Effel drafted the settlement agreement transferring their property to Robert Rosberg, what where they trying to accomplish? Did the court carry out the intentions of the parties? Why?

16.2. **Other approaches.** In *Garner v. Gerrish*, 473 N.E.2d 223 (N.Y. 1984), the New York Court of Appeals faced a case with very similar facts. The tenant, Lou Gerrish, had a lease stating, "Lou Gerrish [sic] has the privilege of termination [sic] this agreement at a date of his own choice." The New York court found that the document created a new kind of leasehold—a lease for life. The *Garner* opinion attacked the argument in favor of the tenancy at will as being grounded in the "antiquated notion[s]" of medieval property law. Is there any good reason for the law to only recognize three leasehold tenancies? What if, instead, the lease gave only the *landlord* the power to terminate, and required the tenant to stay and pay as long as the landlord desired?

16.3. **Working within the system.** Could the lease have been drafted in a way that would have let Lena Effel stay on the property for the duration of her life or until she chose to move, as long as she kept paying the rent?

16.4. **Institutional competence.** Are courts or legislatures better positioned to create new property forms?

16.5. **The background story.** Lena Effel lived in the house owned by her nephews for over 20 years. Before that, her twin brother (Henry and Jack's father) had lived in the home for many years. At the time the compromise settle-

ment agreement was signed, Lena was 93 years old. At the time Rosberg sought to evict her, Lena was 97. Should any of those facts have influenced the judges in the case?

Lease Hypotheticals

A professionally drafted lease will almost always make clear what type of leasehold the parties have elected. When problems arise it's often because lessors and lessees have drafted legal documents without the help of a qualified lawyer. In the following examples try to figure out what kind of leasehold the parties have created. If it's a term of years, how long is the term? If it's a periodic tenancy, what is the period?

1. L and T sign an agreement that reads, "The term is one year, beginning September 1."
2. L and T sign a lease that reads, "This agreement lasts as long as the parties consent."
3. L and T sign an agreement that reads, "The lease will run from September 1 until the following August 31. One thousand dollars payable on the first of every month."
4. L and T enter a lease that reads in relevant part, "the rent is \$48,000 per year, payable \$4,000 on the first of each month."
5. L and T enter a lease that reads, "the rent is \$1,000 per month."
6. L and T enter a lease that reads, "the rent is \$1,000 per month and lasts until the tenant completes medical school."
7. L and T are negotiating on the phone over an apartment lease. At the end of the conversation L says, "Have we got a deal? Five years lease with rent at \$10,000 a year?" T replies, "Great. I accept. It's a deal."

16.2.3 The Problem of Holdovers

The Tenancy at Sufferance. Imagine that you own a small apartment building in a college town. At the end of the school year, one of your tenants refuses to move out. The law refers to such tenants as **holdovers**. As a landlord,

what are your options in this situation? How does the legal system treat individuals who stay past the end of their leases? Can you kick them out? Are they obligated to pay you rent?

When a tenant stays in possession after the lease has expired, the law allows the landlord to make a one-time election. The landlord has the option to treat the holdover as a trespasser, bring an eviction proceeding, and sue for damages. Alternatively, the landlord may renew the holdover's lease for another term. This second option is typically referred to as a **tenancy at sufferance**. Some hornbooks list the tenancy at sufferance as a fourth type of common law leasehold. The tenancy at sufferance, however, is not based on any affirmative agreement between parties and is probably better understood as a remedy for wrongful occupancy. Also note that disputes sometimes pop-up over what election the landlord has made. For example, what if the landlord does nothing for two months but then initiates eviction?

In most jurisdictions, when a landlord chooses to hold the tenant to a new lease, it creates a periodic tenancy. States differ, however, on how to compute the length of the period and, thus, the amount of the damages. Some simply copy over the length of the original lease (with a maximum of one year). Others divine the repeating period by looking at how the rent was paid. Imagine, for example, your tenant had originally signed a lease reading, "This lease will run from January 1, 2014 to December 31, 2014. Rent is due on the first of each month." The tenancy created by the holdover would either be a year-to-year lease or a month-to-month lease depending on the jurisdiction.

Still other states take other approaches. Some, for example, specify that a holdover must pay double (or triple) rent for the holdover period.

Notes and Questions

16.6. **The landlord's options.** Under what circumstances should a landlord move to evict a tenant who holds over? Are there any scenarios where a landlord might want to keep a tenant who has already proven themselves untrustworthy by staying past the agreed-upon term?

16.7. **Drafting.** How can landlords draft leases to better protect themselves from the threat of holdovers?

16.8. **A holdover problem.** Seven years ago, Tommy Hillclimber leased a commercial building on a busy street from Lisa. The lease was for a five-year term with annual rent of \$100,000. At the end of the term, Tommy retained possession of the building but continued to make rent payments. Lisa has cashed

all of Tommy's rent checks. Last week, Sprawl-Mart contacted Lisa and offered to rent the building for \$200,000 a year. Lisa quickly sent notice to Tommy stating that the lease will terminate in 30 days. Does Tommy have to vacate?

16.2.4 Delivery of Possession

Holdovers can also cause problems for other renters. Suppose that before the start of law school you agree to a one-year lease that begins on August 1. Although you've signed a binding lease agreement and have received a set of keys, when your van pulls into the driveway on move-in day, you find that the previous tenant hasn't left "your" apartment. If the lease doesn't include a contingency for such an event, what are your rights?

Hannan v. Dusch

153 S.E. 824 (Va. 1930)

PRENTIS, C.J.,

The declaration filed by the plaintiff, Hannan, against the defendant, Dusch, alleges that Dusch had on August 31, 1927, leased to the plaintiff certain real estate in the city of Norfolk, Virginia, therein described, for fifteen years, the term to begin January 1, 1928, at a specified rental; that it thereupon became and was the duty of the defendant to see to it that the premises leased by the defendant to the plaintiff should be open for entry by him on January 1, 1928, the beginning of the term, and to put said petitioner in possession of the premises on that date; that the petitioner was willing and ready to enter upon and take possession of the leased property, and so informed the defendant; yet the defendant failed and refused to put the plaintiff in possession or to keep the property open for him at that time or on any subsequent date; and that the defendant suffered to remain on said property a certain tenant or tenants who occupied a portion or portions thereof, and refused to take legal or other action to oust said tenants or to compel their removal from the property so occupied. Plaintiff alleged damages which he had suffered by reason of this alleged breach of the contract and deed, and sought to recover such damages in the action. There is no express covenant as to the delivery of the premises

The single question of law therefore presented in this case is whether a landlord, who without any express covenant as to delivery of possession

leases property to a tenant, is required under the law to oust trespassers and wrongdoers so as to have it open for entry by the tenant at the beginning of the term—that is, whether without an express covenant there is nevertheless an implied covenant to deliver possession. . . .

It seems to be perfectly well settled that there is an implied covenant in such cases on the part of the landlord to assure to the tenant the legal right of possession—that is, that at the beginning of the term there shall be no legal obstacle to the tenant's right of possession. This is not the question presented. Nor need we discuss in this case the rights of the parties in case a tenant rightfully in possession under the title of his landlord is thereafter disturbed by some wrongdoer. In such case the tenant must protect himself from trespassers, and there is no obligation on the landlord to assure his quiet enjoyment of his term as against wrongdoers or intruders.

Of course, the landlord assures to the tenant quiet possession as against all who rightfully claim through or under the landlord.

The discussion then is limited to the precise legal duty of the landlord in the absence of an express covenant, in case a former tenant, who wrongfully holds over, illegally refuses to surrender possession to the new tenant. This is a question about which there is a hopeless conflict of the authorities. It is generally claimed that the weight of the authority favors the particular view contended for. There are, however, no scales upon which we can weigh the authorities. In numbers and respectability they may be quite equally balanced.

It is then a question about which no one should be dogmatic, but all should seek for that rule which is supported by the better reason. . . .

It is conceded by all that the two rules, one called the English rule, which implies a covenant requiring the lessor to put the lessee in possession, and that called the American rule, which recognizes the lessee's legal right to possession, but implies no such duty upon the lessor as against wrongdoers, are irreconcilable.

The English rule is that in the absence of stipulations to the contrary, there is in every lease an implied covenant on the part of the landlord that the premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of his term. . . .

[A] case which supports the English rule is *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N.W. 382, 111 N.W. 359, 9 L.R.A. (N.S.) 1127, 14 Ann. Cas. 399, note. In that case the court gave these as its reasons for following the English rule:

We think . . . that the English rule is most in consonance with good conscience, sound principle, and fair dealing. Can it be supposed that the plaintiff in this case would have entered into the lease if he had known at the time that he could not obtain possession on the 1st of March, but that he would be compelled to begin a lawsuit, await the law's delays, and follow the case through its devious turnings to an end before he could hope to obtain possession of the land he had leased? Most assuredly not. It is unreasonable to suppose that a man would knowingly contract for a lawsuit, or take the chance of one. Whether or not a tenant in possession intends to hold over or assert a right to future term may nearly always be known to the landlord, and is certainly much more apt to be within his knowledge than within that of the prospective tenant. Moreover, since in an action to recover possession against a tenant holding over, the lessee would be compelled largely to rely upon the lessor's testimony in regard to the facts of the claim to hold over by the wrongdoer, it is more reasonable and proper to place the burden upon the person within whose knowledge the facts are most apt to lie. We are convinced, therefore, that the better reason lies with the courts following the English doctrine, and we therefore adopt it, and hold that, ordinarily, the lessor impliedly covenants with the lessee that the premises leased shall be open to entry by him at the time fixed in the lease as the beginning of the term. . . .

So let us not lose sight of the fact that under the English rule a covenant which might have been but was not made is nevertheless implied by the court, though it is manifest that each of the parties might have provided for that and for every other possible contingency relating to possession by having express covenants which would unquestionably have protected both.

Referring then to the American rule: Under that rule, in such cases, . . . the landlord is not bound to put the tenant into actual possession, but is bound only to put him in legal possession, so that no obstacle in the form of superior right of possession will be interposed to prevent the tenant from obtaining actual possession of the demised premises. If the landlord gives the tenant a right of possession he has done all that he is re-

quired to do by the terms of an ordinary lease, and the tenant assumes the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over. . . .

So that, under the American rule, where the new tenant fails to obtain possession of the premises only because a former tenant wrongfully holds over, his remedy is against such wrongdoer and not against the landlord—this because the landlord has not covenanted against the wrongful acts of another and should not be held responsible for such a tort unless he has expressly so contracted. This accords with the general rule as to other wrongdoers, whereas the English rule appears to create a specific exception against lessors. It does not occur to us now that there is any other instance in which one clearly without fault is held responsible for the independent tort of another in which he has neither participated nor concurred and whose misdoings he cannot control. . . .

For the reasons which have been so well stated by those who have enforced the American rule, our judgment is that there is no error in the judgment complained of.

Affirmed

Notes and Questions

16.9. The basic law. U.S. jurisdictions remain split over the landlord's duty to provide possession. A majority of jurisdictions (and the Uniform Residential Landlord and Tenant Act) now follow the English rule, but the American rule remains alive and well. As should be obvious, the biggest difference between the two approaches is the remedy available to the dispossessed tenant. Under the English view, the tenant may terminate the lease and sue the landlord for damages. The tenant can also choose to withhold payment from the landlord until the tenant is able to take possession. In contrast, under the American rule, the tenant must bring an eviction action directly against the holdover.

16.10. Justifying the rules. What policies support the English view? What policies support the American view? Would you find the remedies available under the American rule helpful?

16.11. Conceptual Arguments. The *Hannan* case does an excellent job discussing the policy rationales for and against the two rules. But what about the more conceptual arguments? If we view the lease as a conveyance of the legal right to possession, isn't the American rule "correct?" Once a landlord turns

over possessory rights, aren't her obligations fulfilled?

16.12. **What do tenants know?** Do you think that tenants in American rule jurisdictions know that their landlord has no obligation provide them with actual possession? Should that matter?

16.13. **What rules are mandatory?** Imagine that you sit in a state legislature that wants to adopt the English Rule by statute. Should you make the new law a mandatory rule or a default position that parties can negotiate around?

16.14. **Your Lease?** Does the lease for the apartment you're currently renting make any provision for this problem?

16.2.5 Tenant Selection

As we saw earlier in the textbook, the right to exclude remains a cornerstone of property ownership. Owners have expansive power to keep others off of their land and out of their homes. Generally speaking, this right extends to landlords, who have broad discretion to select tenants as they see fit. Landlords, for example, remain free to exclude smokers from their properties. They can also refuse to rent to a tenant who acts erratically, possesses a criminal record, or has a low credit score. Landlords, however, cannot violate state or federal anti-discrimination laws when they go through the leasing process.

The Civil Rights Act of 1866. One of the oldest laws that protects tenants against discrimination in the housing market is the Civil Rights Act of 1866. Passed in the aftermath of the Civil War, the Civil Rights Act of 1866 prohibits all discrimination based on race in the purchase or rental of real or personal property. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Thus, landlords cannot deny an apartment unit to a potential tenant based on tenant's heritage or the color of their skin. There are no exceptions.

The Fair Housing Act of 1968. The Fair Housing Act of 1968 (and its many amendments) greatly expanded the number of individuals covered by anti-discrimination law. Broadly speaking, the Fair Housing Act (FHA) prohibits discrimination in the renting, selling, advertising, or financing of real estate on the basis of race, color, national origin, religion, sex, familial status, and disability. It is worth looking closely at some of its provisions. The Act begins with a statement of policy and a few (counter-intuitive) definitions:

§ 3601. DECLARATION OF POLICY.—It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. DEFINITIONS.—As used in this subchapter . . .

- (c) “Family” includes a single individual. . . .
- (h) “Handicap” means, with respect to a person—
 - (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,
 - (2) a record of having such an impairment, or
 - (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21). . . .
- (k) “Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with—
 - (1) a parent or another person having legal custody of such individual or individuals; or
 - (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

The definition of “familial status” surprises many students. Whom, exactly, does it protect? Unmarried people? Single mothers? Although more intuitive, the definition of handicap has generated a number of legal disputes. Alcohol, for example, is not a controlled substance under section 802 of title 21. Does that mean that a landlord cannot refuse to rent to a person who drinks heavily or sounds very drunk (and belligerent) over the phone?

The real meat of the Fair Housing act comes in § 3604. The first subsection makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable” a “dwelling” to any person because of race, color, religion, sex, familial status, or national origin. See 42 U.S.C. § 3604(a). Later sections provide similar protections for the handicapped. The Act then takes a number of additional steps designed to eliminate discrimination from the housing market. Under the terms of the law it is illegal to:

1. discriminate in the terms or conditions of a sale or rental [§ 3604(b)];

2. create or publish an advertisement or statement that express a preference or hostility toward individuals in any of the protected categories [§ 3604(c)];
3. lie about or misrepresent the availability of housing [§ 3604(d)];
4. refuse to permit handicapped tenants from making reasonable modifications of the existing premise at their own expense [§ 3604(f)(3)(A)];
5. refuse to make reasonable accommodations in rules and policies to accommodate individuals with handicaps [§ 3604(f)(3)(B)];
6. Harass or intimidate persons in their enjoyment of a dwelling [§ 3617].

Unlike the Civil Rights Act of 1866, the Fair Housing Act does contain a number of important exemptions. Section 3607(b), for example, allows housing designated for older persons to bar families with young children. Similarly, section 3607(a) allows religious organizations and private clubs to give preferences to their own members. The most controversial exemption, reproduced below, is the so-called Mrs. Murphy exemption:

(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner:
Provided, That such private individual owner does not own more than three such single-family houses at any one time:

Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period:

Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time:

Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented

(A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and

(B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

42 U.S.C. § 3603(b) (paragraph breaks added). What does this exemption allow? If the act is intended to root out pernicious discrimination, why include this provision?

It is crucial to note that the plain text of the Mrs. Murphy exemption states that it does not apply to 3604(c)—the subsection that prohibits discriminatory advertising. Thus, although certain categories of landlords are exempted from the statute's basic framework, they are still not allowed to post discriminatory advertisements.

State Anti-Discrimination Efforts. Some state legislatures have passed laws that afford far more protection from discrimination than the federal statutes provide. Minnesota, for example, protects against housing discrimination on the basis of sexual orientation, gender identity, marital status, and source of income. Other states in the Northeast and West Coast provide similar coverage, but these positions are in no way a majority. As the map in Figure 16.1

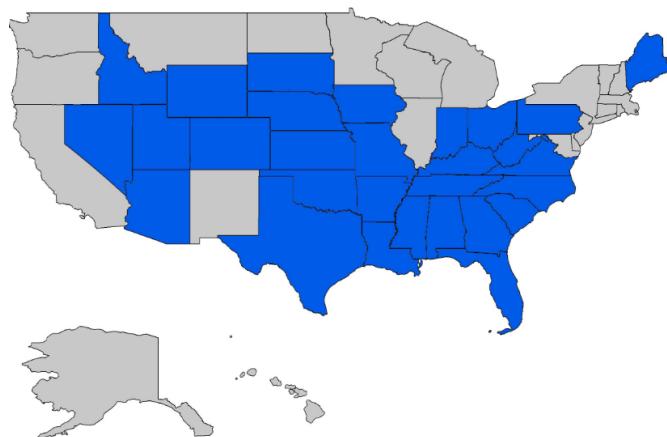


Figure 16.1: States (in blue) that lack laws protecting against discrimination based on marital status. NAT'L FAIR HOUS. ALL., MODERNIZING THE FAIR HOUSING ACT FOR THE 21ST CENTURY: 2013 FAIR HOUSING TRENDS REPORT 13 (Apr. 11, 2013), https://nationalfairhousing.org/wp-content/uploads/2017/04/2013_trends_report.pdf.

indicates, in most states nothing prevents a landlord from denying an apartment to an engaged heterosexual couple, based on the belief that cohabitation before marriage is sinful.

Despite the small number of states that extend protection against housing discrimination on the basis of sexual orientation or transgender status, recent changes in the interpretation of federal antidiscrimination law may make state protections a moot point. In June of 2020, the Supreme Court held that an employer who fires an employee for their sexual orientation or transgender status unlawfully discriminates on the basis of sex for purposes of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination “because of . . . sex.”). As the Court explained:

[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason



Figure 16.2: A sign erected by white homeowners trying to prevent black tenants from moving into their Detroit neighborhood (1942).

other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1741-42 (2020). Given that the Fair Housing Act uses the same “because of . . . sex” language as Title VII, it seems probable that the federal courts will conclude that sexual orientation and transgender status are protected categories under the Fair Housing Act as well.

Proving Discrimination. Two broad categories of cases may be brought under the FHA: disparate treatment claims and disparate impact claims.

Disparate treatment claims target intentional forms of discrimination, including the refusal to rent based on one of the protected categories. A plain-

tiff can show intent to discriminate with “smoking gun” style evidence, such as statements by the landlord that he “would never rent to an Irishman.” Of course, modern landlords rarely make such forthright admissions. As a result, courts in the United States have established a burden-shifting approach that allows plaintiffs to prove intentional discrimination with indirect circumstantial evidence. The initial burden is on the plaintiff to make a *prima facie* case of discrimination. In a refusal to rent case, the plaintiff must show that (1) that she is a member of a class protected by the FHA; (2) that she applied for and was qualified to rent the unit; (3) that she was rejected; and (4) the unit remained unrented. Once the plaintiff has established sufficient evidence to state a *prima facie* case, the burden shifts to the defendant landlord to proffer a legitimate nondiscriminatory reason for the refusal to rent. If the defendant meets this requirement, the burden then shifts back to the tenant to prove that the reason offered is a pretext.

Discrimination is often ferreted out through the use of “testers.” Advocacy groups, many of which are funded by the federal government, will send comparable white and black individuals to inquire about renting a vacant unit. If the landlord treats the testers differently (e.g., provides different levels of assistance, shows different units, provides different information about unit availability) this provides persuasive evidence of illegal discrimination.

Disparate impact claims allege that some seemingly neutral policy has a disproportionately harmful effect on members of a group protected by the FHA. These cases rely heavily on statistical evidence and employ a very similar burden-shifting methodology as the disparate treatment claims. Using statistics, plaintiffs need to show that a defendant’s policy has actually caused some disparity. The defendant then has the opportunity to escape liability if it can show that its actions are necessary to achieve a valid goal. See *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

Problems

16.15. William Neithamer, who is gay and HIV positive, attempted to rent an apartment from Brenneman Properties. Neithamer did not reveal his HIV status, but admitted to the property manager that he had dismal credit because he had recently devoted all of his resources to taking care of a lover who had died of AIDS. Neithamer, however, offered to pre-pay one year’s rent. Brenneman Properties rejected Neithamer’s application and, in turn, Neithamer sued

under the FHA. Does he have a case? See *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp. 2d 1 (D.D.C. 1999).

16.16. Over the phone, Landlord said to Plaintiff, “Do you have children? I don’t want any little boys because they’ll mess up the house and nobody would be here to watch them. Really, this house isn’t good for kids because it’s right next to a main road.” Plaintiff sues. Landlord argues that her statements only show that she is concerned about the welfare of children. Is that a legitimate non-discriminatory reason to refuse to rent?

16.17. A local government has decided to knock down two high-rise public housing projects within its borders. The high-rises primarily house recent immigrants from Guatemala. A local advocacy group brings a lawsuit on their behalf, claiming that the government action has a disparate impact on a protected group. Is this a disparate treatment or disparate impact case? Can you think of a non-discriminatory reason why the government may have taken such an action?

16.18. The FHA requires landlords to make “reasonable accommodations” for individuals with handicaps. Which of the following requests by a tenant would qualify as a reasonable accommodation? (a) Asking a landlord with a first-come/first-served parking policy to create a reserved parking space for a tenant who has difficulty walking; (b) Requesting that a landlord waive parking fees for a disabled tenant’s home health care aide; (c) Asking the landlord to make an exception to the building’s “no pets” rule for a tenant with a service animal; (d) Requesting landlord to pay for a sign language interpreter for a deaf individual during the application process; (e) Asking the landlord to provide oral reminders to pay the rent for a tenant with documented short-term memory loss.

An Exercise in Advertising

Imagine that you are a lawyer for a newspaper in a large metropolitan area. The local chapter of the ACLU has raised concerns that some advertisements in the classifieds section of your paper violate the Fair Housing Act.² Your boss has asked you to review the ads in Figure 16.3 for any offending language. Which of the following would you feel comfortable printing?³

²Would any of these ads violate the Civil Rights Act of 1866?

³The government does provide some guidance to landlords worried about triggering FHA liability through their advertisements. There are, for example, published lists of “words to avoid”

For Rent Seeking tenant for 1 bed apt. \$500/m. I only rent to black people.	For Rent New apartment building. \$650/m. Walking distance to synagogue. Great amenities.
For Rent Great deal! Apt. in exclusive Danbury area. Very selective. Contact ASAP. \$700/m	For Rent Perfect apt. for rent. Near park. \$400/m. Absolutely no pets.
For Rent Snazzy digs near downtown! Looking for muscular football players to rent rooms. 500/m	For Rent Looking for tenants. Absolutely no lawyers. Only couples. Must show income 3x monthly rent.
For Rent Seeking new tenants for 2 br. Pref for women—I'm female & want female tenants!	For Rent Great place by University. \$600/m. Kids ok, but must pay 2x security dep. Kids = trouble

Figure 16.3: Hypothetical classified advertisements.

What about this ad for a roommate on Craigslist? Is it objectionable to you? Does it violate the FHA? Does it matter that the poster is looking for a *roommate*? Would your answers change if the advertisement read, “Have a room available for an able-bodied white man with no children?”

\$650 / 1010 sq. ft. – Have a room available for female Christian elderly woman none smoker

Nice comfortable furnished room available access to patio, back-yard, 1/2 bath & full bath available, wifi available, cable TV available, This is all for that special Christian elderly none smoking or drinking church going female. Thank you

Serious inquiries only!!!

Fair Housing Council v. Roommate.com, LLC
666 F.3d 1216 (9th Cir. 2012)

KOZINSKI, Chief Judge:

There’s no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the Fair Housing Act (“FHA”) extend to the selection of roommates?

Roommate.com, LLC (“Roommate”) operates an internet-based business that helps roommates find each other. Roommate’s website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended “Additional Comments” section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them

and “acceptable language.” Although context is important, landlords can generally use these phrases: good neighborhood, secluded setting, single family home, quality construction, near public transportation, near places of worship, and assistance animals only.

a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics, including sex, sexual orientation and familial status. The Fair Housing Councils of San Fernando Valley and San Diego (“FHCs”) sued Roommate in federal court, alleging that the website’s questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the Fair Housing Act (“FHA”), 42 U.S.C. § 3601 et seq. . . .

Analysis

If the FHA extends to shared living situations, it’s quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of “race, color, religion, sex, familial status, or national origin” in the “sale or rental of *a dwelling*.” 42 U.S.C. § 3604(b) (emphasis added). The FHA also makes it illegal to:

make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of *a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. § 3604(c) (emphasis added). The reach of the statute turns on the meaning of “dwelling.”

The FHA defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.” *Id.* § 3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate “dwellings” for purposes of the statute. Is a “dwelling” a bedroom plus a right to access common areas? What if

roommates share a bedroom? Could a “dwelling” be a bottom bunk and half an armoire? It makes practical sense to interpret “dwelling” as an independent living unit and stop the FHA at the front door.

There’s no indication that Congress intended to interfere with personal relationships inside the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA’s prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it’s possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results. . . . Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). “[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. *Id.* While the right protects only “highly personal relationships,” *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618), the right isn’t restricted exclusively to family, *Bd. of Dirs. of Rotary Int’l*, 481 U.S. at 545. The right to association also implies a right not to associate. *Roberts*, 468 U.S. at 623.

To determine whether a particular relationship is protected by the right

to intimate association we look to “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.” *Bd. of Dirs. of Rotary Int’l*, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it’s hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate’s unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. . . .

Equally important, we are fully exposed to a roommate’s belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual’s ability to pick a roommate thus intrudes into the home, which “is entitled to special protection as the center of the private lives of our people.” *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). . . . Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.

An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won’t have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not

understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave. . . .

It's a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. . . . Reading "dwelling" to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of "dwelling" to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA. . . .

As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

16.19. What's a dwelling? The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." *Id.* § 3602(b). Do you think the FHA applies to college dormitories? Is it illegal to reserve some dormitories for women or to have ethnic-themed dorms?

16.20. A broader Craigslist problem. It's not unusual to stumble across advertisements for apartments (as opposed to just roommate ads) on Craigslist that violate the FHA. If a local newspaper published similar ads they would be liable under the FHA for publishing discriminatory material. Why doesn't anyone sue Craigslist? The answer is that section 230(c) of the Communications Decency Act provides internet service providers and website owners with broad immunity from liability for content posted by third parties. Craigslist and other similar sites may voluntarily remove offending posts, but they are not required to do so.

16.3 Exiting a Lease

Most leases expire either at the end of the agreed-upon term or when one party serves the other with notice that they've decided not to renew for another period. Sometimes, however, either a tenant or landlord seeks to get out of the lease before the negotiated term concludes. For example, a new job in a faraway state, a family emergency, or a business failure can all change a tenant's needs or ability to pay the rent. We turn now to the legal consequences of exiting a lease.

16.3.1 Landlord Exit: Transfer

Landlords may sell their properties to third parties at any time. The law categorizes a landlord's interest in rented property as a reversion and, like most other property interests, the landlord's reversion is fully alienable. But what happens to a lease if a property is transferred? As a default rule, when a landlord sells his interest, the purchaser takes subject to any leases. If there are tenants with unexpired term-of-years leases, for example, the new landlord cannot evict them. Conversely, the tenants must continue to pay the agreed upon rent to the new owner. If the lease is a periodic tenancy (or tenancy at will), the new landlord may end the leasehold by providing the tenant with the required notice. Until then, the leases continue unabated.

Remember that these are default rules, alterable by contract. In fact, landlords often insert provisions into leases that give them the option to terminate rental agreements upon sale of the property.

16.3.2 Tenant Exit: Transfer

Tenants have exit options, too. The default rule is that a tenant's interest in a term of years lease or periodic tenancy is also freely transferable. (Note, however, that a tenant cannot transfer a tenancy at will to another party.) The law recognizes two types of transfer: the **assignment** and the **sublease**. The vast majority of jurisdictions use an objective test to distinguish the two. In an assignment, the original tenant transfers all of the remaining interest under the lease to a new tenant. In a sublease, on the other hand, the original tenant transfers less than all of her remaining rights in the unexpired period—the original tenant either gets the unit back at the end of the sublease or reserves a right to

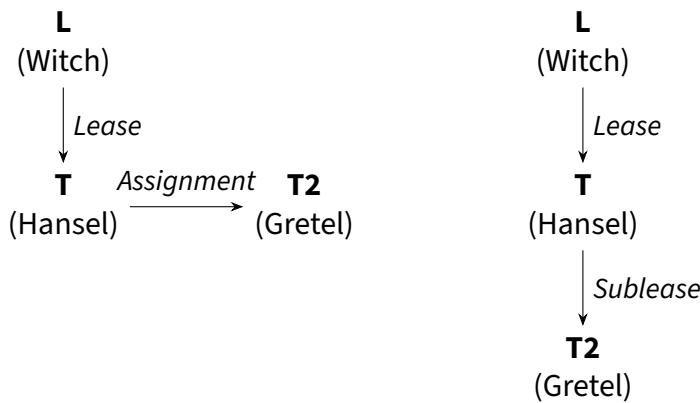


Figure 16.4: Diagram of an assignment and sublease. Downward arrows will always represent (sub)leases, while rightward arrows will represent assignments.

cut the sublease short.

An example should illuminate the concepts. Imagine that the Witch leases her Gingerbread Cottage to Hansel for a period of one year—January 1 to December 31—in exchange for \$100 a month. Four months into the lease, Hansel then transfers all of his remaining interest in the property to Gretel so that she now has exclusive possessory rights until the end of the term. This transfer, shown in the left part of Figure 16.4, is an assignment because Hansel has no further rights in the property. If Hansel had retained for himself the final two months of the lease or if he'd rented the cottage to Gretel for only the summer months, we would then categorize the agreement as a sublease.

A minority of jurisdictions takes a less formalistic approach to the assignment/sublease division. In these states, the subjective intent of the parties, rather than the structure of the transaction, controls. Arkansas, for example, allows parties to designate their leases as subleases or assignment (and receive all the attendant rights and obligations under the chosen category) regardless of whether the new tenant takes the unit for the entire remaining term.

The distinction between subleases and assignments has a few significant legal consequences. Primarily, it affects who can benefit from the promises in the original lease and who is on the hook for the obligations. Think again about the Hansel and Gretel example described above. If Gretel, who took over the lease, stops making rent payments, whom can the landlord sue? The original tenant, Hansel? Gretel? Both? What if the original one-year lease contained a

provision allowing the tenant to renew for a second year with the same terms? Can Gretel take advantage of that clause?

To enforce any promise, the law requires a certain type of legal relationship between the parties, known as *privity*. Donald Trump, for example, cannot successfully sue you if one of his Trump Tower tenants suddenly fails to pay rent—there's simply no connection between Trump and you. Trump could only sue you if a privity relationship exists: either **privity of contract** or **privity of estate**. Privity of contract is easy enough to understand. Parties are in privity of contract if they have entered into a valid contract with each other. In our example, the Witch and Hansel are in privity of contract because they signed the original lease agreement. The Witch gave Hansel the right to exclusive possession for one year and Hansel promised to pay rent every month. As a result of this legal relationship, the Witch has the option to sue Hansel if she doesn't receive rent. That remains true even if Hansel transfers his lease to someone else. That bears repeating: the original tenant's promise to pay the landlord stands until the original lease expires (or until the landlord releases the tenant from this obligation).

When Hansel and the Witch first sign the lease, they also stand in privity of estate with each other. This concept is yet another holdover from feudal times. Privity of estate makes concrete the medieval belief that an individual takes on a series of rights and obligations when they occupy land owned by another.⁴ For our purposes, privity of estate arises when two parties have successive ownership claims in the same property. Hansel and the Witch have privity of estate because once Hansel's possessory interest concludes, his property rights flow immediately back to the Witch. Despite its archaic origin, the idea remains important in modern property law because individuals in privity of estate can sue each other directly for (some) violations of a rental agreement.⁵

Consider, again, what happens when Hansel transfers his rights in the gingerbread cottage to Gretel. Can the Witch successfully haul Gretel into court if she stops making payments? It should be obvious that Gretel has not made any direct agreement with the Witch (or made any promise to benefit her) so they are not in privity of contract. But what about privity of estate? This is where the distinction between assignments and subleases matters. If Hansel assigns his

⁴The medieval mind thought of rent as something that came from the land itself: the tenant paid the land-*lord* out of the fruits of the land, sometimes metaphorically but sometimes literally, with crops harvested from the land being leased.

⁵We'll learn more about which promises "run with the land" in Chapter 26. For now, it's enough to know that transferees can only enforce promises that concern the property or land.

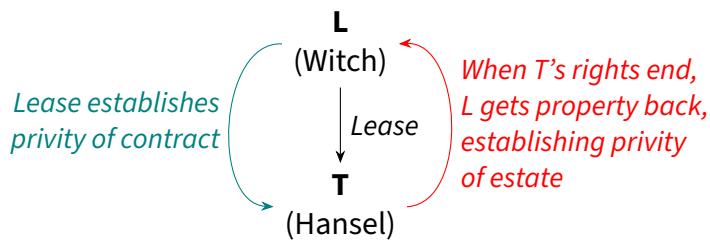


Figure 16.5: Privity of contract and estate for leases.

interest to Gretel, then Gretel and the Witch would be in privity of estate (and the Witch could sue Gretel for the missing rent). We know they have privity of estate because when Gretel's rights end under the assignment, the Witch would immediately be entitled to exclusive possession of the cottage—they have successive interests in the same piece of real estate. Conversely, if Hansel subleases his apartment to Gretel for the summer, a privity relationship would not arise between Gretel and the Witch. Instead, Gretel would have privity of estate with Hansel because at the conclusion of Gretel's interest, Hansel would have the right to exclusive possession. Thus, under the sublease, the Witch could not sue Gretel for rent.

Figuring out which parties stand in privity of estate can initially cause a lot of confusion. However, asking two quick questions can help define these relationships. The first step is to ask, “Have any tenants made an assignment of their rights?” If a tenant has assigned their rights they have no chance of possessing the property again and, thus, cannot stand in privity of estate with anyone (although they may still be in privity of contract with various parties). For all the remaining tenants ask, “Who receives the property when this tenant’s possessory rights finally end?” Remember, parties with successive interests have privity of estate.

Although it may be redundant, a few diagrams may help clarify these relationships. Assume that L leases an apartment to T. Whenever a landlord initially leases to a tenant the two parties are in both privity of contract and privity of estate, as shown in Figure 16.5.

L and T are in privity of contract because they agreed on a lease contract. To figure out the privity of estate relationships, we first ask if anyone has assigned their interest. The answer here is “no.” For all remaining tenants, we inquire “who gets control over the property when this tenant’s possessory rights end?”

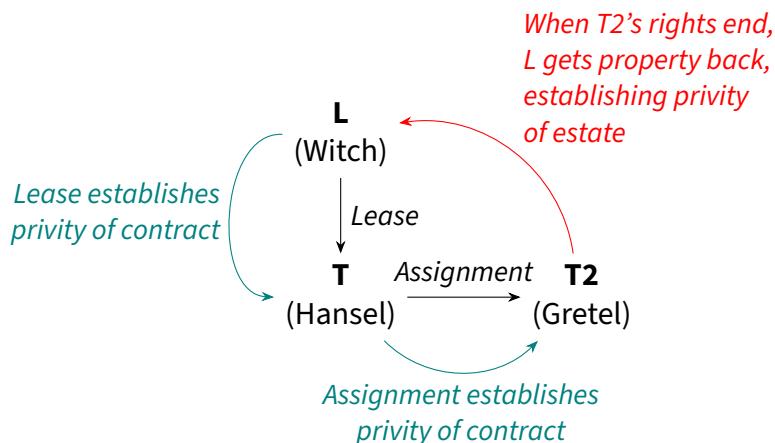


Figure 16.6: Privity of contract and estate following an assignment.

In this hypothetical, who gets the leased premise when T's term concludes? The answer, of course, is the landlord. T and L are in privity of estate because the landlord gets the property back from the tenant at the end of the lease.

The relationships change if T assigns his rights to a new party, T2. The diagram of an assignment is in Figure 16.6.

The contractual relationships are easy enough to map. As discussed earlier, when T assigns his interest, he remains in privity of contract with L—they signed a rental agreement that has not expired. T and T2 are also in privity of contract as a result of the assignment contract. But what about privity of estate? L and T are no longer in privity of estate because T has relinquished all of his property interests. Remember that parties who assign their rights stand in privity of estate with no one. For all other tenants we ask, “Who receives the property when this tenant’s possessory rights finally end?” When T2’s possessory rights conclude, who takes control of the property? The answer is the landlord. L and T2 now have a privity of estate relationship.

How do things change with a sublease? In Figure 16.7, T remains in privity of contract with L for the duration of the original lease. In this example, there are no assignments, so we begin by asking which parties have successive property interests. When the possessory rights of T2 end, T will then have control over the property. Thus T2 and T have a privity of estate relationship. Then, when T's rights over the property conclude, the possessory rights will flow back to the landlord, meaning that T and L also have privity of estate.

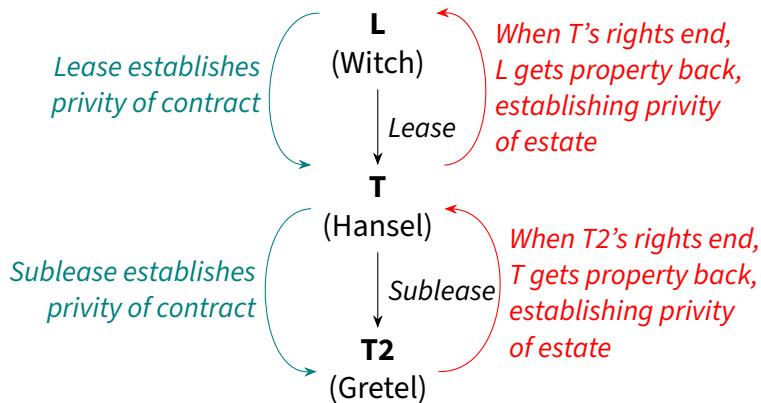


Figure 16.7: Privity of contract and estate following a sublease.

Before moving on, one final wrinkle merits attention. As discussed earlier, when the original tenant subleases or assigns his leasehold, the default rule is that the landlord and the new tenant are not in privity of contract. It is possible, however, to create a privity of contract relationship between the L and T2. Most often this is accomplished by including a clause in the takeover agreement between the original tenant and the new tenant that reads, “New Tenant assumes the obligation to perform all of the original tenant’s duties under the original lease.” If the new tenant takes on this responsibility, the landlord becomes a third-party beneficiary to the agreement and comes into privity of contract with the new tenant.

Problems

16.21. Landlord leases property to T1 from January 1, 2015 to December 31, 2015. On March 1, T1 sold T2 her remaining interest in the property. On October 1, T2 rented the property to T3 for two months. Describe the privity relationships between all of the parties. If T3 stops sending rent payments to Landlord, whom can the Landlord sue to recover the money?

16.22. Alger, a landlord, rents a commercial building to Brown for 5 years. Six months into the lease, Brown subleases his interest to Clancy for 3 years. Clancy then turns around and assigns his interest to Dahl. Describe the privity relationships between all of the parties. If Dahl stops sending rent checks to Alger, whom can Alger sue to recover the money?

16.23. Picasso, a landlord, rents an apartment to Renoir for one year. The lease contains a provision allowing the tenant to renew the leasehold for a second year on the same terms. Renoir assigns his interest in the lease to Seurat. Seurat then assigns his interest to Turner. What are the privity relationships between the parties? Can Turner exercise the renewal clause in the original lease? See *Castle v. Double Time, Inc.*, 737 P.2d 900 (Okla. 1987) (discussing renewal clauses).

16.24. Landlord leases a unit to T1 for ten years beginning in 2010. In 2012, T1 transfers all of his right to T2 “for a period of five” years. In 2013, T2 subleases to T3 for one year. What are the privity relationships and whom can the landlord sue if T3 stops paying rent?

16.25. L leases a commercial property to T1 for ten years beginning in 2010. In 2012, T1 assigns all of her interest to T2. A year later, T2 assigns all of her interest to T3. In 2014, T3 subleases to T4 for a term of four years. In the sublease contract, T4 agrees to assume “all of the covenants and promises” in the original lease between L and T1. In 2015, T4’s business fails and she ceases making paying rent. What are the privity relationships? Whom can L sue to recover the unpaid rent money?

16.3.3 Tenant Exit: Limiting the Right to Transfer

Under the traditional common law, leaseholds were freely transferable property interests. Modern courts continue to recognize the alienability of tenancies as a default position, but allow parties to contract around the basic rule. As a result, most leases (including yours, probably) now contain some restriction on a tenant’s ability to assign or sublease her property interests. For example, one oft-used lease agreement, which can be downloaded for free from the Internet, includes the following provision: “The tenant will not assign this Lease, or sublet or grant any concession or license to use the Property or any part of the Property. Any assignment or subletting will be void and will, at the Landlord’s option, terminate the Lease.” In most states, courts uphold such bars on transfer as reasonable restraints on alienation. More controversial are clauses that allow sublease or assignment but only “with the consent of the landlord.”

Julian v. Christopher
575 A.2d 735 (Md. 1990)

CHASANOW, Judge.

In 1961, this Court decided the case of *Jacobs v. Klawans*, 169 A.2d 677 (1961) and held that when a lease contained a “silent consent” clause prohibiting a tenant from subletting or assigning without the consent of the landlord, landlords had a right to withhold their consent to a subletting or assignment even though the withholding of consent was arbitrary and unreasonable. . . . We now have before us the issue of whether the common law rule applied in *Klawans* should be changed.

In the instant case, the tenants, Douglas Julian and William J. Gilliland, III, purchased a tavern and restaurant business, as well as rented the business premises from landlord, Guy D. Christopher. The lease stated in clause ten that the premises, consisting of both the tavern and an upstairs apartment, could not be assigned or sublet “without the prior written consent of the landlord.” Sometime after taking occupancy, the tenants requested the landlord’s written permission to sublease the upstairs apartment. The landlord made no inquiry about the proposed sublessee, but wrote to the tenants that he would not agree to a sublease unless the tenants paid additional rent in the amount of \$150.00 per month. When the tenants permitted the sublessee to move in, the landlord filed an action in the District Court of Maryland in Baltimore City requesting repossession of the building because the tenants had sublet the premises without his permission.

At the district court trial, the tenants testified that they specifically inquired about clause ten, and were told by the landlord that the clause was merely included to prevent them from subletting or assigning to “someone who would tear the apartment up.” The district court judge refused to consider this testimony. He stated in his oral opinion that he would “remain within the four corners of the lease, and construe the document strictly,” at least as it pertained to clause ten. Both the District Court and, on appeal, the Circuit Court for Baltimore City found in favor of the landlord. The circuit judge noted: “If you don’t have the words that consent will not be unreasonably withheld, then the landlord can withhold his consent for a good reason, a bad reason, or no reason at all in the context of a commercial lease, which is what we’re dealing with.” We granted certiorari to determine whether the *Klawans* holding should be modified in light of the

changes that have occurred since that decision.

While we are concerned with the need for stability in the interpretation of leases, we recognize that since the *Klawans* case was decided in 1961, the foundations for that holding have been substantially eroded. The *Klawans* opinion cited Restatement of Property § 410 as authority for its holding. The current Restatement (Second) of Property § 15.2 rejects the *Klawans* doctrine and now takes the position that:

A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

Another authority cited in *Klawans* in support of its holding was 2 R. Powell, Powell on Real Property. The most recent edition of that text now states:

Thus, if a lease clause prohibited the tenant from transferring his or her interest without the landlord's consent, the landlord could withhold consent arbitrarily. This result was allowed because it was believed that the objectives served by allowing the restraints outweighed the social evils implicit in them, inasmuch as the restraints gave the landlord control over choosing the person who was to be entrusted with the landlord's property and was obligated to perform the lease covenants. It is doubtful that this reasoning retains full validity today. Relationships between landlord and tenant have become more impersonal and housing space (and in many areas, commercial space as well) has become scarce. These changes have had an impact on courts and legislatures in varying degrees. Modern courts almost universally adopt the view that restrictions on the tenant's right to transfer are to be strictly construed. (Footnotes omitted.)

2 R. Powell, Powell on Real Property § 248[1] (1988).

Finally, in support of its decision in *Klawans*, this Court noted that, "although it, apparently, has not been passed upon in a great number of jurisdictions, the decisions of the courts that have determined the question are

in very substantial accord.” *Klawans*, 169 A.2d at 679. This is no longer true. Since *Klawans*, the trend has been in the opposite direction. “The modern trend is to impose a standard of reasonableness on the landlord in withholding consent to a sublease unless the lease expressly states otherwise.” *Campbell v. Westdahl*, 715 P.2d 288, 292 (Ariz. Ct. App. 1985). . . .

Traditional property rules favor the free and unrestricted right to alienate interests in property. Therefore, absent some specific restriction in the lease, a lessee has the right to freely alienate the leasehold interest by assignment or sublease without obtaining the permission of the lessor. R. Schoshinski, *American Law of Landlord and Tenant* § 5:6 (1980); 1 *American Law of Property* § 3.56 (1952).

Contractual restrictions on the alienability of leasehold interests are permitted. R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* § 12.40 (1984). Consequently, landlords often insert clauses that restrict the lessee’s common law right to freely assign or sublease. *Id.* Probably the most often used clause is a “silent consent” clause similar to the provision in the instant case, which provides that the premises may not be assigned or sublet without the written consent of the lessor.

In a “silent consent” clause requiring a landlord’s consent to assign or sublease, there is no standard governing the landlord’s decision. Courts must insert a standard. The choice is usually between 1) requiring the landlord to act reasonably when withholding consent, or 2) permitting the landlord to act arbitrarily and capriciously in withholding consent.

Public policy requires that when a lease gives the landlord the right to withhold consent to a sublease or assignment, the landlord should act reasonably, and the courts ought not to imply a right to act arbitrarily or capriciously. If a landlord is allowed to arbitrarily refuse consent to an assignment or sublease, for what in effect is no reason at all, that would virtually nullify any right to assign or sublease.

Because most people act reasonably most of the time, tenants might expect that a landlord’s consent to a sublease or assignment would be governed by standards of reasonableness. Most tenants probably would not understand that a clause stating “this lease may not be assigned or sublet without the landlord’s written consent” means the same as a clause stating “the tenant shall have no right to assign or sublease.” Some landlords may have chosen the former wording rather than the latter because it vaguely implies, but does not grant to the tenant, the right to assign or sublet.

There are two public policy reasons why the law enunciated in *Klawans*

should now be changed. The first is the public policy against restraints on alienation. The second is the public policy which implies a covenant of good faith and fair dealing in every contract.

Because there is a public policy against restraints on alienation, if a lease is silent on the subject, a tenant may freely sublease or assign. Restraints on alienation are permitted in leases, but are looked upon with disfavor and are strictly construed. *Powell on Real Property, supra*. If a clause in a lease is susceptible of two interpretations, public policy favors the interpretation least restrictive of the right to alienate freely. Interpreting a "silent consent" clause so that it only prohibits subleases or assignments when a landlord's refusal to consent is reasonable, would be the interpretation imposing the least restraint on alienation and most in accord with public policy.

Since the *Klawans* decision, this Court has recognized that in a lease, as well as in other contracts, "there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others." *Food Fair v. Blumberg*, A.2d 166, 174 (1964). When the lease gives the landlord the right to exercise discretion, the discretion should be exercised in good faith, and in accordance with fair dealing; if the lease does not spell out any standard for withholding consent, then the implied covenant of good faith and fair dealing should imply a reasonableness standard.

We are cognizant of the value of the doctrine of *stare decisis*, and of the need for stability and certainty in the law. However, as we noted in *Harrison v. Mont. Co. Bd. of Educ.*, 456 A.2d 894, 903 (1983), a common law rule may be modified "where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people." The *Klawans* common law interpretation of the "silent consent" clause represents such a "vestige of the past," and should now be changed.

Reasonableness of Withheld Consent

In the instant case, we need not expound at length on what constitutes a reasonable refusal to consent to an assignment or sublease. We should, however, point out that obvious examples of reasonable objections could include the financial irresponsibility or instability of the transferee, or the unsuitability or incompatibility of the intended use of the property by the transferee. We also need not expound at length on what would constitute an unreasonable refusal to consent to an assignment or sublease. If

the reasons for withholding consent have nothing to do with the intended transferee or the transferee's use of the property, the motivation may be suspect. Where, as alleged in this case, the refusal to consent was solely for the purpose of securing a rent increase, such refusal would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord.

Prospective Effect

The tenants ask us to retroactively overrule *Klawans*, and hold that in all leases with "silent consent" clauses, no matter when executed, consent to assign or sublease may not be unreasonably withheld by a landlord. We decline to do so. In the absence of evidence to the contrary, we should assume that parties executing leases when *Klawans* governed the interpretation of "silent consent" clauses were aware of *Klawans* and the implications drawn from the words they used. We should not, and do not, rewrite these contracts.

In appropriate cases, courts may "in the interest of justice" give their decisions only prospective effect. Contracts are drafted based on what the law is; to upset such transactions even for the purpose of improving the law could be grossly unfair. . . .

For leases with "silent consent" clauses which were entered into before the mandate in this case, *Klawans* is applicable, and we assume the parties were aware of the court decisions interpreting a "silent consent" clause as giving the landlord an unrestricted right to withhold consent.

For leases entered into after the mandate in this case, if the lease contains a "silent consent" clause providing that the tenant must obtain the landlord's consent in order to assign or sublease, such consent may not be unreasonably withheld. If the parties intend to preclude any transfer by assignment or sublease, they may do so by a freely negotiated provision in the lease. . . . For example, the clause might provide, "consent may be withheld in the sole and absolute subjective discretion of the lessor."

The final question is whether the tenants in the instant case, having argued successfully for a change in the law, should receive the benefit of the change. . . . [Even though our decision is to have only prospective effect] [t]he tenants in the instant case should get the benefit of the interpretation of the "silent consent" clause that they so persuasively argued for, unless this interpretation would be unfair to the landlord. We note that the tenants testified they were told that the clause was only to prevent subleasing

to “someone who would tear the apartment up.” Therefore, we will reverse the judgment of the Circuit Court with instructions to vacate the judgment of the District Court and remand for a new trial. At that trial, the landlord will have the burden of establishing that it would be unfair to interpret the “silent consent” clause in accordance with our decision that a landlord must act reasonably in withholding consent. He may establish that it would be unfair to do so by establishing that when executing the lease he was aware of and relied on the *Klawans* interpretation of the “silent consent” clause. . . .

Notes and Questions

16.26. **Landlords love restrictions.** Why are restrictions on transfer so common in both commercial and residential leases? You might want to refer back to the Sprawl-Mart example from note 16.8, which makes clear why a landlord and tenant might disagree about who should get the benefit of the remaining term.

16.27. **Status of the Julian rule.** The approach taken in *Julian*, which reads a reasonableness requirement into the lease, is still a minority rule. Roughly 15 states have taken a position similar to Maryland’s highest court, including California, Illinois, North Carolina, and Ohio. Although the *Julian*/minority approach has gained popularity in the last two decades (and is considered the “modern” rule), it’s important to note that in most states a landlord may still arbitrarily refuse to consent to any sublease or assignment under a “silent consent” clause.

16.28. **Contracting around the rule?** Imagine a lease that includes the following provision: “The tenant shall not sublease or assign any part of their interest in the property without the Landlord’s written permission. The Landlord reserves the absolute right to deny any request for any and all reasons at his sole and absolute discretion.” Under the holding in *Julian*, would this clause be valid? See Restatement (Second) Property § 15.2 (“A restraint on alienation with the consent of the landlord of the tenant’s interest in the leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.”)

16.29. **Defining reasonableness.** What counts as a reasonable objection to a sublease or assignment request? Courts in Illinois have found that it’s proper to consider: (1) the sublessee’s credit history, (2) the sublessee’s capital on

hand, (3) whether the sublessee's business is compatible with landlord's other properties, (4) whether the sublessee's business will compete with those of the lessor or any other lessee, and, (5) the sublessee's expertise and business plan. See, for example, *Jack Frost Sales, Inc. v. Harris Trust & Savings Bank*, 433 N.E.2d 941 (Ill. App. 3d 1982). In most jurisdictions, tenants have the burden to show the sublessee or assignee meets the reasonable commercial standard.

16.30. The Landlord's Stance. Is the reasonableness rule fair to landlords? Imagine you're a landlord and your original tenant announces that they're moving out and proffers a subleasee for your approval. If you're not completely satisfied with the new tenant, should you object? If you say "no" and the tenant either leaves or sues you, how much will that enforcement action cost?

16.31. Residential v. Commercial. Courts have not imposed the rule articulated in *Julian* on residential tenants. Why not? Aren't commercial tenants better able to protect themselves and bargain than residential tenants? Consider the following statute from a jurisdiction where residential leases account for a huge proportion of extremely scarce housing stock: New York. As you read it, consider whether and to what extent the statute permits parties to residential leases to contract around its provisions, and whether it is more or less restrictive than the rule of *Julian*.

New York Real Property Law § 226-B

1. Unless a greater right to assign is conferred by the lease, a tenant renting a residence may not assign his lease without the written consent of the owner, which consent may be unconditionally withheld without cause provided that the owner shall release the tenant from the lease upon request of the tenant upon thirty days notice if the owner unreasonably withholds consent which release shall be the sole remedy of the tenant. If the owner reasonably withholds consent, there shall be no assignment and the tenant shall not be released from the lease.

2.

(a) A tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting. Such consent shall not be unreasonably withheld.

(b) The tenant shall inform the landlord of his intent to sublease

by mailing a notice of such intent by certified mail, return receipt requested. Such request shall be accompanied by the following information: (i) the term of the sublease, (ii) the name of the proposed sublessee, (iii) the business and permanent home address of the proposed sublessee, (iv) the tenant's reason for subletting, (v) the tenant's address for the term of the sublease, (vi) the written consent of any cotenant or guarantor of the lease, and (vii) a copy of the proposed sublease, to which a copy of the tenant's lease shall be attached if available, acknowledged by the tenant and proposed subtenant as being a true copy of such sublease.

(c) Within ten days after the mailing of such request, the landlord may ask the tenant for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Any such request for additional information shall not be unduly burdensome. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the tenant of his consent or, if he does not consent, his reasons therefor. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting. If the landlord consents, the premises may be sublet in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant's obligations under said lease. If the landlord reasonably withholds consent, there shall be no subletting and the tenant shall not be released from the lease. If the landlord unreasonably withholds consent, the tenant may sublet in accordance with the request and may recover the costs of the proceeding and attorneys fees if it is found that the owner acted in bad faith by withholding consent.

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5. Any sublet or assignment which does not comply with the provisions of this section shall constitute a substantial breach of lease or tenancy.
 6. Any provision of a lease or rental agreement purporting to waive a provision of this section is null and void.

Notes and Questions

- 16.32. Last year, X rented a storefront in a local strip mall and opened a suc-

cessful coffee shop. The lease is for 10 years and includes the following provision: “No assignments or subleases without the landlord’s consent. Landlord can only deny consent based on commercially reasonable objections.” Recently X was offered her dream job on a coffee plantation in a faraway country. She now wishes to exit her lease. Must the Landlord consent to the following assignment proposals?

1. Alfred plans to open a mattress store. He’s a college dropout with no business experience but his rich father will co-sign the lease and guarantee all payments get made on time.
2. Bob, an experienced therapist with good credit, wants to open a marriage counseling practice targeted at same-sex couples. The landlord, however, believes same-sex marriage is immoral and worries that the counseling center will hurt the business of a Christian bookstore in the strip mall.
3. Cathy has a well-thought out plan to open a shooting range. The Landlord agrees to the assignment on the condition that Cathy increase the rent payment by \$100/month. Cathy refuses.

16.3.4 Tenant Exit: Abandonment and the Duty to Mitigate

A tenant who needs to exit a lease early and cannot find another party to sublet must seek out other alternatives. For example, a tenant can always ask her landlord to terminate the lease before the term ends. The tenant generally agrees to turn over the property and pay a small fee and, in return, the landlord releases the tenant from all further obligations. This is called a **surrender**.

Alternatively, a tenant may **abandon** the lease: simply pack her things, vacate the premises, and stop making rent payments. This often happens if a tenant cannot work out a surrender agreement or finds herself in desperate financial circumstances. What are the rights and obligations of the parties in this scenario? What happens if a tenant breaks a lease and leaves?

Sommer v. Kridel
378 A.2d 767 (N.J. 1977)

PASHMAN, J.

We granted certification in these cases to consider whether a landlord seeking damages from a defaulting tenant is under a duty to mitigate dam-

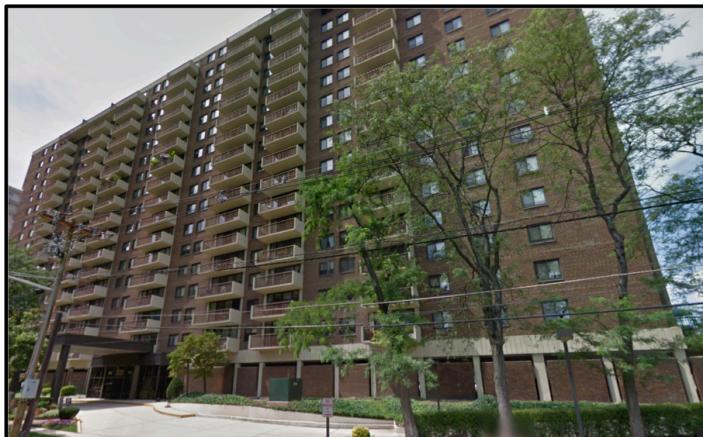


Figure 16.8: The Pierre Apartments today

ages by making reasonable efforts to re-let an apartment wrongfully vacated by the tenant. Separate parts of the Appellate Division held that, in accordance with their respective leases, the landlords in both cases could recover rents due under the leases regardless of whether they had attempted to re-let the vacated apartments. Although they were of different minds as to the fairness of this result, both parts agreed that it was dictated by *Joyce v. Bauman*, 174 A. 693 (1934) We now reverse and hold that a landlord does have an obligation to make a reasonable effort to mitigate damages in such a situation. We therefore overrule *Joyce v. Bauman* to the extent that it is inconsistent with our decision today.

I

This case was tried on stipulated facts. On March 10, 1972 the defendant, James Kridel, entered into a lease with the plaintiff, Abraham Sommer, owner of the "Pierre Apartments" in Hackensack, to rent apartment 6-L in that building. The term of the lease was from May 1, 1972 until April 30, 1974, with a rent concession for the first six weeks, so that the first month's rent was not due until June 15, 1972.

One week after signing the agreement, Kridel paid Sommer \$690. Half of that sum was used to satisfy the first month's rent. The remainder was paid under the lease provision requiring a security deposit of \$345. Although defendant had expected to begin occupancy around May 1, his

plans were changed. He wrote to Sommer on May 19, 1972, explaining:

I was to be married on June 3, 1972. Unhappily the engagement was broken and the wedding plans cancelled. Both parents were to assume responsibility for the rent after our marriage. I was discharged from the U.S. Army in October 1971 and am now a student. I have no funds of my own, and am supported by my stepfather.

In view of the above, I cannot take possession of the apartment and am surrendering all rights to it. Never having received a key, I cannot return same to you.

I beg your understanding and compassion in releasing me from the lease, and will of course, in consideration thereof, forfeit the 2 month's rent already paid.

Please notify me at your earliest convenience.

Plaintiff did not answer the letter.

Subsequently, a third party went to the apartment house and inquired about renting apartment 6-L. Although the parties agreed that she was ready, willing and able to rent the apartment, the person in charge told her that the apartment was not being shown since it was already rented to Kridel. In fact, the landlord did not re-enter the apartment or exhibit it to anyone until August 1, 1973. At that time it was rented to a new tenant for a term beginning on September 1, 1973. The new rental was for \$345 per month with a six week concession similar to that granted Kridel.

Prior to re-letting the new premises, plaintiff sued Kridel in August 1972, demanding \$7,590, the total amount due for the full two-year term of the lease. Following a mistrial, plaintiff filed an amended complaint asking for \$5,865, the amount due between May 1, 1972 and September 1, 1973. The amended complaint included no reduction in the claim to reflect the six week concession provided for in the lease or the \$690 payment made to plaintiff after signing the agreement. Defendant filed an amended answer to the complaint, alleging that plaintiff breached the contract, failed to mitigate damages and accepted defendant's surrender of the premises. He also counterclaimed to demand repayment of the \$345 paid as a security deposit.

The trial judge ruled in favor of defendant. Despite his conclusion that the lease had been drawn to reflect "the 'settled law' of this state," he found

that "justice and fair dealing" imposed upon the landlord the duty to attempt to re-let the premises and thereby mitigate damages. He also held that plaintiff's failure to make any response to defendant's unequivocal offer of surrender was tantamount to an acceptance, thereby terminating the tenancy and any obligation to pay rent. As a result, he dismissed both the complaint and the counterclaim. The Appellate Division reversed in a per curiam opinion, 153 N.J.Super. 1 (1976), and we granted certification. . . .

II

As the lower courts in both appeals found, the weight of authority in this State supports the rule that a landlord is under no duty to mitigate damages caused by a defaulting tenant. *See Joyce v. Bauman, supra* This rule has been followed in a majority of states . . . and has been tentatively adopted in the American Law Institute's Restatement of Property. . . .

Nevertheless, while there is still a split of authority over this question, the trend among recent cases appears to be in favor of a mitigation requirement. . . .

The majority rule is based on principles of property law which equate a lease with a transfer of a property interest in the owner's estate. Under this rationale the lease conveys to a tenant an interest in the property which forecloses any control by the landlord; thus, it would be anomalous to require the landlord to concern himself with the tenant's abandonment of his own property. *Wright v. Baumann*, 398 P.2d 119, 120-21 (Or. 1965).

For instance, in *Muller v. Beck*, *supra*, where essentially the same issue was posed, the court clearly treated the lease as governed by property, as opposed to contract, precepts. The court there observed that the "tenant had an estate for years, but it was an estate qualified by this right of the landlord to prevent its transfer," 110 A. at 832, and that "the tenant has an estate with which the landlord may not interfere." *Id.* at 832. Similarly, in *Heckel v. Griese*, *supra*, the court noted the absolute nature of the tenant's interest in the property while the lease was in effect, stating that "when the tenant vacated, . . . no one, in the circumstances, had any right to interfere with the defendant's possession of the premises." 171 A. 148, 149. Other cases simply cite the rule announced in *Muller v. Beck*, *supra*, without discussing the underlying rationale. *See Joyce v. Bauman, supra*, 174 A. 693

Yet the distinction between a lease for ordinary residential purposes

and an ordinary contract can no longer be considered viable. As Professor Powell observed, evolving “social factors have exerted increasing influence on the law of estates for years.” 2 *Powell on Real Property* (1977 ed.), § 221(1) at 180-81. The result has been that:

[t]he complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient.

(*Id.* at 181). . . .

This Court has taken the lead in requiring that landlords provide housing services to tenants in accordance with implied duties which are hardly consistent with the property notions expressed in *Muller v. Beck, supra*, and *Heckel v. Griese, supra*. See *Braitman v. Overlook Terrace Corp.*, 346 A.2d 76 (1975) (liability for failure to repair defective apartment door lock); *Berzito v. Gambino*, 308 A.2d 17 (1973) (construing implied warranty of habitability and covenant to pay rent as mutually dependent); *Marini v. Ireland*, 265 A.2d 526 (1970) (implied covenant to repair); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (1969) (implied warranty of fitness of premises for leased purpose). In fact, in *Reste Realty Corp. v. Cooper, supra*, we specifically noted that the rule which we announced there did not comport with the historical notion of a lease as an estate for years. 251 A.2d 268. And in *Marini v. Ireland, supra*, we found that the “guidelines employed to construe contracts have been modernly applied to the construction of leases.” 265 A.2d at 532.

Application of the contract rule requiring mitigation of damages to a residential lease may be justified as a matter of basic fairness. Professor McCormick first commented upon the inequity under the majority rule when he predicted in 1925 that eventually:

the logic, inescapable according to the standards of a “jurisprudence of conceptions” which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, [will] yield to the more realistic notions of social advantage which in other fields of the

law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. (McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 Mich. L. Rev. 211, 221-22 (1925)).

Various courts have adopted this position.

The pre-existing rule cannot be predicated upon the possibility that a landlord may lose the opportunity to rent another empty apartment because he must first rent the apartment vacated by the defaulting tenant. Even where the breach occurs in a multi-dwelling building, each apartment may have unique qualities which make it attractive to certain individuals. Significantly, in *Sommer v. Kridel*, there was a specific request to rent the apartment vacated by the defendant; there is no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual.

We therefore hold that antiquated real property concepts which served as the basis for the pre-existing rule, shall no longer be controlling where there is a claim for damages under a residential lease. Such claims must be governed by more modern notions of fairness and equity. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant.

If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment. In such cases he must treat the apartment in question as if it was one of his vacant stock.

As part of his cause of action, the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises. We note that there has been a divergence of opinion concerning the allocation of the burden of proof on this issue. See Annot., *supra*, § 12 at 577. While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation . . . here the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises. . . .

III

The *Sommer v. Kridel* case presents a classic example of the unfairness which occurs when a landlord has no responsibility to minimize damages. Sommer waited 15 months and allowed \$4658.50 in damages to accrue be-

fore attempting to re-let the apartment. Despite the availability of a tenant who was ready, willing and able to rent the apartment, the landlord needlessly increased the damages by turning her away. While a tenant will not necessarily be excused from his obligations under a lease simply by finding another person who is willing to rent the vacated premises, see, e.g., *Reget v. Dempsey-Tegler & Co.*, 216 N.E.2d 500 (Ill. App. 1966) (new tenant insisted on leasing the premises under different terms); *Edmands v. Rust & Richardson Drug Co.*, 77 N.E. 713 (Mass. 1906) (landlord need not accept insolvent tenant), here there has been no showing that the new tenant would not have been suitable. We therefore find that plaintiff could have avoided the damages which eventually accrued, and that the defendant was relieved of his duty to continue paying rent. Ordinarily we would require the tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the premises . . . but no such expenses were incurred in this case. . . .

In assessing whether the landlord has satisfactorily carried his burden, the trial court shall consider, among other factors, whether the landlord, either personally or through an agency, offered or showed the apartment to any prospective tenants, or advertised it in local newspapers. Additionally, the tenant may attempt to rebut such evidence by showing that he proffered suitable tenants who were rejected. However, there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts.

Compare . . . *Carpenter v. Wisniewski*, 215 N.E.2d 882 (Ind. App. 1966) (duty satisfied where landlord advertised the premises through a newspaper, placed a sign in the window, and employed a realtor); *Re Garment Center Capitol, Inc.*, 93 F.2d 667, 115 A.L.R. 202 (2 Cir. 1938) (landlord's duty not breached where higher rental was asked since it was known that this was merely a basis for negotiations); *Foggia v. Dix*, 509 P.2d 412, 414 (Or. 1973) (in mitigating damages, landlord need not accept less than fair market value or "substantially alter his obligations as established in the pre-existing lease"); *with Anderson v. Andy Darling Pontiac, Inc.*, 43 N.W.2d 362 (Wis. 1950) (reasonable diligence not established where newspaper advertisement placed in one issue of local paper by a broker); . . . *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801, 811 (8 Cir. 1964) (dictum) (demand for rent which is "far greater than the provisions of the lease called for" negates landlord's assertion that he acted in good faith in seeking a

new tenant).

IV

The judgment in *Sommer v. Kridel* is reversed.

Notes and Questions

16.33. **The basic law.** Today almost all states impose a **duty to mitigate** on residential landlords. The rule also applies to commercial tenancies in many states. The RESTATEMENT (SECOND) OF PROPERTY § 12.1(3), however, continues to cling to the common law notion that a landlord can wait until the end of the term and then sue the tenant for all of the unpaid rent. The authors of the Restatement believe the traditional rule discourages abandonment, limits vandalism, and better protects the expectations of landlords.

16.34. **Tenants still on the hook.** Importantly, the duty to mitigate does not relieve an abandoning tenant of all liability. Even if a new tenant rents the unit, the landlord can still recover damages for all of the costs of finding the replacement tenant and for any time that the unit remained empty. The landlord can also recoup any unpaid rent that accrued before the abandonment. Finally, if the rental market in the area has softened and landlord is forced to rent the unit at lower price, the tenant is responsible for the difference between the new rent and the original rent.

16.35. **Property v. Contract.** The lingering controversy over the duty to mitigate stems largely from the property/contract tension inherent in the nature of the lease. If a leasehold is primarily a property interest, then the landlord has few responsibilities to the tenant after ceding possession and control—the tenant is free to use the property or let it lay fallow. If, on the other hand, the lease is viewed through the lens of contract law, the parties clearly have a responsibility to mitigate damages. *But see Edward Chase & E. Hunter Taylor, Jr., Landlord and Tenant: A Study in Property and Contract, 30 VILL. L. REV. 571 (1985)* (arguing the distinction is overstated).

16.36. **What's a good faith effort?** Ken rents an apartment to Sarah for one year. Three months into the lease, Sarah gets a new job in a different state and turns the apartment back over to Ken. Ken puts an 8x11 “for rent” sign in the window of the unit. Has he made a good faith effort to mitigate damages? Does it matter how he advertises the other units? What if Tim offers to rent Sarah’s unit but Tim has bad credit: does Ken have to accept Tim?

16.37. **The Legend of Jim Kridel.** The woman Jim Kridel intended to marry

came from a family with significant assets. When the engagement fell through, Kridel—who had no income of his own—could not afford the rent at the Pierre Apartments. The opinion mentions that Kridel notified Sommer of his predicament in writing, but does not reflect that Kridel and Sommer also had a heated discussion on the phone. During the telephone conversation, Kridel offered Sommer \$750 of the pre-paid rent as compensation for breaking the lease (adjusted for inflation, that's roughly equivalent to \$3000 today). Sommer, however, knew that Kridel's stepfather was a prominent (and presumably well-off) physician and demanded an additional \$750. Kridel refused, and told Sommer, “If you don't like it, you can sue me, baby!” Sommer did just that.

When the litigation began, Kridel was a first year law student at Rutgers. He initially represented himself but gradually picked up pro bono help from lawyers he met at summer jobs and partners in the firm where he worked after graduating. Kridel estimates that Sommer—a very wealthy landlord—spent over \$500,000 on legal fees. Kridel also recalls that the law of New Jersey was firmly against his position that the lease should be governed by contract principles. On appeal, he relied primarily on a case from the state of Oregon, which opposing counsel disparaged as a place full of bumpkin fishermen and loggers. When Kridel won, he wrapped the opinion around an Oregon salmon and sent to Sommer's lawyers.

Asked why he pursued the case with such vigor, he replied, “Sommer was wrong. The rule was unfair. And I was probably the only tenant in New Jersey who could afford to pour that much time and attention into a case like that.”

In the intervening years, Kridel has had a long and successful legal career in New Jersey and New York. He continues to find himself mixed up with controversy. In 2010, Kridel represented *Real Housewives of New Jersey* star Teresa Giudice in her bankruptcy proceeding. The bankruptcy went sour: Giudice and her husband were convicted of fraud and sentenced to federal prison in 2014. Giudice sued Kridel for malpractice, charging that his “abysmal failure as an attorney . . . literally led his client into the cross-hairs of federal prosecutors, and a prison cell.” First Amended Complaint at ¶ 4, *Giudice v. Kridel*, No. MRS-L-1861-15 (N.J. Sup. Ct. Mar. 17, 2017). The case apparently settled in 2018.

16.3.5 Tenant Exit: Eviction

If a tenant fails to pay rent or otherwise commits a material breach of the lease, the landlord can elect to terminate the leasehold and **evict** the tenant

from the property. It is undoubtedly true that the eviction process and the subsequent scramble for a new place to live can be a traumatic, humiliating, and disruptive occurrence. Eviction displaces children from their schools, rends the social networks of the poor, and forces many families into shelters or onto the streets. Matthew Desmond, a sociologist at Harvard, has found that forced relocations are also shockingly common. In Milwaukee, the location of Desmond's research, 17 percent of the moves undertaken by renters over a two-year period were forced relocations. See Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 Soc. Sci. REV. 227 (2015). In response to the social cost of eviction, some American cities and many countries around the world make it difficult for landlords to remove tenants. Should more U.S. jurisdictions follow suit? Consider the following story:

A patient political scientist . . . might be able to place American cities on a left-to-right spectrum according to how long tenants whose eviction has become a cause manage to stay where they are. It may be, for instance that some city like Houston is on the far right of the spectrum. . . . Houston's most powerful citizens are known for a devotion to private property so intense that they see routine planning and zoning as acts of naked confiscation. . . . San Francisco might qualify for the left end of the spectrum. [I]ts best-known evictees [are] the tenants of the run-down three-story building called the International Hotel. . . . In the fall of 1968, about a hundred and fifty people who were living in the hotel . . . were told to be out of the building by January 1, 1969. The building was finally cleared—in what amounted to a military operation requiring several hundred policemen—on August 4, 1977.

Calvin Trillin, *Some Thoughts on the International Hotel Controversy*, New Yorker, Dec. 19, 1977, at 116.

Notes and Questions

16.38. Would you rather be a tenant in a place like Houston—where evictions happen quickly—or in San Francisco—where they do not?

16.39. Imagine you're a landlord in a jurisdiction where it takes a long time to remove a tenant for non-payment of rent. How would that change your business strategy? Would you ever take a chance on a tenant with bad credit or a

history of being evicted?

We turn now to the procedure of eviction. When a landlord believes that a tenant has committed a material breach of the lease, how exactly does she go about removing a lessee from the property?

Berg v. Wiley
264 N.W.2d 145 (Minn. 1978)

ROGOSHESKE, Justice.

Defendant landlord, Wiley Enterprises, Inc., and defendant Rodney A. Wiley (hereafter collectively referred to as Wiley) appeal from a judgment upon a jury verdict awarding plaintiff tenant, A Family Affair Restaurant, Inc., damages for wrongful eviction from its leased premises. The issues for review are whether the evidence was sufficient to support the jury's finding that the tenant did not abandon or surrender the premises and whether the trial court erred in finding Wiley's reentry forcible and wrongful as a matter of law. We hold that the jury's verdict is supported by sufficient evidence and that the trial court's determination of unlawful entry was correct as a matter of law, and affirm the judgment.

On November 11, 1970, Wiley, as lessor . . . executed a written lease agreement letting land and a building in Osseo, Minnesota, for use as a restaurant. The lease provided a 5-year term beginning December 1, 1970, and specified that the tenant agreed to bear all costs of repairs and remodeling, to "make no changes in the building structure" without prior written authorization from Wiley, and to "operate the restaurant in a lawful and prudent manner." Wiley also reserved the right "at (his) option (to) retake possession" of the premises "(s)hould the Lessee fail to meet the conditions of this Lease." In early 1971, plaintiff Kathleen Berg took assignment of the lease from the prior lessee, and on May 1, 1971, she opened "A Family Affair Restaurant" on the premises. In January 1973, Berg incorporated the restaurant and assigned her interest in the lease to "A Family Affair Restaurant, Inc." As sole shareholder of the corporation, she alone continued to act for the tenant.

The present dispute has arisen out of Wiley's objection to Berg's continued remodeling of the restaurant without procuring written permission and her consequent operation of the restaurant in a state of disrepair with alleged health code violations. Strained relations between the parties

came to a head in June and July 1973. In a letter dated June 29, 1973, Wiley's attorney charged Berg with having breached lease items 5 and 6 by making changes in the building structure without written authorization and by operating an unclean kitchen in violation of health regulations. The letter demanded that a list of eight remodeling items be completed within 2 weeks from the date of the letter, by Friday, July 13, 1973, or Wiley would retake possession of the premises under lease item 7. Also, a June 13 inspection of the restaurant by the Minnesota Department of Health had produced an order that certain listed changes be completed within specified time limits in order to comply with the health code. The major items on the inspector's list, similar to those listed by Wiley's attorney, were to be completed by July 15, 1973.

During the 2-week deadline set by both Wiley and the health department, Berg continued to operate the restaurant without closing to complete the required items of remodeling. The evidence is in dispute as to whether she intended to permanently close the restaurant and vacate the premises at the end of the 2 weeks or simply close for about 1 month in order to remodel to comply with the health code. At the close of business on Friday, July 13, 1973, the last day of the 2-week period, Berg dismissed her employees, closed the restaurant, and placed a sign in the window saying "Closed for Remodeling." Earlier that day, Berg testified, Wiley came to the premises in her absence and attempted to change the locks. When she returned and asserted her right to continue in possession, he complied with her request to leave the locks unchanged. Berg also testified that at about 9:30 p.m. that evening, while she and four of her friends were in the restaurant, she observed Wiley hanging from the awning peering into the window. Shortly thereafter, she heard Wiley pounding on the back door demanding admittance. Berg called the county sheriff to come and preserve order. Wiley testified that he observed Berg and a group of her friends in the restaurant removing paneling from a wall. Allegedly fearing destruction of his property, Wiley called the city police, who, with the sheriff, mediated an agreement between the parties to preserve the status quo until each could consult with legal counsel on Monday, July 16, 1973.

Wiley testified that his then attorney advised him to take possession of the premises and lock the tenant out. Accompanied by a police officer and a locksmith, Wiley entered the premises in Berg's absence and without her knowledge on Monday, July 16, 1973, and changed the locks. Later in the day, Berg found herself locked out. The lease term was not due to

expire until December 1, 1975. The premises were re-let to another tenant on or about August 1, 1973. Berg brought this damage action against Wiley . . . [for] intentional infliction of emotional distress . . . and other tort damages based upon claims in wrongful eviction. . . . Wiley answered with an affirmative defense of abandonment and surrender and counter-claimed for damage to the premises. . . . With respect to the wrongful eviction claim, the trial court found as a matter of law that Wiley did in fact lock the tenant out, and that the lockout was wrongful.

The jury, by answers to the questions submitted, found no liability on Berg's claim for intentional infliction of emotional distress and no liability on Wiley's counterclaim for damages to the premises, but awarded Berg \$31,000 for lost profits and \$3,540 for loss of chattels resulting from the wrongful lockout. The jury also specifically found that Berg neither abandoned nor surrendered the premises. . . .

On this appeal, Wiley seeks an outright reversal of the damages award for wrongful eviction, claiming insufficient evidence to support the jury's finding of no abandonment or surrender and claiming error in the trial court's finding of wrongful eviction as a matter of law.

The first issue before us concerns the sufficiency of evidence to support the jury's finding that Berg had not abandoned or surrendered the leasehold before being locked out by Wiley. Viewing the evidence to support the jury's special verdict in the light most favorable to Berg, as we must, we hold it amply supports the jury's finding of no abandonment or surrender of the premises. While the evidence bearing upon Berg's intent was strongly contradictory, the jury could reasonably have concluded, based on Berg's testimony and supporting circumstantial evidence, that she intended to retain possession, closing temporarily to remodel. Thus, the lockout cannot be excused on ground that Berg abandoned or surrendered the leasehold.

The second and more difficult issue is whether Wiley's self-help repossession of the premises by locking out Berg was correctly held wrongful as a matter of law.

Minnesota has historically followed the common-law rule that a landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided two conditions are met: (1) The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause; and (2) the landlord's means

of reentry are peaceable. *Mercil v. Broulette*, 69 N.W. 218 (1896). Under the common-law rule, a tenant who is evicted by his landlord may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both. See, e.g., *Poppen v. Wadleigh*, 51 N.W.2d 75 (1952)

Wiley contends that Berg had breached the provisions of the lease, thereby entitling Wiley, under the terms of the lease, to retake possession, and that his repossession by changing the locks in Berg's absence was accomplished in a peaceful manner. In a memorandum accompanying the post-trial order, the trial court stated two grounds for finding the lockout wrongful as a matter of law: (1) It was not accomplished in a peaceable manner and therefore could not be justified under the common-law rule, and (2) any self-help reentry against a tenant in possession is wrongful under the growing modern doctrine that a landlord must always resort to the judicial process to enforce his statutory remedy against a tenant wrongfully in possession. Whether Berg had in fact breached the lease and whether Wiley was hence entitled to possession was not judicially determined. . . .

In applying the common-law rule, we have not before had occasion to decide what means of self-help used to dispossess a tenant in his absence will constitute a nonpeaceable entry, giving a right to damages without regard to who holds the legal right to possession. Wiley argues that only actual or threatened violence used against a tenant should give rise to damages where the landlord had the right to possession. We cannot agree.

It has long been the policy of our law to discourage landlords from taking the law into their own hands, and our decisions and statutory law have looked with disfavor upon any use of self-help to dispossess a tenant in circumstances which are likely to result in breaches of the peace. We gave early recognition to this policy in *Lobdell v. Keene*, 88 N.W. 426, 430 (1901), where we said:

The object and purpose of the legislature in the enactment of the forcible entry and unlawful detainer statute was to prevent those claiming a right of entry or possession of lands from redressing their own wrongs by entering into possession in a violent and forcible manner. All such acts tend to a breach of the peace, and encourage high-handed oppression. The law does not permit the owner of land, be his title ever so good, to be the

judge of his own rights with respect to a possession adversely held, but puts him to his remedy under the statutes.

To facilitate a resort to judicial process, the legislature has provided a summary procedure in Minn. St. 566.02 to 566.17 whereby a landlord may recover possession of leased premises upon proper notice and showing in court in as little as 3 to 10 days. As we recognized in *Mutual Trust Life Ins. Co. v. Berg*, 246 N.W. 9, 10 (1932), "(t)he forcible entry and unlawful detainer statutes were intended to prevent parties from taking the law into their own hands when going into possession of lands and tenements . . ." To further discourage self-help, our legislature has provided treble damages for forcible evictions, §§ 557.08 and 557.09, and has provided additional criminal penalties for intentional and unlawful exclusion of a tenant. § 504.25. In *Sweeney v. Meyers*, *supra*, we allowed a business tenant not only damages for lost profits but also punitive damages against a landlord who, like Wiley, entered in the tenant's absence and locked the tenant out.

In the present case, as in *Sweeney*, the tenant was in possession, claiming a right to continue in possession adverse to the landlord's claim of breach of the lease, and had neither abandoned nor surrendered the premises. Wiley, well aware that Berg was asserting her right to possession, retook possession in her absence by picking the locks and locking her out. The record shows a history of vigorous dispute and keen animosity between the parties. Upon this record, we can only conclude that the singular reason why actual violence did not erupt at the moment of Wiley's changing of the locks was Berg's absence and her subsequent self-restraint and resort to judicial process. Upon these facts, we cannot find Wiley's means of reentry peaceable under the common-law rule. Our long-standing policy to discourage self-help which tends to cause a breach of the peace compels us to disapprove the means used to dispossess Berg. To approve this lockout, as urged by Wiley, merely because in Berg's absence no actual violence erupted while the locks were being changed, would be to encourage all future tenants, in order to protect their possession, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage. . . .

We recognize that the growing modern trend departs completely from the common-law rule to hold that self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises. Annotation, 6 A.L.R.3d 177, 186; 76 Dickinson L. Rev.

215, 227. This growing rule is founded on the recognition that the potential for violent breach of peace inheres in any situation where a landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord. Courts adopting the rule reason that there is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process. At least 16 states have adopted this modern rule, holding that judicial proceedings, including the summary procedures provided in those states' unlawful detainer statutes, are the exclusive remedy by which a landlord may remove a tenant claiming possession. . . .

While we would be compelled to disapprove the lockout of Berg in her absence under the common-law rule as stated, we approve the trial court's reasoning and adopt as preferable the modern view represented by the cited cases. To make clear our departure from the common-law rule for the benefit of future landlords and tenants, we hold that, subsequent to our decision in this case, 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. We find that Minn. St. 566.02 to 566.17 provide the landlord with an adequate remedy for regaining possession in every such case. Where speedier action than provided in §§ 566.02 to 566.17 seems necessary because of threatened destruction of the property or other exigent circumstances, a temporary restraining order under Rule 65, Rules of Civil Procedure, and law enforcement protection are available to the landlord. Considered together, these statutory and judicial remedies provide a complete answer to the landlord. In our modern society, with the availability of prompt and sufficient legal remedies as described, there is no place and no need for self-help against a tenant in claimed lawful possession of leased premises.

Applying our holding to the facts of this case, we conclude, as did the trial court, that because Wiley failed to resort to judicial remedies against Berg's holding possession adversely to Wiley's claim of breach of the lease, his lockout of Berg was wrongful as a matter of law. The rule we adopt in this decision is fairly applied against Wiley, for it is clear that, applying the older common-law rule to the facts and circumstances peculiar to this case, we would be compelled to find the lockout nonpeaceable for the reasons previously stated. The jury found that the lockout caused Berg damage and, as between Berg and Wiley, equity dictates that Wiley, who

himself performed the act causing the damage, must bear the loss.
Affirmed.

Notes and Questions

16.40. Who did what wrong? Kathleen Berg, the tenant, never missed a rent payment. Why, exactly, did Wiley think he was entitled to enter the property and exclude the tenant? Is Rodney Wiley at fault for this dispute? If you were his lawyer at the time, would you have given him different advice? If he was entitled to possession, how did he end up owing \$34,500 to Berg?

16.41. Tending to Cause a Breach of the Peace. In case you aren't convinced that repossession carries an inherent risk of a breach of the peace, consider the story of Erskine G. Bryce. In the summer of 2001, Mr. Bryce—a 66-year-old city marshal in Brooklyn, New York—arrived at the second-story apartment of 53-year-old JoAnne Jones to remove her from possession pursuant to a duly issued court order for her eviction. At the time, Ms. Jones owed about \$14,000 in back rent. She violently attacked the marshal, knocking him over a stairwell railing down to the ground floor below. Mr. Bryce's head hit a refrigerator on the way down. Ms. Jones grabbed an aluminum rod, ran down the stairs, and began beating Mr. Bryce with the rod. She then doused his body with paint thinner and set him on fire with a cigarette lighter. Almost as quickly as it had arisen, Ms. Jones's rage subsided, and she attempted to put out the flames she had ignited by running back and forth to her apartment to fetch basins of water—but it was too late. The medical examiner concluded that Mr. Bryce died from a combination of blunt force injuries and the flames that quickly consumed his upper body—in other words, that he had been beaten to within an inch of his life and then burned alive. C.J. Chivers, *Tenant Held in Murder of Marshal*, N.Y. TIMES (Aug. 23, 2001).

Mr. Bryce had two decades of experience as a marshal and a reputation for dealing calmly and compassionately with those he evicted. He was a stranger to Ms. Jones until he arrived to evict her. But in the moment, the situation still exploded into horrific, deadly violence. How much more likely do we think such violence would be where a landlord—who has a personal stake in recovering possession, no particular professional experience in managing or defusing tense situations, no imprimatur of government authority, and a bitter history with the tenant—attempts to repossess?

16.42. Do landlords love violence? If the court here is correct that all self-help remedies contain the inherent potential for violence, why do landlords

seem so eager to employ them? Why would a landlord ever resist going through the court process, which the Justice Rogoscheske describes as “adequate and speedy”?

16.43. Can landlords stand their ground? Many states have so-called “stand your ground” laws. Stand your ground laws authorize individuals to use deadly force in self-defense when faced with a reasonable threat. There is no duty to retreat first. Why are legislatures concerned about violence in the landlord/tenant context but not in the self-defense setting?

16.44. Costs. Who does the demise of self-help hurt?

16.45. Basic eviction procedure. Every state has now enacted statutes—often referred to as forcible entry and detainer laws—that help landlords to promptly regain possession when a tenant holds over or commits a material breach of the lease. In most jurisdictions, statutes mandate that landlords pursue relief through the court system and refrain from self-help remedies. While these eviction procedures vary between jurisdictions, there are some significant commonalities between most states’ forced entry and detainer laws. In all jurisdictions, for example, a landlord who wishes to evict a tenant must first send the tenant proper written notice. The notice requirement generally obliges the landlord to accurately state the tenant’s name and address, and reveal the nature of the alleged breach. Most states also require the landlord to give the tenant an opportunity (often 3 days, but sometimes as long as 14) to either cure the default or move out. These are often referred to as “Cure or Quit” notices. If the tenant corrects the problem, they must be allowed to stay. However, if the tenant stays in the unit and does not cure the default, the landlord can file a petition for eviction with the local housing court. Upon the landlord’s request, the court will quickly set a trial date and a process server will deliver a summons and complaint to each tenant. Most tenants do not contest their evictions. If the tenant does not respond to the summons, the court will enter a judgment in favor of the landlord and the landlord will then hire a local sheriff to remove the tenant from the property. The entire process generally takes from 20 to 60 days.

16.46. Defending against eviction. Occasionally a tenant will mount a vigorous defense to an eviction notice. The most commonly raised defenses are (1) notice was faulty, (2) the tenant cured the default, (3) the landlord illegally retaliated against the tenant, and, (4) the tenant had a right to withhold rent because the unit failed to meet certain minimum standards required by law.

16.3.6 Tenant Exit: Security Deposits

Most landlords require their tenants to pay a security deposit—a sum of money that the landlord can raid if the tenant defaults on the rent, leaves the unit untidy, or damages any property during the course of the tenancy. State law mandates that if the tenant has complied with all terms of the lease and kept the unit in good order, the landlord must return the security deposit (generally within 30 or 60 days). If the tenant causes damage, the landlord has the right to use the security to restore the unit to its previous condition, but must provide the tenant with a list of damages and receipts for the repairs.

Although the law of security deposits is generally crystal-clear, a huge number of renters report that they have unfairly lost deposit money to their landlords. Why is this so? Game theorists argue that the structure of the landlord-tenant relationship makes disputes over security deposits almost unavoidable. The key insight is that while the tenancy is ongoing, landlords and tenants have incentives to get along and make compromises—the landlord wants the tenant to make timely rent payments and the tenant wants the landlord to respond quickly when problems arise. However, once the landlord and tenant decide to end their relationship, there are few checks to prevent bad behavior. If the landlord will never interact with the tenant again, why not fudge a little bit with security deposit? Additionally, the small amounts of money involved security deposit disputes mean that it's rarely worth hiring a lawyer or taking the time to sue the landlord in small claims court.

Notes and Questions

16.47. **Tenant self help?** If tenants recognize that landlords often cheat them out of their security deposits, why don't more tenants respond by refusing to pay the last month's rent? After all, eviction procedures almost always take longer than 30 days.

16.48. **America v. England.** To solve the security deposit dilemma, English law does not permit landlords to keep their tenants' deposits. Rather, they must place them with a government-approved holding agency. If a dispute arises over the money at the end of the lease, the parties are referred to an arbitrator who works for the organization that holds the money. The dispute resolution service does not charge either party but they are bound by its decision. Should jurisdictions in the U.S. move toward this model? Would it change your opinion to know that English landlords routinely fail to comply with these rules? Are

there other solutions worth considering?

16.4 The Quest for Clean, Safe, and Affordable Premises

In feudal England, policy makers and government officials expressed little concern over the housing conditions of renters. The law was well-settled: Once a landlord turned over the right of possession, the tenant became responsible for maintenance of the leased property. If a tenant decided to live in squalor rather than complete basic repairs, that was the tenant's problem, not the landlord's worry. Although it may seem counterintuitive to modern readers (who rely on landlords to fix nearly everything), putting the burden on the tenant to maintain the property actually produced efficient results in the medieval world: landlords often lived long distances from their lessees, communication was slow, houses were simply constructed, and most tenants had the knowledge and skills to complete basic repairs.

The basic principle that tenants are responsible for their own living conditions remained unchallenged until the 1960s, when both academics and politicians expressed growing concern about the rental housing stock in central cities. Many worried that exploitative landlords were flouting safety regulations and taking advantage of tenants who had few housing choices as a result of their poverty and the rampant discrimination in the housing market. The problems in the poorest neighborhoods also had spillover effects in surrounding communities—disease, vermin, and fires do not respect municipal borders. In response to these problems, the law began to vest tenants with a new series of rights against their landlords. This subsection traces the evolution of these rights and explores the rise of legal tools to ensure minimum housing standards for all renters.

16.4.1 The Covenant of Quiet Enjoyment

Traditional common law principles do not leave renters completely defenseless against unprincipled landlords. Every lease, whether residential or commercial, contains a **covenant of quiet enjoyment**. Often this promise is explicitly stated in the lease contract. Where it's not specifically mentioned, all courts will imply it into the agreement. The basic idea is that the landlord cannot in-

terfere with the tenant's use of the property. Most courts state the legal test this way: A breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant's use or enjoyment of the premises.

Consider the following hypothetical:

Little Bo Peep Detective Services rents the second floor of a four-floor building. A year into the five-year lease, the landlord suddenly begins a construction project designed to update the suites on the first floor. These renovations create loud noise and regular interruptions of electric service. The construction work has also made the parking lot inaccessible. Employees and customers need to walk a quarter-mile to access the building from a nearby parking garage.

Do these problems amount to a violation of the covenant of quiet enjoyment? To determine whether the interference is "substantial" courts generally consider the purpose the premises are leased for, the foreseeability of the problem, the potential duration, and the degree of harm. In this example, if the construction project lasts for more than a few days, then Little Bo Peep can most likely bring a successful claim against its landlord under the covenant of quiet enjoyment. The problems here are not mere trifles—the noise, lack of electricity, and inadequate parking fundamentally affect the company's ability to use the property as they intended.

The difficult conceptual issue with the covenant of quiet enjoyment concerns the remedy. If the landlord breaks the covenant, what are the tenant's options? After a breach, the tenant can always choose to stay in the leased property, continue to pay rent, and sue the landlord for damages.

Additionally, certain violations of the covenant of quiet enjoyment allow the tenant to consider the lease terminated, leave, and stop paying rent. Recall from Chapter 16.2.4 that the landlord's fundamental responsibility is to provide the tenant with possession (or, in some jurisdictions, the right to possession). From that principle, courts developed a rule that in cases where the landlord wrongfully evicts the tenant, all the tenant's obligations under the lease cease. Imagine:

Landlord and tenant both sign a lease that reads, "Landlord agrees to provide Tenant with possession of 123 Meadowlark Lane for a period of 12 months beginning April 1. Tenant agrees to pay \$100 per month." After 4 months, however, the Landlord retakes possession of the property by forcing the tenant out and changing the locks.

Assuming the tenant hasn't committed a material breach, the landlord's actions constitute an obvious violation of the covenant of quiet enjoyment—the tenant can no longer use the property for any purpose. Thus, any eviction where the tenant is physically denied access to the unit ends the tenant's obligation to pay rent and allows the tenant to sue for damages incurred from being removed from possession (A tenant could also sue to regain the unit). The law is very clear on this point. Relatedly, if the landlord denies the tenant access to some portion of the rented space (say, an allotted parking space) that, too, constitutes a breach of the covenant of quiet enjoyment. The tenant subject to such a partial eviction has the option to terminate the lease and sue for damages.

But what if the landlord doesn't physically interfere with her tenant's occupancy? What if the landlord creates an environment that's so miserable that the tenant is forced to flee? Is this an "eviction" that would allow the tenant to consider the lease terminated or must the tenant stay and continue paying rent while he brings a damages lawsuit?

Fidelity Mutual Life Insurance Co. v. Kaminsky

768 S.W.2d 818 (Tex. App. 1989)

MURPHY, Justice.

The issue in this landlord-tenant case is whether sufficient evidence supports the jury's findings that the landlord and appellant, Fidelity Mutual Life Insurance Company ["Fidelity"], constructively evicted the tenant, Robert P. Kaminsky, M.D., P.A. ["Dr. Kaminsky"] by breaching the express covenant of quiet enjoyment contained in the parties' lease. We affirm.

Dr. Kaminsky is a gynecologist whose practice includes performing elective abortions. In May 1983, he executed a lease contract for the rental of approximately 2,861 square feet in the Red Oak Atrium Building for a two year term which began on June 1, 1983. The terms of the lease required Dr. Kaminsky to use the rented space solely as "an office for the practice of medicine." Fidelity owns the building and hires local companies to manage it. At some time during the lease term, Shelter Commercial Properties ["Shelter"] replaced the Horne Company as managing agents. Fidelity has not disputed either management company's capacity to act as its agent.

The parties agree that: (1) they executed a valid lease agreement; (2) Paragraph 35 of the lease contains an express covenant of quiet enjoy-

ment conditioned on Dr. Kaminsky's paying rent when due, as he did through November 1984; Dr. Kaminsky abandoned the leased premises on or about December 3, 1984 and refused to pay additional rent; anti-abortion protestors began picketing at the building in June of 1984 and repeated and increased their demonstrations outside and inside the building until Dr. Kaminsky abandoned the premises.

When Fidelity sued for the balance due under the lease contract following Dr. Kaminsky's abandonment of the premises, he claimed that Fidelity constructively evicted him by breaching Paragraph 35 of the lease. Fidelity apparently conceded during trial that sufficient proof of the constructive eviction of Dr. Kaminsky would relieve him of his contractual liability for any remaining rent payments. Accordingly, he assumed the burden of proof and the sole issue submitted to the jury was whether Fidelity breached Paragraph 35 of the lease, which reads as follows:

Quiet Enjoyment.

Lessee, on paying the said Rent, and any Additional Rental, shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the said term.

A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant's beneficial use of the premises. *See Downtown Realty, Inc. v. 509 Tremont Bldg.*, 748 S.W.2d 309, 313 (Tex. App.—Houston [14th Dist.] 1988, n.w.h.).*, Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if he can establish a constructive eviction by the landlord. . . .

In order to prevail on his claim that Fidelity constructively evicted him and thereby relieved him of his rent obligation, Dr. Kaminsky had to show the following: 1) Fidelity intended that he no longer enjoy the premises, which intent the trier of fact could infer from the circumstances; 2) Fidelity, or those acting for Fidelity or with its permission, committed a material act or omission which substantially interfered with use and enjoyment of the premises for their leased purpose, here an office for the practice of medicine; 3) Fidelity's act or omission permanently deprived Dr.

*Texas courts follow state-specific citation rules of the *Greenbook*, published by the Texas Law Review. Among other things, citations to Texas appellate decisions must contain an indication of subsequent case history at the Texas Supreme Court. Here, "n.w.h." means "no writ history." —Eds.

Kaminsky of the use and enjoyment of the premises; and 4) Dr. Kaminsky abandoned the premises within a reasonable period of time after the act or omission. *E.g., Downtown Realty, Inc.*, 748 S.W.2d at 311

[T]he jury found that Dr. Kaminsky had established each element of his constructive eviction defense. The trial court entered judgment that Fidelity take nothing on its suit for delinquent rent.

Fidelity raises four points of error. . . .

Fidelity's first point of error relies on *Angelo v. Deutser*, 30 S.W.2d 707 (Tex. Civ. App.—Beaumont 1930, no writ), *Thomas v. Brin*, 38 Tex. Civ. App. 180, 85 S.W. 842 (1905, no writ) and *Sedberry v. Verplanck*, 31 S.W. 242 (Tex. Civ. App. 1895, no writ). These cases all state the general proposition that a tenant cannot complain that the landlord constructively evicted him and breached a covenant of quiet enjoyment, express or implied, when the eviction results from the actions of third parties acting without the landlord's authority or permission. Fidelity insists the evidence conclusively establishes: a) that it did nothing to encourage or sponsor the protestors and; b) that the protestors, rather than Fidelity or its agents, caused Dr. Kaminsky to abandon the premises. Fidelity concludes that reversible error resulted because the trial court refused to set aside the jury's answers to the special issues and enter judgment in Fidelity's favor and because the trial court denied its motion for a new trial. We disagree. . . .

The protests took place chiefly on Saturdays, the day Dr. Kaminsky generally scheduled abortions. During the protests, the singing and chanting demonstrators picketed in the building's parking lot and inner lobby and atrium area. They approached patients to speak to them, distributed literature, discouraged patients from entering the building and often accused Dr. Kaminsky of "killing babies." As the protests increased, the demonstrators often occupied the stairs leading to Dr. Kaminsky's office and prevented patients from entering the office by blocking the doorway. Occasionally they succeeded in gaining access to the office waiting room area.

Dr. Kaminsky complained to Fidelity through its managing agents and asked for help in keeping the protestors away, but became increasingly frustrated by a lack of response to his requests. The record shows that no security personnel were present on Saturdays to exclude protestors from the building, although the lease required Fidelity to provide security service on Saturdays. The record also shows that Fidelity's attorneys prepared a written statement to be handed to the protestors soon after Fidelity hired Shelter as its managing agent. The statement tracked TEX. PENAL CODE

ANN. § 30.05 (Vernon Supp. 1989) and generally served to inform trespassers that they risked criminal prosecution by failing to leave if asked to do so. Fidelity's attorneys instructed Shelter's representative to "have several of these letters printed up and be ready to distribute them and verbally demand that these people move on and off the property." The same representative conceded at trial that she did not distribute these notices. Yet when Dr. Kaminsky enlisted the aid of the Sheriff's office, officers refused to ask the protestors to leave without a directive from Fidelity or its agent. Indeed, an attorney had instructed the protestors to remain unless the landlord or its representative ordered them to leave. It appears that Fidelity's only response to the demonstrators was to state, through its agents, that it was aware of Dr. Kaminsky's problems.

Both action and lack of action can constitute "conduct" by the landlord which amounts to a constructive eviction. *E.g., Downtown Realty Inc.*, 748 S.W.2d at 311. In *Steinberg v. Medical Equip. Rental Serv., Inc.*, 505 S.W.2d 692 (Tex. Civ. App.—Dallas 1974, no writ) accordingly, the court upheld a jury's determination that the landlord's failure to act amounted to a constructive eviction and breach of the covenant of quiet enjoyment. 505 S.W.2d at 697. Like Dr. Kaminsky, the tenant in Steinberg abandoned the leased premises and refused to pay additional rent after repeatedly complaining to the landlord. The Steinberg tenant complained that Steinberg placed trash bins near the entrance to the business and allowed trucks to park and block customer's access to the tenant's medical equipment rental business. The tenant's repeated complaints to Steinberg yielded only a request "to be patient." *Id.* Fidelity responded to Dr. Kaminsky's complaints in a similar manner: although it acknowledged his problems with the protestors, Fidelity, like Steinberg, effectively did nothing to prevent the problems.

This case shows ample instances of Fidelity's failure to act in the fact of repeated requests for assistance despite its having expressly covenanted Dr. Kaminsky's quiet enjoyment of the premises. These instances provided a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the leased premises, not because of the trespassing protestors, but because of Fidelity's lack of response to his complaints about the protestors. Under the circumstances, while it is undisputed that Fidelity did not "encourage" the demonstrators, its conduct essentially allowed them to continue to trespass. The general rule of the *Angelo, Thomas* and *Sedberry* cases, that a landlord is not responsible for the actions of third parties, applies only when the landlord does not permit the third party to

act. See e.g., *Angelo*, 30 S.W.2d at 710 [“the act or omission complained of must be that of the landlord and not merely of a third person *acting without his authority or permission*” (emphasis added)]. We see no distinction between Fidelity’s lack of action here, which the record shows resulted in preventing patients’ access to Dr. Kaminsky’s medical office, and the *Steinberg* case where the landlord’s inaction resulted in trucks’ blocking customer access to the tenant’s business. We overrule the first point of error. . . .

In its [final] point of error, Fidelity maintains the evidence is factually insufficient to support the jury’s finding that its conduct permanently deprived Dr. Kaminsky of use and enjoyment of the premises. Fidelity essentially questions the permanency of Dr. Kaminsky’s being deprived of the use and enjoyment of the leased premises. To support its contentions, Fidelity points to testimony by Dr. Kaminsky in which he concedes that none of his patients were ever harmed and that protests and demonstrations continued despite his leaving the Red Oak Atrium building. Fidelity also disputes whether Dr. Kaminsky actually lost patients due to the protests.

The evidence shows that the protestors, whose entry into the building Fidelity failed to prohibit, often succeeded in blocking Dr. Kaminsky’s patients’ access to his medical office. Under the reasoning of the *Steinberg* case, omissions by a landlord which result in patients’ lack of access to the office of a practicing physician would suffice to establish a permanent deprivation of the use and enjoyment of the premises for their leased purpose, here “an office for the *practice* of medicine.” *Steinberg*, 505 S.W.2d at 697; accord, *Downtown Realty, Inc.*, 748 S.W.2d at 312 (noting jury’s finding that a constructive eviction resulted from the commercial landlord’s failure to repair a heating and air conditioning system in a rooming house).

Texas law has long recited the requirement, first stated in *Stillman*, 266 S.W.2d at 916, that the landlord commit a “material and permanent” act or omission in order for his tenant to claim a constructive eviction. However, as the *Steinberg* and *Downtown Realty, Inc.* cases illustrate, the extent to which a landlord’s acts or omissions permanently and materially deprive a tenant of the use and enjoyment of the premises often involves a question of degree. Having reviewed all the evidence before the jury in this case, we cannot say that its finding that Fidelity’s conduct permanently deprived Dr. Kaminsky of the use and enjoyment of his medical office space was so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule the fourth point of error.

We affirm the judgment of the trial court.

Notes and Questions

16.49. **Evolution of the doctrine.** As discussed above, English judges widely recognized that tenants could terminate the lease (and sue for damages) if the landlord physically denied them possession of the rented property. Eventually the basic concept was expanded to situations where the landlord commits some act that, while it falls short of an actual eviction, so severely affects the value of the tenancy that the tenant is forced to flee. This is known as **constructive eviction**.

16.50. **Basic constructive eviction law.** To make a claim of constructive eviction a tenant must show that some act or omission by the landlord substantially interferes with the tenant's use and enjoyment of the property. The tenant also needs to notify the landlord about the problem, give the landlord an opportunity to cure the defect, and then vacate the premises within a reasonable amount of time.

16.51. **Stay or go?** Why might a tenant contemplating bringing a constructive eviction claim worry about the requirement to vacate the premises? Is constructive eviction a more powerful remedy in a place like San Francisco, which has a very tight housing market, or Houston, which has more open units?

16.52. **Landlord's wrongful conduct.** To make use of the doctrine of quiet enjoyment, the tenant must show that the landlord committed some wrongful act. There's wide agreement that any affirmative step taken by the landlord that impedes the tenant's use of the property can meet the requirement of an "act." Examples would include burning toxic substances on the property, prolonged construction activities, or a substantial alteration of an essential feature of the leased premises. The trickier doctrinal question is whether a landlord's failure to act can ever qualify as the wrongful conduct. Traditionally, courts hesitated to impose liability on landlords for their omissions, but the law of most states now asserts that a "lack of action" can constitute the required act. For example, a landlord's failure to provide heat in the winter months is generally found to violate the covenant of quiet enjoyment. Some courts, nervous about unjustly expanding landlords' potential liability, deem omissions wrongful only when the landlord fails to fulfill some clear duty—either a duty bargained for in the lease or a statutory duty.

16.53. **Troublesome tenants.** Suppose your landlord rents the floor above your apartment to the members of a Led Zeppelin cover band. If the band prac-

tices every night between the hours of 3:00 am and 4:00 am, could you bring a successful constructive eviction claim against the landlord?

16.54. **Third parties.** What if the Led Zeppelin cover band played every night at a club across the street? If the noise from the bar kept you awake, could you sue your landlord for constructive eviction?

16.4.2 The Implied Warranty of Habitability

Although the covenant of quiet enjoyment offers tenants some protections, the doctrine—without more—can leave renters exposed to dreadful living conditions. What if cockroaches invade a tenant’s apartment? Or a sewer pipe in the basement begins to leak? What if a storm shatters the windows of the apartment? Or a wall of a building falls down? Unless the landlord somehow caused any of these disasters (or had a clearly articulated duty to fix them) a tenant cannot bring a successful case under the covenant of quiet enjoyment. In *Hughes v. Westchester Development Corp.*, 77 F.2d 550 (D.C. Cir. 1935), for example, vermin invaded the tenant’s apartment, making it “impossible to use the kitchen and toilet facilities.” Despite the infestation, the court found that the tenant remained responsible for the rent because the landlord was not to blame for the bugs’ sudden appearance. Leases, the court ruled, contained no implied promise that the premises were fit for the purpose it was leased. If tenants desired more and better protection, they had the burden to bargain for such provisions in the lease.

All of this changed in the late 1960s and early 70s. The most lasting accomplishment of the tenants’ rights movement was the widespread adoption of the **implied warranty of habitability**. In the United States, only Arkansas has failed to adopt the rule as of 2023. In a nutshell, the implied warranty of habitability imposes a duty on landlords to provide residential tenants with a clean, safe, and habitable living space.

Hilder v. St. Peter
478 A.2d 202 (Vt. 1984)

BILLINGS, Chief Justice.

Defendants appeal from a judgment rendered by the Rutland Superior Court. The court ordered defendants to pay plaintiff damages in the amount of \$4,945.00, which represented “reimbursement of all rent paid

and additional compensatory damages" for the rental of a residential apartment over a fourteen month period in defendants' Rutland apartment building. Defendants filed a motion for reconsideration on the issue of the amount of damages awarded to the plaintiff, and plaintiff filed a cross-motion for reconsideration of the court's denial of an award of punitive damages. The court denied both motions. On appeal, defendants raise [two] issues for our consideration: first, whether the court correctly calculated the amount of damages awarded the plaintiff; secondly, whether the court's award to plaintiff of the entire amount of rent paid to defendants was proper since the plaintiff remained in possession of the apartment for the entire fourteen month period. . . .

The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants' 10-12 Church Street apartment building in Rutland with her three children and new-born grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter \$140 a month and a damage deposit of \$50; plaintiff paid defendant the first month's rent and the damage deposit prior to moving in. Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff's damage deposit if she would clean the apartment herself prior to taking possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff's tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff attached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plain-

tiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants' building. Raw sewage littered the floor of the basement, but defendant failed to clean it up. Plaintiff also discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff's tenancy, to furnish heat.

In its conclusions of law, the court held that the state of disrepair of plaintiff's apartment, which was known to the defendants, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of the implied warranty of habitability. The court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that the court misapplied the law of Vermont relating to habitability because the plaintiff never abandoned the demised premises and, therefore, it was error to award her the full amount of rent paid. Plaintiff counters that, while never expressly recognized by this Court, the trial court was correct in applying an implied warranty of habitability and that under this warranty, abandonment of the premises is not required. Plaintiff urges this Court to affirmatively adopt the implied warranty of habitability.

Historically, relations between landlords and tenants have been defined by the law of property. Under these traditional common law property concepts, a lease was viewed as a conveyance of real property. See Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 Cornell L.Q. 489, 489–90 (1971) (hereinafter cited as *Expansion of Tenants' Rights*). The relationship between landlord and tenant was controlled by the doctrine of

caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis. L. Rev. 19, 27–28. The landlord's only covenant was to deliver possession to the tenant. The tenant's obligation to pay rent existed independently of the landlord's duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. *Expansion of Tenants' Rights, supra*, at 490. The land, not the dwelling, was regarded as the essence of the conveyance.

An exception to the rule of caveat lessee was the doctrine of constructive eviction. *Lemle v. Breeden*, 462 P.2d 470, 473 (Haw. 1969). Here, if the landlord wrongfully interfered with the tenant's enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. *Legier v. Deveneau*, 126 A. 392, 393 (Vt. 1924).

Beginning in the 1960's, American courts began recognizing that this approach to landlord and tenant relations, which had originated during the Middle Ages, had become an anachronism in twentieth century, urban society. Today's tenant enters into lease agreements, not to obtain arable land, but to obtain safe, sanitary and comfortable housing.

[T]hey seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

Not only has the subject matter of today's lease changed, but the characteristics of today's tenant have similarly evolved. The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling. *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974). Additionally, "the common law courts assumed that an equal bargaining position existed between landlord and tenant. . . ." Note, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L. REV. 237, 238 (1980) (hereinafter cited as *A Dream Deferred*).

In sharp contrast, today's residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. *Green v. Superior Court, supra*, 517 P.2d at 1173. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to "discover and cure" any faults and break-downs. *Id.* Confronted with a recognized shortage of safe, decent housing, see 24 V.S.A. § 4001(1), today's tenant is in an inferior bargaining position compared to that of the landlord. *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979). Tenants vying for this limited housing are "virtually powerless to compel the performance of essential services." *Id.*

In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.

The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition.

Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 842 (Mass. 1973).

Recognition of residential leases as contracts embodying the mutual covenants of habitability and payment of rent does not represent an abrupt change in Vermont law. Our case law has previously recognized that contract remedies are available for breaches of lease agreements. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 381 A.2d 1063, 1065 (Vt. 1977). . . . More significantly, our legislature, in establishing local housing authorities, 24 V.S.A. § 4003, has officially recognized the need for assuring the existence of adequate housing.

[S]ubstandard and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents

which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists . . .

24 V.S.A. § 4001(4). In addition, this Court has assumed the existence of an implied warranty of habitability in residential leases. *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983).

Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will. *Boston Housing Authority v. Hemingway*, *supra*, 293 N.E.2d at 843. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit. *Id.* Essential facilities are “facilities vital to the use of the premises for residential purposes. . . .” *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971). This means that a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty. Nor can this implied warranty of habitability be waived by any written provision in the lease or by oral agreement.

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)–5003(c)(5). A substantial violation of an applicable housing code shall constitute *prima facie* evidence that there has been a breach of the warranty of habitability. “[O]ne or two minor violations standing alone which do not affect” the health or safety of the tenant, shall be considered *de minimis* and not a breach of the warranty. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n.63. . . . In addition, the landlord will not be liable for defects caused by the tenant. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n.62.

However, these codes and standards merely provide a starting point in determining whether there has been a breach. Not all towns and municipi-

palities have housing codes; where there are codes, the particular problem complained of may not be addressed. *Park West Management Corp. v. Mitchell*, *supra*, 391 N.E.2d at 1294. In determining whether there has been a 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. *Id.*

In order to bring a cause of action for 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 correction." *King v. Moorehead*, *supra*, 495 S.W.2d at 76.

Because we hold that the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. *Lemle v. Breeden*, *supra*, 462 P.2d at 475. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. *Birkenhead v. Coombs*, *supra*, 465 A.2d at 246. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue. *Id.* "[I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony" concerning the value of the defect. *Id.* at 247. The tenant will be liable only for "the reasonable rental value [if any] of the property in its imperfect condition during his period of occupancy." *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the implied warranty of habitability. See Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1470-73 (1974) (hereinafter cited as *A New Doctrine*); *A Dream Deferred*, *supra*, at 250-51. Damages for annoyance and discomfort are reasonable in light of the fact that:

the residential tenant who has suffered a breach of the warranty . . . cannot bathe as frequently as he would like or at all if there is inadequate hot water; he must worry about rodents harassing his children or spreading disease if the premises are in-

fested; or he must avoid certain rooms or worry about catching a cold if there is inadequate weather protection or heat. Thus, discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.

Moskovitz, *A New Doctrine*, *supra*, at 1470–71. Damages for discomfort and annoyance may be difficult to compute; however, “[t]he trier [of fact] is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard.” *Vermont Electric Supply Co. v. Andrus*, 315 A.2d 456, 459 (Vt. 1974).

Another remedy available to the tenant when there has been a breach of the implied warranty of habitability is to withhold the payment of future rent. *King v. Moorehead*, *supra*, 495 S.W.2d at 77. The burden and expense of bringing suit will then be on the landlord who can better afford to bring the action. In an action for ejectment for nonpayment of rent, 12 V.S.A. § 4773, “[t]he trier of fact, upon evaluating the seriousness of the breach and the ramification of the defect upon the health and safety of the tenant, will abate the rent at the landlord’s expense in accordance with its findings.” *A Dream Deferred*, *supra*, at 248. The tenant must show that: (1) the landlord had notice of the previously unknown defect and failed, within a reasonable time, to repair it; and (2) the defect, affecting habitability, existed during the time for which rent was withheld. *See A Dream Deferred*, *supra*, at 248–50. Whether a portion, all or none of the rent will be awarded to the landlord will depend on the findings relative to the extent and duration of the breach. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082–83. Of course, once the landlord corrects the defect, the tenant’s obligation to pay rent becomes due again. *Id.* at 1083 n. 64.

Additionally, we hold that when the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent. 11 Williston on Contracts § 1404 (3d ed. W. Jaeger 1968); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

In addition to general damages, we hold that punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. *Claren-*

Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra, 381 A.2d at 1065. A willful and wanton or fraudulent breach may be shown "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting . . . a reckless or wanton disregard of [one's] rights . . ." *Sparrow v. Vermont Savings Bank*, 112 A. 205, 207 (Vt. 1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper. *111 East 88th Partners v. Simon*, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980).

The purpose of punitive damages . . . is to punish conduct which is morally culpable. . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action. . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

Davis v. Williams, 402 N.Y.S.2d 92, 94 (N.Y. Civ. Ct. 1977).

In the instant case, the trial court's award of damages, based in part on a breach of the implied warranty of habitability, was not a misapplication of the law relative to habitability. Because of our holding in this case, the doctrine of constructive eviction, wherein the tenant must abandon in order to escape liability for rent, is no longer viable. When, as in the instant case, the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly unnecessary. *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc., supra*, 418 A.2d at 26-27. Under our holding, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid.

In its conclusions of law the trial court stated that the defendants' failure to make repairs was compensable by damages to the extent of reimbursement of all rent paid and additional compensatory damages. The court awarded plaintiff a total of \$4,945.00; \$3,445.00 represents the entire amount of rent plaintiff paid, plus the \$50.00 deposit. . . .

Additionally, the court denied an award to plaintiff of punitive damages on the ground that the evidence failed to support a finding of willful and wanton or fraudulent conduct. See *Clarendon Mobile Home Sales, Inc.*

v. *Fitzgerald, supra*, 381 A.2d at 1065. The facts in this case, which defendants do not contest, evince a pattern of intentional conduct on the part of defendants for which the term “slumlord” surely was coined. Defendants’ conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff’s rights. The trial court found that defendants were aware of defects in the essential facilities of plaintiff’s apartment, promised plaintiff that repairs would be made, but never fulfilled those promises. The court also found that plaintiff continued, throughout her tenancy, to pay her rent, often in the face of verbal threats made by defendant Stuart St. Peter. These findings point to the “bad spirit and wrong intention” of the defendants, *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983), and would support a finding of willful and wanton or fraudulent conduct, contrary to the conclusions of law and judgment of the trial judge. However, the plaintiff did not appeal the court’s denial of punitive damages, and issues not appealed and briefed are waived. *R. Brown & Sons, Inc. v. International Harvester Corp.*, 453 A.2d 83, 84 (Vt. 1982).

Notes and Questions

16.55. **Residential v. commercial.** Unlike the covenant of quiet enjoyment, the implied warranty of habitability only applies to residential leases. Commercial tenants still largely operate under common-law legal rules. Commonly, commercial landlords and tenants do not rely on the default rules, but rather assign the duty of upkeep and repair with an express provision in the lease.

16.56. **What is habitability?** Do all defects in an apartment amount to violations? What is the standard of habitability as laid out in *Hilder*?

16.57. **Paternalism?** Is the implied warranty of habitability too paternalistic? Some economists argue that the poorest Americans should have more freedom over how they spend their limited dollars. Isn’t it possible that some individuals might want to occupy a really cheap (if slightly dangerous) dwelling so that they have more money to spend on healthy foods, transportation, and clothes? Would it matter if the evidence showed that such apartments were in fact cheaper than “habitable” apartments?

16.58. **Necessary?** Do you agree with the arguments made by the court in *Hilder* about the necessity of the implied warranty of habitability? Don’t landlords already have excellent incentives to maintain their buildings?

16.59. **Arkansas and beyond.** As mentioned above, Arkansas is the one state that has not adopted the implied warranty of habitability—either by

statute or judicial fiat. Is Arkansas a Mad Max-style hellscape for renters? Are tenants there worse (or worse off) than the tenants in other states? Some people think so. *Vice* magazine recently dubbed Arkansas, “The Worst Place to Rent in America.” See *Arkansas: The Worst Place to Rent in America*, VICE NEWS (June 24, 2014), <https://www.youtube.com/watch?v=...>. But does the implied warranty of habitability provide much practical protection? Do poor tenants know about it? Do they have the resources to push back against aggressive landlords who threaten lawsuits and other forms of retaliation? Professor David Super has suggested that the decision of tenants’ rights movement to focus on habitability over affordability and overcrowding was a strategic mistake. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389-463 (2011). Is there a nirvana for renters anywhere?

16.60. **Procedure & remedies.** If a tenant believes his apartment does not meet the standard of habitability, he must first must notify the landlord of the defects and give the landlord a reasonable amount of time to cure the problems. If the landlord either cannot or will not make repairs, the implied warranty of habitability offers the renter a menu of options. Each option presents a different combination of costs and risks to the tenant. If the landlord breaches, the tenant may:

1. *Leave, terminate contract.* The tenant may consider the lease terminated and move out.
2. *Stay and sue for damages.* As with the covenant of quiet enjoyment, a tenant may stay in the unit and pay rent, while suing the landlord for damages. There is significant disagreement among jurisdictions about how to calculate damages. In *Hilder*, the court uses the difference between the rental price of the dwelling if it met the standard of habitability and the value of the dwelling as it exists; the rent charged is not evidence of actual value, but rather evidence of the appropriate price if it met the standard of habitability. [Note that given the court’s calculation, the value was apparently zero?] Other courts look at the difference between the amount of rent stated in the lease and the fair market value of the premises. What is the better approach? Should the rent charged be considered evidence of fair market value? If not, why not?
3. *Stay and charge the cost of repair.* A tenant has the option to fix the defect and then deduct the cost of repair from the rent.
4. *Stay and withhold rent.* In most jurisdictions, a tenant can withhold the entire rent for violations of the implied warranty of habitability (although, a

cautious tenant should pay the rent into an escrow account). This is a very powerful remedy. First, it gives the landlord strong incentive to respond to valid complaints from tenants. Second, it puts the burden on the landlord (rather than the tenant) to initiate a lawsuit when contested issues arise. Finally, if the landlord does move to evict the tenant for non-payment, violations of the implied warranty of habitability can serve as a defense.

5. *Extreme violations.* Tenants have won punitive damages in cases where the landlord committed repeated or gruesome violations of the implied warranty.

Problem

16.61. The Mad Hatter and the Alice each decide to rent an apartment in Wonderland. The Mad Hatter walks into a large apartment and sees a hole in the roof, but he decides to rent the unit anyway. The apartment that Alice decides to lease has no obvious problems. The next day, however, some mold spots appear by one of the vents. The mold grows rapidly and Alice starts to have regular headaches and some trouble breathing. Additionally, an unknown troublemaker smashed Alice's air conditioning unit and it no longer works. Can either the Mad Hatter or Alice win a lawsuit against their landlord if their problems aren't fixed?

16.4.3 Retaliatory Eviction

Imperial Colliery Co. v. Fout
373 S.E.2d 489 (W. Va. 1988)

Danny H. Fout, the defendant below, appeals a summary judgment dismissing his claim of retaliatory eviction based on the provisions of W. Va. Code, 55-3A-3(g), which is our summary eviction statute. Imperial Colliery had instituted an eviction proceeding and Fout sought to defend against it, claiming that his eviction was in retaliation for his participation in a labor strike.

This case presents two issues: (1) whether a residential tenant who is sued for possession of rental property under W. Va. Code, 55-3A-1, *et seq.*, may assert retaliation by the landlord as a defense, and (2) whether the retaliation motive must relate to the tenant's exercise of a right incidental to the tenancy.

Fout is presently employed by Milburn Colliery Company as a coal miner. For six years, he has leased a small house trailer lot in Burnwell, West Virginia, from Imperial Colliery Company. It is alleged that Milburn and Imperial are interrelated companies. A written lease was signed by Fout and an agent of Imperial in June, 1983. This lease was for a primary period of one month, and was terminable by either party upon one month's notice. An annual rental of \$1.00 was payable in advance on January 1 of each year. No subsequent written leases were signed by the parties.

On February 14, 1986, Imperial advised Fout by certified letter that his lease would be terminated as of March 31, 1986. Fout's attorney corresponded with Imperial before the scheduled termination date. He advised that due to various family and monetary problems, Fout would be unable to timely vacate the property. Imperial voluntarily agreed to a two-month extension of the lease. A second letter from Fout's attorney, dated May 27, 1986, recited Fout's personal problems and requested that Imperial's attempts to oust Fout be held "in abeyance" until they were resolved. A check for \$1.00 was enclosed to cover the proposed extension. Imperial did not reply.

On June 11, 1986, Imperial sued for possession of the property, pursuant to W. Va. Code, 55-3A-1, *et seq.*, in the Magistrate Court of Kanawha County. Fout answered and removed the suit to the circuit court on June 23, 1986. He asserted as a defense that Imperial's suit was brought in retaliation for his involvement in the United Mine Workers of America and, more particularly, in a selective strike against Milburn. Imperial's retaliatory motive was alleged to be in violation of the First Amendment rights of speech and assembly, and of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* Fout also counter-claimed, seeking an injunction against Imperial and damages for annoyance and inconvenience.

After minimal discovery, Imperial moved for summary judgment. The circuit court granted Imperial's motion in an amended judgment order dated October 8, 1986, relying principally upon *Criss v. Salvation Army Residences*, 173 W.Va. 634, 319 S.E.2d 403 (1984). The court concluded that the retaliation defense "must derive from, or in some respect be related to, exercise by the tenant of rights incident to his capacity as a 'tenant'." Since Fout's participation in the labor strike was admittedly unrelated to his tenancy, the defense was dismissed and possession of the property was awarded to Imperial. It is from this order that Fout appeals.

Our initial inquiry is whether retaliation by the landlord may be asserted by the tenant as a defense in a suit under W. Va. Code, 55-3A-3(g). We addressed this issue in *Criss v. Salvation Army Residences, supra*, and stated without any extended discussion that this section “specifically provides for the defense of retaliation.” 173 W. Va. at 640, 319 S.E.2d at 409. We did not have occasion in *Criss* to trace the development of the retaliatory eviction defense.

It appears that the first case that recognized retaliatory eviction as a defense to a landlord’s eviction proceeding was *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). There, a month-to-month tenant who resided in a District of Columbia apartment complex reported to a local health agency a number of sanitary code violations existing in her apartment. The agency investigated and ordered that remedial steps be taken by the landlord, who then advised Edwards that her lease was terminated. When the landlord sued for possession of the premises, Edwards alleged the suit was brought in retaliation for her reporting of the violations. A verdict was directed for the landlord and Edwards appealed.

On appeal, the court reviewed at length the goals sought to be advanced by local sanitary and safety codes. It concluded that to allow retaliatory evictions by landlords would seriously jeopardize the efficacy of the codes. A prohibition against such retaliatory conduct was therefore to be implied, even though the regulations were silent on the matter.

Many states have protected tenant rights either on the *Edwards* theory or have implied such rights from the tenant’s right of habitability. Others have utilized statutes analogous to section 5.101 of the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 503 (1985), which is now adopted in fifteen jurisdictions. Similar landlord and tenant reform statutes in seventeen other states also provide protection for tenancy-related activities.

Under W. Va. Code, 37-6-30, a tenant is, with respect to residential property, entitled to certain rights to a fit and habitable dwelling. In *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978), we spoke at some length of the common law right of habitability which a number of courts had developed to afford protection to the residential tenant. We concluded that these rights paralleled and were spelled out in more detail in W. Va. Code, 37-6-30. In *Teller*, we also fashioned remedies for the tenant where there had been a breach of the warranty of habitability. However, we had no occasion to discuss the retaliatory eviction issue in *Teller*.

The central theme underlying the retaliatory eviction defense is that a

tenant should not be punished for claiming the benefits afforded by health and safety statutes passed for his protection. These statutory benefits become a part of his right of habitability. If the right to habitability is to have any meaning, it must enable the tenant to exercise that right by complaining about unfit conditions without fear of reprisal by his landlord. *See Annot.*, 40 A.L.R.3d 753 (1971).

After the seminal decision in *Edwards*, other categories of tenant activity were deemed to be protected. Such activity was protected against retaliation where it bore a relationship to some legitimate aspect of the tenancy. For example, some cases provided protection for attempts by tenants to organize to protect their rights as tenants. Others recognized the right to press complaints directly against the landlord via oral communications, petitions, and "repair and deduct" remedies. . . .

A few courts recognize that even where a tenant's activity is only indirectly related to the tenancy relationship, it may be protected against retaliatory conduct if such conduct would undermine the tenancy relationship. Typical of these cases is *Winward Partners v. Delos Santos*, 59 Haw. 104, 577 P.2d 326 (1978). There a group of month-to-month tenants gave testimony before a state land use commission in opposition to a proposal to redesignate their farm property from "agricultural" to "urban" uses. The proposal was sponsored by the landlord, a land developer. As a result of coordinated activity by the tenants, the proposal was defeated. Within six months, the landlord ordered the tenants to vacate the property and brought suit for possession.

The Hawaii Supreme Court noted that statutory law provided for public hearings on proposals to redesignate property, and specifically invited the views of the affected tenants. The court determined that the legislative policy encouraging such input would be jeopardized "if . . . [landlords] were permitted to retaliate against . . . tenants for opposing land use changes in a public forum." 59 Haw. at 116, 577 P.2d at 333. It relied on *Pohlman v. Metropolitan Trailer Park, Inc.*, 126 N.J. Super. 114, 312 A.2d 888 (Ch. Div. 1973), which involved a similar fact pattern where tenants' intervention in zoning matters to protect their tenancy was sufficiently germane to the landlord-tenant relationship to support the defense of retaliatory eviction. *See also S.P. Growers Ass'n v. Rodriguez*, 17 Cal.3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976) (retaliation for suit by tenant charging violation of Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, et seq.).

The Legislature, in giving approval to the retaliation defense, must

have intended to bring our State into line with the clear weight of case law and statutory authority outlined above. We accordingly hold that retaliation may be asserted as a defense to a summary eviction proceeding under W. Va. Code, 55-3A-1, et seq., if the landlord's conduct is in retaliation for the tenant's exercise of a right incidental to the tenancy.

Fout seeks to bring this case within the *Windward* line of authority. He argues principally that Imperial's conduct violated a public policy which promotes the rights of association and free speech by tenants. We do not agree, simply because the activity that Fout points to as triggering his eviction was unrelated to the habitability of his premises.

From the foregoing survey of law, we are led to the conclusion that the retaliatory eviction defense must relate to activities of the tenant incidental to the tenancy. First Amendment rights of speech and association unrelated to the tenant's property interest are not protected under a retaliatory eviction defense in that they do not arise from the tenancy relationship. Such rights may, of course, be vindicated on other independent grounds.

For the reasons discussed above, the judgment of the Circuit Court of Kanawha County is affirmed.

Notes and Questions

16.62. The basic law. In states that recognize **retaliatory eviction**, a landlord may not punish tenants when they exercise legal rights incidental to their tenancy. Generally, this means that a landlord cannot raise the rent, reduce services, refuse to renew a lease, or bring an eviction action for the purpose of retaliating against a tenant who has complained about the condition of the unit, filed a lawsuit concerning the fitness of the unit, contacted a local agency, or exercised rights under the implied warranty of habitability.

16.63. Legal change. Under the traditional English common law, a landlord could raise the rent or refuse to renew a tenant's lease for any reason. How does the court in *Imperial Colliery* justify changing a long-settled rule?

16.64. Rise of the doctrine. The doctrine of retaliatory eviction came to prominence around the same time as the implied warranty of habitability. What's the link between these two rules?

16.65. Retaliate for what? West Virginia, like most states, protects tenants from retaliatory eviction. In the case above, Fout presented evidence that he lost his tenancy as a result of retaliation by his landlord. Why then did Fout lose? Do you agree with the limitations that West Virginia has put on the doctrine of

retaliatory eviction? Why should tenants fear losing their homes if they exercise their First Amendment rights?

16.66. **Property serves human values?** Recall the *Marsh* case (company owned town cannot prevent distribution of pamphlets on sidewalk) and the *Shack* case (property owners cannot bar social service workers from meeting with migrant laborers) from earlier in the semester. In those opinions we saw that property rights are occasionally trumped by other values. Why don't Fout's rights under the First Amendment and the National Labor Relations Act outweigh his landlord's desire to kick him out? Can you distinguish *Imperial Colliery* from *Marsh* and *Shack*?

16.67. **Is housing special?** Is housing a good like any other, or is it somehow different from most things we buy and sell on the market? In continental European countries there's a tentative national consensus that all housing—even privately owned apartments—has a uniquely public or social dimension. As a result, many European nations grant citizens strong protections against forced relocations. For example, "good faith" eviction schemes are pervasive. In a "good faith" jurisdiction, a landlord can only refuse to renew a tenancy for a good reason—generally some faulty behavior on the part of the tenant (damaging the premise, creating a nuisance, breaching a material term in the lease) or the landlord's desire to remodel the unit. Should U.S. states adopt such a rule?

16.68. **Remedies.** What's the appropriate remedy for a tenant who wins a retaliatory eviction case?

16.69. **Establishing motive.** Peter Pan calls his local Board of Health to complain about the conditions in The Neverland Apartments, where he rents a two-bedroom unit. The landlord, Hook, is furious at Pan. They get into a heated screaming match in front of the building. If Hook waits a year and then dramatically raises Pan's rent, will Pan be able to win a retaliatory eviction case? What if Hook waits six months? Three months? Some states require the tenant to show that the landlord would not have taken action "but for" the tenant exercising a right. Because of the difficulties in establishing motive, other states employ a burden-shifting model in retaliatory eviction cases. In these jurisdictions, the law presumes that the landlord has acted with a retaliatory motive if the landlord raises the rent (or takes another retaliatory action) within a certain amount of time after the tenant has availed himself of a legal entitlement. The window of time varies from three months to a year, but many states use a six-month period. Importantly, the presumption against the landlord is rebuttable.

16.70. **How common is retaliation?** In his book, *Evicted: Poverty and Profit*

in the American City, Matthew Desmond recounts an anecdote about a landlord who would immediately begin preparing eviction papers as soon as his tenants complained about their living conditions.

16.4.4 Landlord's Tort Liability

A landlord's responsibility for injuries sustained on the leased premise has dramatically expanded in the last 50 years. As discussed in the previous subsection, under the traditional common law rule, the tenant had the duty to undertake all repairs and maintenance on the rented property. As a result, the law absolved landlords from liability for injuries sustained because of dangerous conditions in the unit. The costs of damage (to both property and persons) sustained from rotted decks, falling plaster, and collapsing walls all fell squarely on tenants.

Almost every jurisdiction now imposes greater duties on landlords. At the very least, landlords must exercise reasonable care in keeping common areas safe, use reasonable care when making repairs, and warn tenants about latent defects—unsafe conditions that would not be obvious upon an inspection. Other jurisdictions, following the logic of the implied warranty of habitability, have gone farther. They reason that since the landlord now has a duty to provide tenants (and their guests) with safe and clean premises, a failure to comply with this obligation may amount to negligence. The basic rule in these states is that a landlord must take reasonable steps to repair defects of which the landlord becomes aware. Failure to comply exposes landlords to liability for injuries that result from the defective conditions.

Landlords sometimes attempt to avoid the obligation to repair by inserting into the lease a clause stating that the lessor is not responsible for personal injury or property damage that occurs on the premise. While such exculpatory clauses are typically upheld in commercial settings, courts increasingly strike them from residential leases as violations of public policy.

16.4.5 Gentrification and Rent Control

Defined broadly, gentrification is the movement of wealthier people into a poor neighborhood, which results in a subsequent increase in rents and the ultimate displacement of longtime residents. The stereotypic progression starts when artists and gay couples move into a run-down but centrally located neigh-



Figure 16.9: Photo courtesy of Flickr user Keith Hamm

borhood in the urban core. They fix up houses, open trendy cafes, and start galleries. The newcomers also demand better public services and police protection from the local government. As the number of amenities grows, home prices and rents begin to rise. Married couples without children start to flow into the area, followed quickly by bankers, lawyers, and families attracted the neighborhood's beautiful older homes and terrific location. As rents continue to rise, many of the original residents—who are often poor and black—can no longer afford the neighborhood. They are forced to either move or pay an enormous percentage of their income toward rent.

One resident of a gentrifying neighborhood in Portland gives a personal account of the basic problem:

Last week I heard a shuffle at my front door and saw that my building manager was slipping a notice under my door. I opened it only to read that my rent was being raised by 10%.... [In the last year], my rent has gone up a total of 14%. If it continues at this pace, I'll have to find another place to live because I'll be priced out of my very walkable, very centrally-located neighborhood.

[Gentrification is] an emotional tinderbox. People who are just going about their lives are having to face eviction, displacement, or just have to spend a lot more on housing if they want to stay where they are because of forces completely out of their

control. In other words, you could be doing everything “right” in your life – being a responsible citizen, earning a viable income and doing your best – but it still isn’t good enough. Not unlike the tragedy of having your house destroyed by a natural phenomenon like a hurricane or a flood, you could become a victim of the “greed phenomenon” where developers look with dollar signs in their eyes at the house you live in with the intention of razing it and building a hugely profitable and expensive condo building there instead.

For low-income individuals pushed out of their neighborhoods, the process of gentrification often produces traumatic effects. In addition to the financial costs of an unwanted move, gentrification often shatters valuable personal networks. People who have lived their entire lives within a small geographic area may suddenly find themselves separated from the friends and family who provide emotional support and economic resources that serve as a vital buffer against the ills of poverty.

Many activists have suggested that rent control laws are the best solution to problems spawned by gentrification. Rent control legislation comes in a variety of forms but most often puts caps on the amount of rent that a landlord can charge (first-generation controls) and/or requires that prices for rented properties do not increase by more than a certain percent each year (second-generation controls). Rent controls, activists argue, allow existing tenants to stay in their homes while continuing to devote the same percentage of their incomes to rent as they have in the past.

Economists have a very different perspective on fighting gentrification with rent control mechanisms. American legal economists are typically opposed to rent controls. Often heatedly so. To understand why, put yourself in the shoes of a landlord in a city that holds the price of rent below what the market will bear. How would you respond if you were forced to provide a service for less than the market price? First and foremost, you probably wouldn’t build any new rental housing units. Why? Because you’d almost certainly make more money if you used your capital to build something that’s not regulated by the government. Ultimately, the lack of proper incentive to build apartments lowers the supply of rental housing and thereby increases the price (for anyone who doesn’t qualify for rent controls). Second, you might decide to skimp on the maintenance of your rent-controlled unit in order to recoup some of the lost profits. After all, will a tenant in a rent-controlled apartment really give up their unit if you don’t

respond to their request to fix the sink?

So goes the theory, at any rate—and it is a theory that has found expression in judicial opinions, particularly among those judges of the U.S. Court of Appeals for the Seventh Circuit who moonlight as academic legal economists of the so-called “Chicago School.” See *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987) (Opinion of Posner, J.). In apparent agreement with these theoretical arguments, very few American jurisdictions today maintain rent control policies—only New York, Los Angeles, and a few places in the Bay Area have significant rent control laws. State and local governments are much more likely to attack problems of affordable housing by either giving rent vouchers to the poor or building government-owned housing projects (are these better options?).

But perhaps the legal economists of a generation ago were mistaken—or at least insufficiently sensitive to the potential variety of rent control measures and the diversity of urban environments in which they can be deployed. While first-generation rent control measures have few academic defenders in the United States, there is some suggestion that the actual empirics of second-generation rent controls and other tenant protections may diverge from the dire theoretical predictions of the Chicago School. In particular, the effects of rent control on the supply, quality, and distribution of rental housing may depend significantly on the nature of the protective regulation imposed, the density of existing housing stock, availability of vacant land, the mix of other regulatory constraints on land use in general and housing in particular, and idiosyncrasies of the local economy—particularly the degree of competition among landlords. See generally Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J. ECON. PERSPECT. 99 (1995); Bengt Turner & Stephen Malpezzi, *A review of empirical evidence on the costs and benefits of rent control*, 10 SWED. ECON. POLICY REV. 11 (2003). Outside of the United States, moreover, economists and politicians are less antagonistic toward rent control. Paris, for example, recently passed a law capping many rents. Germany, the Netherlands, and Sweden also have widespread limitations on how much rent landlords can charge.

Notes and Questions

16.71. **Europe v. America.** What do you think accounts for the different views on rent control between European policy makers and their American counterparts?

16.72. **Getting to Affordability.** If rent control isn’t the answer, what steps

should government take to ensure access to affordable housing? Should the government have any role at all in the housing market? Before the Great Depression the federal government played almost no part housing policy. How should government housing policy regarding affordable housing fit into the mix of economic regulations addressing problems of poverty and equity?

16.5 Wrapping Up

The following rental agreement is modeled on an actual lease that a friend of the casebook authors was asked to sign. Do you see any potential problems for a tenant? Would you sign this lease?

Residential Rental Agreement and Contract

THIS AGREEMENT (hereinafter known as the “Lease” or the “Agreement”) is made and entered into this 1st day of September 2015, between **Peter Rabbit** (hereinafter referred to as the “Tenant”) and **Mr. McGregor** (hereinafter referred to as the “Landlord”). In exchange for valuable consideration, the landlord and tenant agree to the following:

1. Property. The landlord owns certain real property and improvements at **123 Vegetable Garden Way, Potterville, Beatrixia** (hereinafter referred to as the “Property” or the “Premise”). The Landlord wishes to lease the Premise to the Tenant upon the terms and conditions stated in this Lease. The Tenant wishes to lease the Premise from the Landlord upon the terms and conditions stated in this Lease.

2. Term. This agreement shall commence on September 1, 2015 and shall terminate on August 31, 2018 at 11:59 PM. Upon any termination of the Agreement, the Tenant will pay off all outstanding bills, remove all personal property from the Premise, bring the leased premise back to the condition it was in upon move-in (excepting normal wear and tear), peacefully vacate the premise, return all keys to the Landlord, and give the Landlord a forwarding address.

3. Holdovers. If the Tenant holds over after the termination of the lease, a new tenancy from month-to-month shall be created. Under the new month-to-month lease the Tenant shall be responsible for double the agreed upon rent.

4. Rent. The Tenant shall pay the landlord \$1000 per month as rent for the entire term of the agreement. The rent shall be due on the 1st day of each calendar month. Weekends, holidays, and religious observances do not excuse

the Tenant's obligation to make timely payments.

5. Delivery of Possession. The Landlord shall not be held liable for any failure to deliver possession of the Premise by the starting date of the agreed upon term.

6. Late Fees. A late fee of 5% shall be due if the rent is received after the 5th day of the month. A late of 10% shall be due if the rent is received after the 10th day of the month. Acceptance of a late fee does not affect or waive any other right or remedy the Landlord may exercise for Tenant's failure to timely pay rent.

7. Returned Checks. In the event that any payment by the Tenant is returned for insufficient funds or if the Tenant stops payment, the Tenant will pay \$100 to the Landlord for each such event, in addition to the Late Fees described above.

8. Security Deposit. The Tenant shall deposit with the Landlord \$1500 as a security deposit for this Agreement. All interest that accrues on such a security deposit shall belong to the Landlord alone. The Landlord may use the deposit money for any and all purposes allowed by law.

9. Utilities. It is the responsibility of the Tenant to obtain all utilities for the leased Property. Tenant's failure to make any payment for the utilities shall constitute a material breach of the agreement. The Landlord shall not be held liable for any failure to deliver any utility service or for any damage caused by a problem with any utility service, whatever the cause of such problem. The Tenants do hereby waive any claim for damages that result from any problem with utility service.

10. Keys. The Tenant shall not install any new locks anywhere on the property or make any copies of the keys. The Tenant also shall refrain from providing any keys to any person not listed on this Agreement. When the lease terminates, the Tenant shall return all keys to the Landlord.

11. Pets. No pets of any kind, type, or breed shall be allowed on the property without the Landlord's express written consent. This consent, if given, will require an additional pet deposit.

12. Use of the Premise. The premise shall be used and occupied solely by the Tenant. Tenant shall not allow any other person to use or occupy the premise without first obtaining Landlord's written consent. No part of the Premise shall be used at any time during the term for any business, trade, or other commercial purpose. Additionally, the tenant agrees to comply with all local, state, and federal laws, regulations, and ordinances. No part of the property may be used in any way that aids or advances a criminal enterprise.

13. Assignments and Subletting. The Tenant shall not license, assign, or sublet the Property and/or this agreement without the written consent of the Landlord. An assignment, subletting or license without the Landlord's written consent shall be considered absolutely null and void and, at the Landlord's option, terminate this Agreement.

14. Alterations. The Tenant shall make no alterations to the Premise without written consent of the Landlord. If the Tenant makes any unauthorized improvement, modification, or change to the Property, the landlord has the option to charge the Tenant the cost of restoring the Premise to its original condition. In the event that the Landlord approves an alteration made by the Tenant, such alterations shall become the property of the Landlord and remain on the Property.

15. Maintenance & Repair. Except for normal wear and tear, the Tenant shall maintain the Premise in the condition it was upon the starting date of the Agreement. Should any damages, malfunctions, breakages, or other problems occur during the course of the Lease, the Landlord shall have a reasonable amount of time to complete such repairs. During that time, the Tenant's rent shall remain due in full and on time despite any hardships such repairs or delays may cause. Tenant also has a contractual duty to (1) notify Landlord of any problems with the leased premise, (2) Deposit all trash, rubbish, refuse, and garbage in the trash cans provided by the city, (3) keep all windows, doors, and locks in good order, (4) inspect the fire alarms each and every month.

16. Noise. The Tenant and the Tenant's guests shall at all times keep the level of sound down to a level that does not annoy or interfere with other residents or neighbors.

17. Sale of the Property. The Landlord shall have the right to sell or transfer his ownership of the Property and this Agreement at any time and without restriction. Upon sale or transfer of the Landlord's interest, this agreement may be terminated by either the Landlord or the party who purchases the Landlord's interest. The Tenant agrees to release, waive, and hold harmless the Landlord and the Landlord's successor from all liability if such a transfer occurs.

18. Access. The Landlord and his agents shall have the right to enter the Property without notice to inspect the property, make repairs, or show the property to prospective tenants or purchasers.

19. Condition of the Premise. The Landlord makes no guarantees or warranties about the condition of the leased premise. The Tenant assumes all risk of injury or harm stemming from any accidents or criminal acts occurring on or around the Premise. The Tenant agrees to hold the Landlord harmless for all

liability stemming any injury or harm to the Tenant, Tenant's property, or Tenant's guests. The Tenant further agrees to indemnify, defend, and hold harmless the Landlord from any and all claims over the condition of the premise. Should the Tenant damage the Premise, he shall indemnify the Landlord for all costs of repair or replacement within 30 days.

20. Natural Disaster. In the event of a natural disaster, fire, or other catastrophic event, the Landlord may choose not to repair the Premise, in which case the Lease shall terminate. The Landlord may also elect to fix the Premise, in which case the Tenant must continue to pay the full monthly rent so long as the repairs are completed within a reasonable time. In either case, any and all damages and injuries connected to acts of the Tenant, his guests, or property shall be the sole financial responsibility of the Tenant.

21. Eminent Domain. If a government or private entity takes the Premise or any part of the Premise by eminent domain, this Lease shall terminate. The new termination shall be the date of the final taking order. Any award or court judgment in favor of the Landlord in an eminent domain case or any settlement award stemming from an eminent domain proceeding shall belong to the Landlord in full. The Tenant shall have no claim over such awards.

22. Attorney's Fees. Tenant agrees to pay all reasonable attorney's fees, court costs, and other expenses if it becomes necessary for the Landlord to enforce any of the conditions of covenants of this Lease, including but not limited to eviction proceedings, collection of rents, and damage to the Premise caused by the Tenant. The Tenant also agrees to indemnify the Landlord for all attorney's fees, court costs, and other expenses that the Landlord may incur while successfully defending a lawsuit brought by the Tenant.

22. Abandonment. If at any time during the term of this Lease the Tenant abandons the Premise, the Landlord may obtain possession of the Premise in any manner provided for by law. Any personal property left behind shall be considered abandoned. The Landlord may dispose of such personal property in any manner he deems fit and is released of all liability for doing so.

23. Severability. If any portion of this Lease shall be found unenforceable, invalid, or void under any law or public policy, that portion of the Lease shall be severed from the remainder of the Agreement. All remaining portions of the Agreement will remain in effect and enforceable.

24. Governing Law. This lease shall be governed and interpreted under the laws of the Commonwealth of Beatrixia.

25. Non-Waiver. No delay or non-enforcement of any term of this Agreement by the Landlord shall not be deemed a waiver. All terms and conditions

of this Agreement shall remain fully enforceable should the Landlord seek to enforce any condition or covenant at a later date, even if the Landlord has intentionally or unintentionally neglected to do so in a previous instance.

26. Notices. Any notice required or permitted under this Agreement must be written on 8½ x 11 paper and sent by United Parcel Service (UPS). Notice shall be sent to the address of the Property for the Tenant or to **345 Bunny Pie Lane, Potterville, Beatrixia** for the Landlord.

27. Spelling and Grammar. Any mistakes in spelling, grammar, punctuation, or gender usage shall not be fatal to the Agreement. Rather, they shall be interpreted to carry out the intent of the parties.

28. Default. Tenant shall be in default of this Agreement if he fails to comply with any covenant, condition or term and/or fails to pay rent when due and/or causes damage to the Premise during the term which cumulatively equals or exceeds \$100. Should the Tenant ever default, the Landlord may **with or without notice** either (1) terminate the Lease or (2) terminate the Tenant's right to possession of the Premise while leaving this Agreement operative. If the Landlord elects option (2), the Landlord will have the immediate right to possess the Premises and the Tenant shall lose all possessory rights and have the obligation to immediately vacate the Premise. However, the Tenant shall still have the duty to pay all rents, fees and expenses mandated under this Agreement and/or by the judicial system until either the agreed upon term concludes or the property is re-rented at a monthly rate not less than the amount owned under this Agreement with any negative balance owed by the Tenant.

Tenant Signature

Date

Landlord Signature

Date

Part IV

Transfers

Chapter 17

Gifts

Rules about transferring property are created by law. There are only certain ways people can rearrange property relations. Some rearrangements happen even if the people involved don't want them, and some don't happen even if the people involved do want them. Knowing the rules is a way to understand which transfers work and why.

There are several methods of transferring property. The key voluntary methods are gifts, sales, and transfers at death, which can be divided into transfers by will (also known as transfer by devise) and transfers by operation of law because of the decedent's intestacy (dying without a will). Although most litigated transfers involve sales, it is useful to study gifts in order to appreciate the significance of possession to ownership. Relatedly, gift law highlights that some problems in contract law arise only out of *executory* promises: completed promises involving property will often be valid as gifts, even if they lacked consideration. Gift law also provides an introduction to methods of transferring land, particularly transfers by deed and transfers by will.

In order for a valid **gift** to occur, three elements must be present: (1) the donor must *intend* to give the property as a gift; (2) the donor must *deliver* the property to the donee; and (3) the donee must *accept* the gift. We won't spend much time on the third element, because when the property has some value, acceptance will generally be presumed in the absence of an explicit rejection.

Unlike a sale or a contract, a gift does not require consideration. This leads to concerns that often shape judicial doctrine. First, without tangible consideration, we need to keep people from lying about what was given to them. Because gift issues often arise after the alleged donor died, courts have been concerned to protect the donor's heirs from having the donor's estate stripped by people

who claim to be donees.

Second and relatedly, we desire to protect the system of written wills and to encourage its use. A standard will must be signed and witnessed. A system that easily allows pre-mortem gifts might undermine people's incentives to take the time to write a will—they might think they can always just give their property away when death approaches—and also harm the legitimate expectations of those who are named in a will. If the person who writes a will, known as the testator, identifies specific property in her will, but sells it or gives it away before she dies, the devise in the will is nullified; it's no longer her property to give away when she dies. Although people named as devisees in a will have no *legal* rights to the property before the testator dies, they might nonetheless have practically and morally compelling expectations—especially if we worry about the people surrounding a dying person exercising undue influence and extracting gifts that the dying person wouldn't give if she were thinking more clearly. Thus, by making it more difficult to give gifts, we may protect the overall system of property transfers. This concern can lead courts to find that no gift has been made even when the would-be donor very clearly wanted to give the property away. Consider as you read whether this overall structural concern is justified.

17.1 Intent

Although laypeople may not be aware of this distinction, there is a huge legal difference between “I will give you this car when you graduate” and “I now give you this car.” “I will give you this car” is a mere promise with no legal force. No matter how serious the speaker’s intent is, it is not an intent to make a present gift, and it will therefore not result in a gift.

Intent is rarely an issue in gift cases, but it can arise when it is not clear what the donor intended to give: Suppose O says to D, “I want you to have the jewelry box on my dresser and the jewelry inside,” believing that she’s storing costume jewelry in the box. D takes the box, but inside there are no costume jewels, only a diamond necklace. What gift has been made? What if O says “I want you to have the jewelry box and its contents,” and the contents are bearer bonds worth \$100,000? If O is deceased when the issue is litigated, how would you determine her intent?

17.2 Delivery

Simply put, the property must in some way pass out of the grantor's control in order for a gift to be valid; this is known as delivery. Professor Philip Mechem summarized the reasons for the requirement:

1. Delivery has psychological significance, forcing the donor to confront the loss of the property: the "wrench of delivery" protects the donor from poor choices.
2. Delivery signifies the gift to third party witnesses, settling doubts about whether what was intended was a mere promise to make a gift in the future or a present gift.
3. Delivery lets the property itself bear mute witness to the fact of the gift: possession itself has evidentiary weight.

Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348-49 (1926); but see Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All – the Current State of the Delivery Requirement for Valid Gifts*, 31 REAL PROP. PROB. & TR. J. 357 (1996) (critiquing Mechem).

Land doesn't move, at least not for these purposes, so manual delivery is impossible, and "symbolic" delivery of land has always been accepted. At early common law, the transfer of land involved a ceremony called livery of seisin, in which the transferor physically handed over a clod of dirt or a twig from the land to the transferee. Fortunately, transfer of an interest in land is now generally accomplished by a written instrument, known as a deed. At a minimum, a deed must describe the land to be transferred, contain some words indicating an intent to make a present transfer of title, and the grantor's signature (which courts construe liberally – almost any mark or symbol of the grantor's approval, including the signature of the grantor's agent, will be sufficient). These formalities will be covered in more detail in the land conveyancing section.

What about personal property? Most gifts, especially gifts of personal property, are given during life. Nonetheless, many litigated cases arise around near-death gifts. As you read, consider why the case law would diverge so much from the practice of giving.

In re Estate of Evans
356 A.2d 778 (Pa. 1976)

NIX, Justice.

Appellant, Vivian Kellow, objected to the inventory, proposed schedule of distribution and final accounting of the executor of the estate of Arthur Evans. After appellant finished the presentation of her case, the lower court granted appellees' motion to dismiss appellant's objections. . . . The thrust of her appeal to this Court is that certain contents of a safe deposit box were the subject of an *inter vivos* gift to her from Arthur Evans, the deceased, and, consequently, should not have been included in his estate.

Appellant, the niece of Arthur Evans' deceased wife, began working for the Evans family when she was 16. For several years she took care of Mrs. Evans who for some years prior to death was an invalid. Appellant cooked meals for the Evanses, cleaned their house, did their laundry and generally cared for Mrs. Evans. She received adequate compensation for performing these needed services. When Mrs. Evans died, appellant continued to cook at least one hot meal a day for Mr. Evans, do his laundry and make sure his house was tidy. After appellant was married, she continued to perform these same services and visited Mr. Evans once a day. In May of 1971, following one of his four hospitalizations, the deceased moved into appellant's home.

Although at times Mr. Evans was confined to his bed because of water in his legs, he frequently took walks, had visits with his lawyers and made trips to his bank. On October 22, 1971, appellant's husband drove Mr. Evans and a friend of his, Mr. Turley, to town so that Mr. Evans might go to the bank. Turley testified that Mr. Evans spent about one hour going through the contents of his safe deposit box. Before leaving the bank, the deceased obtained both keys to the box.

Various witnesses presented by appellant testified to seeing the keys to the safe deposit box beneath appellant's mattress and to statements by Mr. Evans to the effect that the contents of the safe deposit box had been given to appellant. Mr. Evans entered the hospital for the last time on November 5, 1971. During this last hospital stay, Reverend Cunningham visited with him and was told that Mr. Evans was giving the Reverend's church \$10,000.00 and that he had given the rest of his possessions and the keys to his safe deposit box to appellant. Mr. Evans expired on November 23, 1971.

Appellant relinquished the keys to the safe deposit box to a bank offi-

cer, but not without protesting that the contents of the box were hers. The box revealed a holographic will of Mr. Evans dated September 16, 1965, and approximately \$800,000.00 in bonds, preferred and common stock and several miscellaneous items.¹

The lower court correctly noted that the requirements for a valid *inter vivos* gift were donative intent and delivery, actual or constructive. With respect to donative intent, the court found:

Turning to the facts of this case, certainly no one can reasonably argue that Arthur Evans lacked sufficient motive to make a gift to Vivian. The record clearly manifests, both by his conduct and his statements, donative intent, the first prerequisite.

Nevertheless, the court ruled that no delivery had been made. This result was predicated upon a finding that the deceased had not divested himself of complete dominion and control over the safe deposit box. After properly noting that constructive delivery is sufficient when manual delivery is impractical or inconvenient, the court reasoned:

The record contains no evidence of circumstances which were such that it was impractical or inconvenient to deliver the contents of this box into the actual possession or control of Vivian.

Arthur Evans, although suffering physical infirmities and apprehensive of death, was nonetheless ambulatory. On October 22, 1971, he appeared at the Nanticoke National Bank in the company of Harold Turley and Leroy Kellow and spent approximately one hour going over the contents of his safe deposit box in a cubicle provided in the bank for that purpose. He left the bank after redepositing the contents and took with him only the keys which independent testimony indicates he delivered to Vivian the next day. There was no manual delivery of the contents. The contents of the box remained undisturbed. The box, and its contents, were registered in the name of the decedent at the date of his death. The objects of the gift were not placed in the hands of Vivian, nor was there placed within her power the means of obtaining the contents. . . .

A claim of a gift *inter vivos* against the estate of the dead must be supported by clear and convincing evidence. In order to effectuate an *inter vivos* gift there must be evidence of an intention

¹The will was uncontested and under its terms provided for a \$1,000.00 bequest to appellant.

to make a gift and a delivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property but also invest the donee with complete control over the subject-matter of the gift.

[*Tomayko v. Carson*, 368 Pa. 379, 385 (1951).]

In the instant case, the controversy focuses on whether there was an adequate delivery. . . . :

"If there remains something for the donor to do before the title of the donee is complete, the donor may decline the further performance and resume his own." . . . "[I]t is not possible that a chancellor would compel an executor or administrator to complete a gift by the doing of any act which the alleged donor if living might have refused to do, and thereby revoked his purpose to give." . . . "Though every other step be taken that is essential to the validity of the gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of consequence." The consequence is that no matter how often or how emphatically the desire or intention of the donor to make the gift has been expressed, upon his death before delivery has been completed, the promise or purpose to give is revoked.

We have recognized that in some cases due to the form of the subject matter of the gift or due to the immobility of the donor actual, manual delivery may be dispensed with and constructive or symbolic delivery will suffice. In *Ream Estate*, 413 Pa. 489, 198 A.2d 556 (1964), for example, the Court found there had been a valid constructive delivery of an automobile where the donor gave the keys to the alleged donee and also gave him the title to the car after executing an assignment of it leaving the designation of the assignee blank. The assignment was executed in the presence of a justice of the peace and the evidence was overwhelming that the name of the donee was to be inserted upon the death of the decedent. . . .

Appellant relies heavily on *Leadenham's Estate*, 289 Pa. 216, 137 A. 247 (1927), and *Leitch v. Diamond National Bank*, 234 Pa. 557, 83 A. 416 (1912). These decisions, however, support the Court's finding that there was no delivery in the instant case. In *Leadenham's Estate*, *supra*, the donor had

rented a separate safe deposit box in the name of the intended donee, put the contents of his box into the newly rented one and delivered the keys to it to the donee. On those facts we held that the constructive delivery of the keys was sufficient to sustain the *inter vivos* gift because the donor had divested himself of dominion and control and invested the donee with complete dominion and control.

In *Leitch v. Diamond National Bank, supra*, the donor and donee were husband and wife and had lived together harmoniously for many years. The husband had three safe deposit boxes registered in his name and the name of his wife and he designated one of them as his wife's. He gave her the keys to that box. The Court found that she had complete control over that box and that he only entered it with her permission. Since she had complete control over the access to the box the Court found there was a valid delivery of the contents of the box to her.

In both of these cases, the determinative factor was that the donee had complete dominion and control over the box and its contents. In that posture we ruled that giving the keys to the box to the donee was a valid constructive delivery. In the instant case, appellant did not have dominion and control over the box even though she was given the keys to it. The box remained registered in Mr. Evans' name and she could not have gained access to it even with the keys. Mr. Evans never terminated his control over the box, consequently he never made a delivery, constructive or otherwise.

Although appellant suggests that it was impractical and inconvenient for Mr. Evans to manually deliver the contents of his box to her because of his physical condition and the hazards of taking such a large sum of money out of the bank to her home, we need only note that the deceased was obviously a shrewd investor, familiar with banking practices, and could have made delivery in a number of simple, convenient ways. First, he was not on his deathbed. He was ambulatory and not only went to the bank on October 22, 1971, but took walks thereafter and did not enter the hospital until November 5, 1971. On the day he went to the bank he could have rented a second safe deposit box in appellant's name, delivered the contents of his box to it and then given the keys to appellant. He could have assigned the contents of his box to appellant. For that matter, he could have written a codicil to his will.

The lower court noted that the deceased was an enigmatic figure. It is not for us to guess why people perform as they do. On the record before

us it is clear that regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him. On these facts, we are constrained to hold that there was not an *inter vivos* gift to appellant and that the contents of the safe deposit box were properly included in the inventory of Mr. Evans' estate

ROBERTS, Justice (dissenting).

I dissent. The central issue in this case is whether donor made an adequate delivery of the gift to donee. The majority finds that adequate delivery was not made because the safe deposit box was leased solely in donor's name and supports this conclusion by pointing out that there were several alternative means of delivering the gift which would have been adequate. I believe that the inquiry should not be what form of delivery would have been clearly sufficient, but rather whether the delivery made by donor was adequate. I believe that it was.

In *Rynier Estate*, 349 Pa. 471, 32 A.2d 736 (1943), we said that delivery is determined on the facts of each case, with reference to the donor's intent.

As the chief factor in the determination of the question whether a legal delivery has been effected is the intention of the donor to transfer title to the donee, as manifested by his words and actions and by the circumstances surrounding the transaction, it is evident that each case must depend largely upon its own facts.

The majority suggests that donor was "obviously a shrewd investor, familiar with banking practices. . . ." From this "familiar(ity) with banking practices," which is nowhere shown on the record, and the absence of a joint lease for the box, it apparently concludes that donor did not intend a gift. There are two reasons why this result is not correct.

First, there is no doubt in this case that donor intended a gift. He told many people that he had given the contents of the box to appellant. In fact, there is competent testimony that donor directed donee to display the keys, hidden under her mattress, to several witnesses.

Second, it is apparent from the record that donor believed undisputed and unconditional delivery of the keys to be sufficient to complete the gift. Most of this Court's cases dealing with *inter vivos* gifts of the contents of safe deposit boxes turn on the delivery or nondelivery of the keys to the box to the donee. If the key was delivered, the gift was normally upheld;

if the key was not delivered, the gift was set aside, whether or not the box was jointly leased. I have found no case which turned on the presence or absence of a joint lease. Given this line of authority, and accepting the majority's conclusion that donor was sophisticated in these matters, it must be concluded that donor believed delivery of the keys to the box completed the gift. If this were not so, why would donor cause donee to take several witnesses into her bedroom to show them that she had the keys and why would he speak in terms that indicated a completed gift—"I gave to Vivian . . . the keys and the contents *are* hers." Because it is donor's intention to transfer title which is crucial to a valid delivery, and because this donor intended to transfer title, I dissent from the majority's conclusion

Notes and Questions

17.1. The majority writes, "regardless of Mr. Evans' intention to make a gift to appellant, he never executed that intention and we will not do it for him." But it also quotes approvingly the lower court's statement that "[t]he record clearly manifests, both by his conduct and his statements, [Mr. Evans'] donative intent." Has the court contradicted itself, or can these statements be squared?

17.2. Why does the court note that Vivian Kellow "received adequate compensation" for the services she provided to Arthur Evans? What were his motivations for the attempted gift, and why are the appellees contesting it? Does the family setting shed any light on the positions of the majority and dissent?

17.3. The common law required manual **delivery** of personal property for a valid gift unless the object was too big to move. See, e.g., *Newman v. Bost*, 20 S.E. 848 (N.C. 1898) (symbolic delivery insufficient where objects were small items that could easily have been physically delivered, even though would-be donor was ill in bed). If the object was too big to move, substitutes for physical delivery were acceptable. Keys are a classic example: handing over car keys is **constructive** or **symbolic delivery** of the car. The keys symbolize the car (symbolic delivery) and provide the means for exercising dominion and control over it (constructive delivery). Today, because all states require car owners to register the title to their cars, many states require that a gift of a car is not complete unless the donor also hands over the title documents. Why would the law require delivery of the title documents? What happens when someone who doesn't know this rule hands over only the keys, and then a year later changes her mind and demands the car back? (You should see here how a title system can both make it easier to determine who owns property and easier for legally unsophisticated

people to make significant mistakes.)

Why isn't saying "I give you this car" without delivery enough to complete the gift? The keys could be handed over later, after all. If there's a present donative intent, what further purpose does a delivery requirement serve? Most answers focus on the evidentiary role played by delivery: possession of the property by the putative donee is strong evidence that the putative donor really did make a gift. This is especially important because most gift disputes arise after the putative donor's death. Notice to third parties who deal with the property and need to know who owns it is another common rationale. But when might a putative donee's possession not be particularly probative of whether a gift had occurred? Suppose a father allows his daughter to use his second car when she moves to town, and that this continues for six months. If, after they have a falling out, the father sought to retrieve the car, how would you figure out whether this was a loan or a gift?

17.4. Modern courts often relax the delivery requirement to allow constructive or symbolic delivery even of smaller, more portable items, but some delivery requirement remains. Suppose the would-be donor signed a document in front of two witnesses saying "I now give my daughter \$100,000," and gave the document to his daughter. But the donor didn't actually deliver the money. Should we relax the delivery requirement because we are very confident that a gift was intended? Or does delivery still serve an important purpose? See *Devol v. Dye*, 24 N.E. 246 (Ind. 1890) ("The intention of a donor in peril of death, when clearly ascertained and fairly consummated within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery."); *Ferrell v. Stinson*, 11 N.W.2d 701 (Iowa 1943) (deed made out to intended donee was kept in box in donor's house, and recorded after grantor's death; held: delivered given strong evidence of donor's intent and fact that seriously ill grantor was physically unable to access box after executing deed); cf. *Hocks v. Jeremiah*, 759 P.2d 312 (Or. App. 1988) (bonds and diamond ring placed over a period of years in a safe deposit box held jointly with putative grantee were not properly delivered). What should have happened in the *Ferrell* case if the grantor had made out the deed, put it in the box, and then a week later, still in her sickbed, made out a deed to another person and handed *that* second deed to the intended grantee?

17.5. The RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 6.2, cmt. yy, takes the position that personal property can be validly given without delivery "if the donor's intent to make a gift is established

by clear and convincing evidence." Is this the right rule?

Gruen v. Gruen
496 N.E.2d 869 (N.Y. 1986)

Plaintiff commenced this action seeking a declaration that he is the rightful owner of a painting which he alleges his father, now deceased, gave to him. He concedes that he has never had possession of the painting but asserts that his father made a valid gift of the title in 1963 reserving a life estate for himself. His father retained possession of the painting until he died in 1980. Defendant, plaintiff's stepmother, has the painting now and has refused plaintiff's requests that she turn it over to him. She contends that the purported gift was testamentary in nature and invalid insofar as the formalities of a will were not met or, alternatively, that a donor may not make a valid *inter vivos* gift of a chattel and retain a life estate with a complete right of possession. Following a seven-day nonjury trial, Special Term found that plaintiff had failed to establish any of the elements of an *inter vivos* gift and that in any event an attempt by a donor to retain a present possessory life estate in a chattel invalidated a purported gift of it. The Appellate Division held that a valid gift may be made reserving a life estate and, finding the elements of a gift established in this case We now affirm.

The subject of the dispute is a work entitled "Schloss Kammer am Attersee II" painted by a noted Austrian modernist, Gustav Klimt. It was purchased by plaintiff's father, Victor Gruen, in 1959 for \$8,000. On April 1, 1963 the elder Gruen, a successful architect with offices and residences in both New York City and Los Angeles during most of the time involved in this action, wrote a letter to plaintiff, then an undergraduate student at Harvard, stating that he was giving him the Klimt painting for his birthday but that he wished to retain the possession of it for his lifetime. This letter is not in evidence, apparently because plaintiff destroyed it on instructions from his father. Two other letters were received, however, one dated May 22, 1963 and the other April 1, 1963. Both had been dictated by Victor Gruen and sent together to plaintiff on or about May 22, 1963. The letter dated May 22, 1963 reads as follows:

Dear Michael:

I wrote you at the time of your birthday about the gift of the painting by Klimt.

Now my lawyer tells me that because of the existing tax laws, it was wrong to mention in that letter that I want to use the painting as long as I live. Though I still want to use it, this should not appear in the letter. I am enclosing, therefore, a new letter and I ask you to send the old one back to me so that it can be destroyed.

I know this is all very silly, but the lawyer and our accountant insist that they must have in their possession copies of a letter which will serve the purpose of making it possible for you, once I die, to get this picture without having to pay inheritance taxes on it.

Love,
s/Victor

Enclosed with this letter was a substitute gift letter, dated April 1, 1963, which stated:

Dear Michael:

The 21st birthday, being an important event in life, should be celebrated accordingly. I therefore wish to give you as a present the oil painting by Gustav Klimt of Schloss Kammer which now hangs in the New York living room. You know that Lazette and I bought it some 5 or 6 years ago, and you always told us how much you liked it.

Happy birthday again.
Love,
s/Victor*

Plaintiff never took possession of the painting nor did he seek to do so. Except for a brief period between 1964 and 1965 when it was on loan to art exhibits and when restoration work was performed on it, the painting remained in his father's possession, moving with him from New York City to Beverly Hills and finally to Vienna, Austria, where Victor Gruen died on February 14, 1980. Following Victor's death plaintiff requested possession

*As we will discuss below, Victor Gruen evaded substantial taxes on this gift by pretending that he did not reserve a life estate. —Eds.

of the Klimt painting and when defendant refused, he commenced this action.

The issues framed for appeal are whether a valid *inter vivos* gift of a chattel may be made where the donor has reserved a life estate in the chattel and the donee never has had physical possession of it before the donor's death and, if it may, which factual findings on the elements of a valid *inter vivos* gift more nearly comport with the weight of the evidence in this case, those of Special Term or those of the Appellate Division. The latter issue requires application of two general rules. First, to make a valid *inter vivos* gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee. Second, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.

Donative Intent

There is an important distinction between the intent with which an *inter vivos* gift is made and the intent to make a gift by will. An *inter vivos* gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will.

Defendant contends that the trial court was correct in finding that Victor did not intend to transfer any present interest in the painting to plaintiff in 1963 but only expressed an intention that plaintiff was to get the painting upon his death. The evidence is all but conclusive, however, that Victor intended to transfer ownership of the painting to plaintiff in 1963 but to retain a life estate in it and that he did, therefore, effectively transfer a remainder interest in the painting to plaintiff at that time. Although the original letter was not in evidence, testimony of its contents was received along with the substitute gift letter and its covering letter dated May 22, 1963. The three letters should be considered together as a single instrument and when they are they unambiguously establish that Victor Gruen intended to make a present gift of title to the painting at that time. But there was other evidence for after 1963 Victor made several statements orally and in writing indicating that he had previously given plaintiff the painting and that plaintiff owned it. Victor Gruen retained possession of the property, insured it, allowed others to exhibit it and made necessary repairs to it but those acts are not inconsistent with his retention of a life estate. . . . Victor's failure to file a gift tax return on the transaction was par-

tially explained by allegedly erroneous legal advice he received, and while that omission sometimes may indicate that the donor had no intention of making a present gift, it does not necessarily do so and it is not dispositive in this case.

Defendant contends that even if a present gift was intended, Victor's reservation of a lifetime interest in the painting defeated it. . . . Defendant recognizes that a valid *inter vivos* gift of a remainder interest can be made not only of real property but also of such intangibles as stocks and bonds. Indeed, several of the cases she cites so hold. That being so, it is difficult to perceive any legal basis for the distinction she urges which would permit gifts of remainder interests in those properties but not of remainder interests in chattels such as the Klimt painting here. The only reason suggested is that the gift of a chattel must include a present right to possession. [Permitting] a gift of the remainder in this case, however, is consistent with the distinction, well recognized in the law of gifts as well as in real property law, between ownership and possession or enjoyment. Insofar as some of our cases purport to require that the donor intend to transfer both title and possession immediately to have a valid *inter vivos* gift, they state the rule too broadly and confuse the effectiveness of a gift with the transfer of the possession of the subject of that gift. The correct test is "‘whether the maker intended the [gift] to have no effect until after the maker’s death, or whether he intended it to transfer some present interest.’" As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately. Thus, in Speelman v. Pascal, we held valid a gift of a percentage of the future royalties to the play "My Fair Lady" before the play even existed. There, as in this case, the donee received title or the right of ownership to some property immediately upon the making of the gift but possession or enjoyment of the subject of the gift was postponed to some future time.

Defendant suggests that allowing a donor to make a present gift of a remainder with the reservation of a life estate will lead courts to effectuate otherwise invalid testamentary dispositions of property. The two have entirely different characteristics, however, which make them distinguishable. Once the gift is made it is irrevocable and the donor is limited to the rights of a life tenant not an owner. Moreover, with the gift of a remainder title vests immediately in the donee and any possession is postponed until the donor's death whereas under a will neither title nor possession vests

immediately . . .

Delivery

In order to have a valid *inter vivos* gift, there must be a delivery of the gift, either by a physical delivery of the subject of the gift or a constructive or symbolic delivery such as by an instrument of gift, sufficient to divest the donor of dominion and control over the property. As the statement of the rule suggests, the requirement of delivery is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees. Accordingly, what is sufficient to constitute delivery "must be tailored to suit the circumstances of the case." The rule requires that "[t]he delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit."

Defendant contends that when a tangible piece of personal property such as a painting is the subject of a gift, physical delivery of the painting itself is the best form of delivery and should be required. Here, of course, we have only delivery of Victor Gruen's letters which serve as instruments of gift. Defendant's statement of the rule as applied may be generally true, but it ignores the fact that what Victor Gruen gave plaintiff was not all rights to the Klimt painting, but only title to it with no right of possession until his death. Under these circumstances, it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain.

Nor is there any reason to require a donor making a gift of a remainder interest in a chattel to physically deliver the chattel into the donee's hands only to have the donee redeliver it to the donor. As the facts of this case demonstrate, such a requirement could impose practical burdens on the parties to the gift while serving the delivery requirement poorly. Thus, in order to accomplish this type of delivery the parties would have been required to travel to New York for the symbolic transfer and redelivery of the Klimt painting which was hanging on the wall of Victor Gruen's Manhattan apartment. Defendant suggests that such a requirement would be stronger evidence of a completed gift, but in the absence of witnesses to the event or any written confirmation of the gift it would provide less protection against fraudulent claims than have the written instruments of gift delivered in this case.

Acceptance

Acceptance by the donee is essential to the validity of an *inter vivos* gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part. Plaintiff did not rely on this presumption alone but also presented clear and convincing proof of his acceptance of a remainder interest in the Klimt painting by evidence that he had made several contemporaneous statements acknowledging the gift to his friends and associates, even showing some of them his father's gift letter, and that he had retained both letters for over 17 years to verify the gift after his father died. Defendant relied exclusively on affidavits filed by plaintiff in a matrimonial action with his former wife, in which plaintiff failed to list his interest in the painting as an asset. These affidavits were made over 10 years after acceptance was complete and they do not even approach the evidence in *Matter of Kelly* where the donee, immediately upon delivery of a diamond ring, rejected it as "too flashy". We agree with the Appellate Division that interpretation of the affidavit was too speculative to support a finding of rejection and overcome the substantial showing of acceptance by plaintiff.

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

Notes and Questions

17.6. **Postscript.** Michael took possession and immediately sold the painting for \$5 million. A decade later it was resold for \$23 million.

17.7. **Future Interests.** Michael's remainder interest is a type of "future interest." It is a future interest because Michael can only take *possession* in the future. However, as a legal matter, Michael's future interest exists before his right to take possession does. Victor needed to have a present donative intent in order to make a valid gift, and he had that intent: he intended to give Michael *something* when he wrote. That something was a future interest.

Corresponding to Michael's remainder interest is Victor Gruen's "life estate," which is a present possessory interest as long as Victor Gruen lives – and thus the court holds that Victor may keep possession of the painting, despite the delivery requirement. He isn't giving Michael a present possessory interest, so requiring him to deliver the painting wouldn't serve the ordinary purpose served by delivery of uniting the property owner with physical possession of the prop-

erty.

Does Gruen's willingness to recognize legal future interests in personal property undermine the certainty provided by a delivery requirement? What if Victor had intended an even more complicated transfer – perhaps giving the painting to his widow for as long as she lived, then to Michael? This could have raised troubling issues of who owned what.

17.8. **Tax fraud.** If the donor retains a life estate in property transferred *inter vivos*, that property will be included in the donor's estate for estate tax purposes. I.R.C. §2036(a). As a result, the estate tax owed will be the same as if the property hadn't been transferred at all. This provision is designed to discourage evasion of the estate tax (which was substantially more onerous when this case was litigated). Victor did just this, but his lawyer told him to "doctor up" the transaction so that he wouldn't have to pay the resulting taxes. *Do not do this.* It is called tax fraud, and you may be disbarred, or worse. Relatedly, backdating the letter raises serious ethical problems, and it too could have serious consequences for a lawyer who advised backdating in situations where the date of the transfer matters. Should Victor's apparently successful tax evasion have factored into the court's decision on the state law question of whether the gift was valid? If so, how?

17.9. **Substitutes for testamentary transfers?** Consider the outcomes of the following scenarios:

- Victor Gruen writes the same letter giving his son Michael a future interest, but simply shows it to Michael rather than mailing it.
- Victor writes a letter granting Michael total ownership of the painting, without reserving a life estate for himself, and mails the letter to Michael, then dies before being able to deliver the painting.
- Victor writes a will in 1963 devising the painting to Michael. Victor dies in 1980. (What interest, if any, does Michael own in the painting before Victor dies?)
- Victor writes a letter saying "I intend for you to have the painting when I die."

As you should see, the last possibility is an attempted testamentary transfer, but it is unlikely to meet the requirements for a transfer by will. Rather than being a present transfer of a future interest, it's a statement of intent to make a transfer in the future. Is the difference between what Victor actually did and "I intend for you to have the painting when I die" big enough to explain the differ-

ent results? If this rule allows legally savvy people to carry out their intent more successfully than laypeople innocent of the law, is that a good thing or a bad thing, compared to the alternatives? Some states now allow land transfers in this form – a deed that expressly says it won’t take effect until the death of the grantor will be honored, but only if it’s recorded before the death of the grantor. See Mo. Stat. Ann. §461.025(1). Would you support such a law?

17.10. Another Variant of Symbolic or Constructive Delivery: Delivery to a Place. Sometimes, the would-be donor does not physically hand the object or document to the donee, but instead puts it in a particular place, from which she expects the donee to retrieve it. Should this constitute delivery? Courts have disagreed about the details, but if the putative donee does not have any right to control the place and other people do, then there is no delivery. For example, a household servant does not have dominion over the whole house, so a piano placed in the living room would not be delivered to such a servant, even if there was explicit donative intent. Another rule is that, if the putative donee has exclusive dominion over the place, there is delivery. Thus, furniture placed in a live-in servant’s bedroom in her employer’s house would be delivered to the servant. See *Newman v. Bost*, *supra*. (In such a case, disputes might still arise over donative intent.)

What about shared spaces? Suppose four people are living together in a house, and A tells B that she’s giving him a book, which she leaves on the kitchen table for him. The kitchen is shared by all four residents. Should this be sufficient delivery? Does the fact that she could easily instead have put the book in his bedroom, which is under his exclusive control, make any difference? (What should we expect laypeople to know about the law of gifts?) Cf. *Robinson v. Hoalton*, 2 P.2d 34 (Cal. 1931) (personal property was validly delivered when there was an oral grant and the donor and donee lived together: “The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house . . .”).

Disclosure of the location of an item may also serve as delivery, at least when it is otherwise hidden or inaccessible. See *Waite v. Grubbe*, 73 P. 206 (Ore. 1903) (disclosing location of buried cash sufficed for valid gift); *Teague v. Abbott*, 100 N.E. 27 (Ind. Ct. App. 1912) (disclosing combination to safe sufficed for valid gift).

17.11. Intermediated Delivery. Can you identify a unifying principle behind the constructive/symbolic delivery cases? Following the logic of these cases, suppose that, while Buffy Summers is working at the fast food restaurant Doublemeat Palace, her friends leave a present for her at the door, before the restaurant opens. When the manager comes to open up, he takes the present

for himself. Who should bring the claim against him, Buffy or her friends?

Handing the property, or an appropriate symbol of the property, to a third party for delivery to the donee will also complete delivery, as long as the donor has no power to recall the third party. If the donor can still control the third party and interrupt the delivery, by contrast, then the delivery is not complete. These principles have led courts to diverge on the proper treatment of checks: because a check can be stopped by the payor at any time before it's cashed,¹ the majority of courts say there's no delivery until that time. The payor has not given up complete control until the check is cashed. See, e.g., *Rosano v. United States*, 67 F. Supp. 2d 113 (E.D.N.Y. 1999); *In re Estate of Heyn*, 47 P.3d 724 (Colo. Ct. App. 2002); *Woo v. Smart*, 442 S.E.2d 690 (Va. 1994). Other courts say that, at least with respect to gifts made in anticipation of death (of which more below), when the check is *not* stopped before the donor dies, the gift is complete even before the check is cashed.

17.12. Delivering Intangibles. Given the delivery requirement, how would you accomplish the gift of an intangible right, such as a copyright or a share of stock?

17.3 Acceptance

As you've seen, acceptance is generally presumed for gifts of value. Given that presumption, why do you think acceptance is an element of a valid gift at all?

If the donee doesn't want to accept the gift, then the donee may "disclaim" the gift. This usually only arises in cases of attempted transfers by will.

17.4 Irrevocability of Gifts and Exceptions

A gift, once given, is usually *irrevocable*: once the gift is complete, the donor may not change her mind and demand the gift back. The donee may voluntarily give the property back, but that's a second transfer of ownership. Irrevocability makes it important to be able to figure out when the gift was complete, because before it is complete, it is revocable.

¹Be aware that the law governing checks is complicated, and stopping a check may not always succeed or may have other consequences – this note just discusses how courts in gift cases have treated checks.

Suppose that Bobby Singer leaves his junkyard to Dean Winchester in his will. Dean moves in, then realizes after two days that he doesn't want to run a junkyard, disclaims the gift, and tells Bobby's residual heirs – Bobby's second cousins – that the property is theirs. Is it?

Suppose that, on Spencer Hastings's eighteenth birthday, her parents put the keys to a car in an envelope by her place at the table. However, before the birthday meal, the family gets into a screaming fight, and the parents snatch up the keys from the table and say they no longer think Spencer deserves the car. Who owns the car?

There are two notable exceptions to the irrevocability of a gift: Gifts *causa mortis* and conditional gifts. In the materials that follow, we will explore complications relating to both. As you read, keep an eye on the ways in which courts are interpreting the various elements of a gift in order to achieve an overall result they find appropriate.

17.4.1 Gifts *Causa Mortis*

The gifts with which you are likely most familiar—gifts to mark a special occasion or relationship—are generally **inter vivos gifts**, that is, gifts given by living people (the Latin literally means “between the living”). A special category of gift law exists to deal with gifts that are not given in a will, but are given because the donor fears he is soon to die. Again, concerns about interfering with the law of wills and estates shape judicial treatment of this category, known as gifts *causa mortis* (literally, “gifts on account [or ‘because’] of death”).

The elements of a **gift causa mortis** are the same as the elements of an *inter vivos* gift: (1) intent, (2) delivery, and (3) acceptance, but the donor must also (4) anticipate imminent death. A gift *causa mortis* is subject to a condition subsequent: if the donor survives the peril that caused her to fear death, the gift is either revoked or revocable. In most states, the gift is revoked automatically, while in others the donor may choose to revoke the gift. In the latter states, delay may be troublesome. See *RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS* § 31.3 (“A failure to revoke within a reasonable time after the donor is no longer in apprehension of imminent death eliminates the right of revocation.”). In all states, if the donor dies from the anticipated cause, then the gift becomes irrevocable. Some jurisdictions extend this to situations in which the donor dies from something else within roughly the same time frame or in which the cause of death is related to the anticipated peril.

Suppose D is going into the hospital for heart surgery that might end in death. She says to her son, “If I die, I want you to have the contents of my safe deposit box,” and gives him the key. While the surgery is a success, she dies a week later from an infection acquired in the hospital. Is the gift valid? What if she dies six months later from the same infection? See *Brind v. Int'l Trust Co.*, 179 P. 148 (Colo. 1919) (putative donor didn't die from the operation that caused her to fear death, but six months later from the ailment that had triggered the operation; held: no gift *causa mortis*, because putative donor was specific about the operation as the cause of the gift, and her lawyer told her that she probably needed to take further action to reaffirm the gift, but she didn't).

Courts are often suspicious of gifts *causa mortis*. Courts may apply the delivery requirement more stringently than in other gift cases. Is this reluctance justified?

For example, in *Foster v. Reiss*, 112 A.2d 553 (N.J. 1955), the putative donee obtained the property at issue by taking a note written to him from the hospital bedside of his estranged wife, who was then unconscious. The note disclosed the location of money and bank books (which gave access to savings accounts) hidden in their house. The husband found out about the note from a friend who'd been directed to tell him about it. He took the note, went home, and found the cash and the bank books. She died a few days later, never having regained consciousness. Her will gave \$1 to her estranged husband and the rest of her estate to her children and grandchildren, who sued to recover the cash and the bank books. The court held that there had been no gift *causa mortis*, and said the following:

[A] gift *causa mortis* is essentially of a testamentary nature and as a practical matter the doctrine, though well established, is an invasion into the province of the statute of wills

“These gifts *causa mortis* are dangerous things. The law requires, before Mr. Hitt can come into this court and claim \$10,000 as an ordinary testamentary gift from Mrs. Thompson, that he should produce an instrument in writing signed by Mrs. Thompson, and also acknowledged with peculiar solemnity by her in the presence of two witnesses, who thereupon subscribed their names as witnesses. That is what Mr. Hitt would have to prove if he claimed a testamentary gift in the ordinary form of one-third of Mrs. Thompson's estate. And yet, in cases of these gifts *causa mortis*, it is possible that a fortune of a mil-

lion dollars can be taken away from the heirs, the next of kin of a deceased person, by a stranger, who simply has possession of the fortune, claims that he received it by way of gift, and brings parol testimony to sustain that claim." *Varick v. Hitt*, 55 A. 139, 153 (Ch. 1903), *affirmed*, 66 N.J. Eq. 442, 57 A. 406 (E. & A. 1904).

Gifts *causa mortis* are not favored in the law . . . "for the reason that this mode of disposition permits property without limit of value to be transferred by mere delivery, and the proof thereof to be made when death has closed the lips of the claimed donor." . . .

The first question confronting us is whether there has been "actual, unequivocal, and complete delivery during the lifetime of the donor, wholly divesting him (her) of the possession, dominion, and control" of the property. . . .

" . . . The test was this: that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action."

Thus, under New Jersey law actual delivery of the property is still required except where "there can be no actual delivery" or where "the situation is incompatible with the performance of such ceremony." In the case of a savings account, where obviously there can be no actual delivery, delivery of the pass-book or other indicia of title is required.

The court found that there had been no delivery. Instead, the putative donee had merely taken possession of the property, at a time when the would-be donor was incapacitated and incapable of authorizing him to act for her. The court emphasized the separateness of the two elements of intent and delivery:

As stated in *Madison Trust Co. v. Allen*, *supra*, 105 N.J. Eq. 230, 235, 147 A. 546, 548, "the burden of proof is upon the alleged donee to clearly prove both delivery *and* donative intent" (emphasis supplied). This was clearly brought out by the court in *Parker v. Copland*, 70 N.J. Eq. 685, 64 A. 129, 130 (E. & A. 1906):

" . . . [T]he crucial test is not the strenuousness of the language in which the gift is couched, but in 'the transfer,' which is something that is both different from the donative intention and yet capable of acting in conjunction with it, so that both are

necessary to the creation of an enforceable gift. . . . [W]hen two steps are required by law to complete a transaction, the excess of one cannot supply the lack of the other"

Thus, an informal writing such as we have here does not satisfy the separate and distinct requirement of delivery, but rather there must be such delivery of the property that the donor stands absolutely deprived of his control over it. . . .

We must not forget that since a gift *causa mortis* is made in contemplation of death and is subject to revocation by the donor up to the time of his death it differs from a legacy only in the requirement of delivery. Delivery is in effect the only safeguard imposed by law upon a transaction which would ordinarily fall within the statute of wills. To eliminate delivery from the requirements for a gift *causa mortis* would be to permit any writing to effectuate a testamentary transfer, even though it does not comply with the requirements of the statute of wills.

The court quoted an earlier case emphasizing the risks of false testimony in such cases: "Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury; around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proven devices."

A strong dissent emphasized that the donor was fully competent when she wrote her note, clearly intended to make the gift, and never revoked the gift. The dissent would have honored her clearly stated intent because "justice fairly cries out for the fulfillment of [the] wife's wishes":

I find neither reason nor persuasive authority anywhere which compels this untoward result. See *Gulliver and Tilson*, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 2 (1941):

"One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal

arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it.”

Concerns over fraud or uncertainty, the dissent thought, were irrelevant here, where the donor’s wishes “were freely and clearly expressed in a written instrument and the donee’s ensuing possession was admittedly bona fide.” The dissent noted that, in contradiction to New Jersey’s approach, other courts have *relaxed* the delivery requirement in cases of gifts *causa mortis*, rather than strengthening it. Such courts reason that gifts *causa mortis* generally come about as the result of some emergency that makes it impossible to write a formal will. While delivery is still important to avoid problems of figuring out what was really given, the requirements for sufficient delivery ought to be liberally interpreted to protect the donor’s intent. Here, for example, the wife’s authorization of the husband to take physical possession, and the fact that he did indeed take physical possession before she died, ought to have sufficed. As the dissent saw it, “[w]hen Ethel Reiss signed the note and arranged to have her husband receive it, she did everything that could reasonably have been expected of her to effectuate the gift *causa mortis*; and while her husband might conceivably have attempted to return the donated articles to her at the hospital for immediate redelivery to him, it would have been unnatural for him to do so.”

Which position is more persuasive to you? Should it make a difference if the putative donee were an unrelated friend? If the heirs named in the will were unrelated friends?

As noted above, in many cases, a donee’s control over the place in which the gift was left is likely to suffice for delivery. Why didn’t the husband’s possession of the house in which the money was hidden in *Foster* suffice for delivery?

17.4.2 Conditional Gifts

Speaking more generally, it is possible to give other kinds of *conditional* gifts. A conditional gift is a gift that will return to the donor if a condition subsequent is not fulfilled. (By contrast, a promise to give a gift if a condition *precedent* is fulfilled is an unenforceable promise to make a gift.) For example, a student’s parents might give him a car, conditioned on his graduating law school in three years. If the student fails to graduate in that time, the car must be returned. During that period, however, the gift is otherwise irrevocable: the parents cannot change their minds in year two and demand the car back, as long

as the student remains willing to fulfill the condition and remains on track to do so.

Since many gifts are given orally, how can we know which are conditional, and what those conditions are? Would you support a rule that conditions can only be imposed on gifts if the conditions are written down? See *State ex rel. Pai v. Thom*, 563 P.2d 982 (Haw. 1977) (delivery of a deed with an oral condition was irrevocable even if condition was unsatisfied); *but see Martinez v. Martinez*, 678 P.2d 1163 (N.M. 1984) (allowing grantor of deed to offer parol evidence of oral condition). *Pai* states the traditional common law rule for transfers of land – why do you think this is so? What might justify relaxing the traditional rule?

Can conditions sometimes be implied on gifts of personal property? Consider the following case, involving an engagement ring.

Albinger v. Harris
48 P.3d 711 (Mont. 2002)

Who owns a ring given in anticipation of marriage after the engagement is broken? Michelle L. Harris (Harris) appeals the disposition of an engagement ring by the Eighth Judicial District Court, Cascade County, Montana, and Michael A. Albinger (Albinger) cross-appeals the denial of reimbursement for certain telephone charges incurred by Harris and the award of damages for a prior, unlitigated assault and battery claim. We reverse the disposition of the engagement ring, affirm the denial of reimbursement for telephone charges and affirm the award for pain, suffering and emotional distress.

We frame the issues on appeal as follows:

1. Did the District Court err in determining an engagement ring is a conditional gift that may be revoked upon termination of the engagement?...

Factual and Procedural Background

Harris and Albinger met in June 1995, and began a troubled relationship that endured for the next three years, spiked by alcohol abuse, emotional turmoil and violence. Albinger presented Harris with a diamond ring and diamond earrings on December 14, 1995. The ring was purchased for \$29,000. Days after accepting the ring, Harris returned it to Albinger and traveled to Kentucky for the holidays. Albinger immediately sent the ring back to Harris by mail. The couple set a tentative wedding date of June

27, 1997, but plans to marry were put on hold as Harris and Albinger separated and reconciled several times. The ring was returned to or reclaimed by Albinger upon each separation, and was re-presented to Harris after each reconciliation.

Albinger and Harris lived together in Albinger's home from August 1995 until April 1998. During this time, Albinger conferred upon Harris a new Ford Mustang convertible, a horse and a dog, in addition to the earrings and ring. Harris gave Albinger a Winchester hunting rifle, a necklace and a number of other small gifts. Albinger received a substantial jury award for injuries sustained in a 1991 railroad accident. He paid all household expenses and neither party was gainfully employed during their co-habitation.

On the night of February 23, 1997, during one of the couple's many separations, Albinger broke into the house where Harris was staying. He stood over Harris' bed, threatened her with a knife and shouted, "I'm going to chop your finger off, you better get that ring off." After severely beating Harris with a railroad lantern, Albinger forcibly removed the ring and departed. Harris sued for personal injuries and the county attorney charged Albinger by information with aggravated burglary, felony assault, and partner and family member assault. The next month, after another reconciliation, Harris requested the county attorney drop all criminal charges in exchange for Albinger's promise to seek anger management counseling and to pay restitution in the form of Harris' medical expenses and repair costs for damage to her friend's back door. Harris also directed her attorney to request the court dismiss the civil complaint without prejudice.

The parties separated again in late April 1998. Albinger told Harris to "take the car, the horse, the dog, and the ring and get the hell out." During their last month together, Harris ran up approximately \$1,000 in telephone charges on Albinger's credit card. Harris had been free to use Albinger's telephone throughout the relationship, and Albinger paid the bills. Harris moved from Great Falls, Montana to Kentucky, where she now resides. The parties dispute who was responsible for the end of the relationship. No reconciliation followed, marriage plans evaporated and Harris refused to return the ring.

Albinger filed a complaint on August 31, 1998, seeking recovery of the ring or its monetary value and payment for \$1,000 in telephone charges. Harris counterclaimed for damages resulting from the assault of February 23, 1997.

At the conclusion of the trial, both parties submitted briefs discussing how the statute barring actions for breach of promise to marry, § 27-1-602, MCA, impacts an action to recover an engagement ring. The District Court found the ring to be a gift in contemplation of marriage, and reasoned that § 27-1-602, MCA, did not bar the action because the case could be decided on common-law principles, as opposed to contract theories. The court implied the existence of a condition attached to the gift of the engagement ring. Disregarding allegations of fault for "breaking" the engagement, the court concluded that the giver is entitled to the return of the ring upon failure of the condition of marriage.

On September 2, 1999, the District Court awarded the engagement ring or its reasonable value and court costs to Albinger, and denied recovery for the telephone charges. . . . From this judgment, Harris appeals the disposition of the ring and Albinger cross-appeals the denial of telephone charges

Did the District Court err in determining an engagement ring is a conditional gift that may be revoked upon termination of the engagement?

Albinger and Harris gave one another numerous gifts of substantial value during their engagement. The ring is the only item now in controversy

Legal ownership of the gift of an engagement ring when marriage plans are called off is an issue of first impression in Montana. In 1963, the Legislature barred access to the courts for actions arising from breach of the promise to marry. The District Court determined that this action brought to recover an antenuptial gift is maintainable, notwithstanding § 27-1-602, MCA, which states:

All causes of action for breach of contract to marry are hereby abolished. However, where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld where such action otherwise is maintainable under existing law.

. . . Albinger argues that the engagement ring was a conditional gift that he could revoke when the implied condition of marriage failed. Hence,

Harris' refusal to return the ring upon demand constituted unjust enrichment. Harris contends she deserves the ring because Albinger repeatedly beat her, forcibly took the ring back, and was the one who finally ended the engagement by ordering Harris to move out of the residence where they had been living together.

The District Court declined to undertake a determination of which party was at fault in terminating the engagement. The court cited the following three reasons: 1) judicial holdings that fault is an inappropriate concern in matters of family relations; 2) pragmatic difficulties in discerning fault when the conduct of both parties likely contributes to the failure of a relationship; and, 3) aversion to concepts of legal "rightness" and "wrongness" regarding the choice of a marriage partner. We agree, and affirm that judicial fault-finding is irrelevant and immaterial in the adjudication of matters of antenuptial gifting under existing law, absent fraud or deceit.

The District Court employed the "conditional gift" theory advanced by Albinger to determine present ownership of the disputed engagement ring. The theory holds that an implied condition of marriage attaches to the gift of a ring upon initial delivery due to the ring's symbolic association with the promise to marry and, when the condition of marriage fails, the incomplete gift may be revoked by the giver. Albinger urges this Court to affirm the District Court's conclusion that the ownership of an engagement ring remains with the one who gave the ring when plans to marry are called off.

Only in engagement ring cases does precedent from other jurisdictions weigh heavily for conditional gift theory in the absence of an expressed condition. Considering it "unduly harsh and unnecessary" to require a hopeful suitor to express any condition upon which a ring might be premised, many courts stepped in to impute the condition of marriage. In practice, courts presume the existence of the implied condition of marriage attaching to an engagement ring in the absence of an expressed intent to the contrary

Abolition of Breach of Promise Actions

Historic breach of promise jurisprudence tended to view an engagement ring as either a pledge of personal property given to secure a marital promise or as consideration for the contract of marriage. When a contract to marry was abrogated, the jilted lover could seek redress in a breach

of promise action that sounded in contract law, but availed the plaintiff of tort damages. “The law allows punitive or vindictive damages to be assessed by the jury; and all the circumstances attending the breach before, at the time, and after may be given in evidence in aggravation of damages.” The plaintiffs were almost invariably women seeking economic relief for themselves, compensation for pregnancy and material support for children of the relationship. Whatever “heart balm” was awarded to assuage lost love, ruined reputation or foreclosed opportunities to marry well “rest[ed] in the sound discretion of the jury.”

By the mid-1930’s, several state legislatures questioned the efficacy of court “interference with domestic relations” and passed statutes barring actions for breach of promise to marry, alienation of affections, criminal conversation and other inappropriate conduct of the “private realm.” See Rebecca Tushnet, Rules of Engagement (1998), 107 Yale Law Journal 2583, 2586-91. Commentators noted all of these actions “afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement.” “There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives [and] that it is impossible to compensate for such damage with what has derisively been called ‘heart balm.’ ”

In the wake of “anti-heart balm” statutes that barred breach of contract to marry actions, courts heard a plethora of legal theories designed to involve them in settling antenuptial property disputes while avoiding the language of contract law. The results were mixed. Some courts allowed actions in replevin. Others entertained claims for restitution and unjust enrichment. Out of this legal morass, conditional gift analysis emerged as a popular way to resolve acrimonious engagement ring disputes. While some states pursue a fault-based determination for awarding the ring in equity, the modern wave aligns ring disposition with no-fault divorce property disposition and follows a bright-line rule of ring return

Conditional Gift Theory

According to Montana law, “a gift is a transfer of personal property made voluntarily and without consideration.” . . . When clear and convincing evidence demonstrates the presence of the essential elements of donative intent, voluntary delivery and acceptance, the gift is complete and this Court will not void the transfer when the giver experiences a change

of heart.

Another essential element of a gift is that it is given without consideration. A purported “gift” that is part of the inducement for “an agreement to do or not to do a certain thing,” becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one. When an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of the breach of promise actions.

... Albinger maintains he held a reversionary interest in the gift of the engagement ring grounded in an implied condition subsequent. Montana law recognizes the transfer of personal property subject to an express or implied condition which must be satisfied before title vests, as either a contract, or as a gift in view of death. Since actions stemming from breach of the contract to marry are barred by our “anti-heart balm” statute, Albinger urges the Court to adopt a conditional gift theory patterned on the law relevant to a gift in view of death. Under Montana law, no gift is revocable after acceptance except a gift in view of death. While some may find marriage to be the end of life as one knows it, we are reluctant to analogize gifts in contemplation of marriage with a gift in contemplation of death. This Court declines the invitation to create a new category of gifting by judicial fiat.

Gender Bias

... The Montana Legislature made the social policy decision to relieve courts of the duty of regulating engagements by barring actions for breach of promise. While not explicitly denying access to the courts on the basis of gender, the “anti-heart balm” statutes closed courtrooms across the nation to female plaintiffs seeking damages for antenuptial pregnancy, ruined reputation, lost love and economic insecurity. During the mid-20th Century, some courts continued to entertain suits in equity for antenuptial property transfers. The jurisprudence that rose upon the implied conditional gift theory, based upon an engagement ring’s symbolic associations with marriage, preserved a right of action narrowly tailored for ring givers seeking ring return The proposed no-fault adjudication of a disputed engagement ring also ignores the particular circumstances of a couple’s decision not to marry.

Conditional gift theory applied exclusively to engagement ring cases,

carves an exception in the state's gift law for the benefit of predominately male plaintiffs. . . . While antenuptial traditions vary by class, ethnicity, age and inclination, women often still assume the bulk of pre-wedding costs, such as non-returnable wedding gowns, moving costs, or non-refundable deposits for caterers, entertainment or reception halls. Consequently, the statutory "anti-heart balm" bar continues to have a disparate impact on women. If this Court were to fashion a special exception for engagement ring actions under gift law theories, we would perpetuate the gender bias attendant upon the Legislature's decision to remove from our courts all actions for breach of antenuptial promises.

Engagement Ring Disposition

To preserve the integrity of our gift law and to avoid additional gender bias, we decline to adopt the theory that an engagement ring is a gift subject to an implied condition of marriage. We hold that the engagement ring was an unconditional, completed gift upon acceptance and remains in Harris' ownership and control. . . .

Justice TERRY N. TRIEWEILER concurring [as to the telephone charges] and dissenting.

Gender discrimination is a bad thing. I am glad the majority is against it. However, I regret that the majority has taken this opportunity to declare their good intentions because gender equity has about as much to do with this case as banking law. . . .

The simple fact is that if women are more likely to be the subject of an action to recover a conditional gift given in anticipation of a marriage which does not occur, it is because they are more frequently the recipient of the gift. Should we just prohibit gifts in anticipation of marriage altogether because men are more likely to have to pay for them?

. . . The District Court found in Finding No. 7 that each time, except for the last time, the couple broke up (and they broke up frequently), the ring was either returned by Michelle or taken back by Michael. These findings were fully supported by the evidence. For example, Michael testified as follows:

Q. Now, when you gave her the engagement ring, were you contemplating that you were going to get married?

A. That was the whole idea.

Q. Was there any way in your mind that the engagement ring was just a ring and she could keep it whether you were married or not?

A. No . . .

It is equally clear from the record that the engagement ring was treated differently by the couple than other gifts which had been given by Michael to Michelle while they were engaged. He testified as follows:

Q. Okay. Now, you heard her testify, didn't you, about the other gifts you'd given her?

A. Yes, I did.

Q. The 1995 Mustang that cost about \$24,000, was that in contemplation of getting married?

A. No.

Q. Have you ever made any demand that she return that to you?

A. No.

Q. How about the diamond earrings that were the Christmas gift? Have you ever made any demands that she return those because they were given in contemplation of marriage?

A. No.

Q. How about the horse?

A. No.

Q. Any gift you gave her beside the engagement ring, did you ever contend that those other gifts were made in contemplation of marriage?

A. No. They were gifts. Those are gifts.

. . . [A]n older line of cases limited a donor's recovery of the gift to situations where the engagement is dissolved by agreement or unjustifiably broken by the donee. However, the court concluded that the notion of one party being at blame for the termination of an engagement is archaic and outdated.

. . . [E]ither gender can [be] given an engagement ring. For example, in *Vigil v. Haber* (1994), 119 N.M. 9, 888 P.2d 455, the parties exchanged engagement rings. However, their relationship deteriorated, the couple separated, and following their separation a hearing examiner determined

that the parties should return the rings they had given each other. The plaintiff immediately returned the ring he had along with other of the defendant's possessions. However, the defendant objected to returning the engagement ring that had been given to her. The New Mexico Supreme Court held that the ring was a conditional gift depend[e]nt on the parties' marriage and should be returned. What if the roles had been reversed and the woman had returned the engagement ring given to her but the man had refused to do so? According to this Court, she would not be allowed to recover the engagement ring that she had given to her fiancé, no matter how substantial the value and unfair the result because requiring the return of engagement rings is unfair to women.

The second problem with the majority's assumptions is the assumption that conditional gift law as it relates to gifts exchanged in anticipation of marriage only applies to wedding rings. It does not. For example, in Pavlicic, a case which disproves the theory that jurisprudence cannot be written in readable prose, the plaintiff was a 75-year-old man when the 26-year-old defendant asked for his hand in marriage. While he first protested on the basis of his age, she assured him that she was no longer interested in "young fellows" and prevailed upon him to make the commitment. Over the course of the next four years, she then prevailed upon him to pay the mortgage on her home, buy her two new cars, an engagement ring, a diamond for her mother's ring, remodel her house, and advance her \$5000 to purchase a saloon which they could jointly operate. The problem was that after she received the money for the saloon, she disappeared. She was next seen in another town operating Ruby's bar and married to a man two years her junior.

As noted by the Pennsylvania Supreme Court:

When George emerged from the mists and fogs of his disappointment and disillusionment he brought an action in equity praying that the satisfaction of the mortgage on Sara Jane's property be stricken from the record, that she be ordered to return the gifts which had not been consumed, and pay back the moneys [sic] which she had gotten from him under a false promise to marry.

The Pennsylvania Supreme Court held that George's action was not barred by the state's "Heart Balm Act" and that all gifts, not just the wed-

ding ring, were conditional gifts in anticipation of marriage which must be returned or repaid. . . .

The point is that there is no reason to limit the law of “conditional gifts” in anticipation of marriage to engagement rings. . . .

Notes and Questions

17.13. Would the court rule the same way if a woman had given a man an engagement ring, or a man had given a man an engagement ring? Compare *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999) (adopting the majority no-fault rule requiring return of the ring in any broken engagement).

17.14. Does the adoption of a no-fault rule require the mandatory return of the ring in every case? Wouldn’t a no-return rule also be a no-fault rule that distributed the losses differently?

17.15. If the dissent is correct, could Albinger have sought the return of his other gifts?

17.16. The dissent argues that the anti-heartbalm laws were fully consistent with no-fault conditional gift theory, but see Tushnet, *supra*:

[The early post-reform cases like *Pavlicic*, holding that women had to return engagement rings when they were at fault for breaking the engagement,] subtly shifted the justification for antiheartbalm laws in a paternalistic direction. The laws were no longer understood to protect wholly innocent men who had not promised anything to mercenary women; instead, they were construed to protect men who had foolishly, but willingly, made actual promises to marry and who then gave gifts in reliance on a woman’s deceitful promise. Blackmail and extortion disappeared, leaving trickery and desire-induced gullibility as the only rationales for the rule. Whereas prereform cases had presumed that women were vulnerable to a naturally dominating male influence, the emerging line of engagement gift cases were premised on the view that women could misuse their power over love-blinded men. There was a related shift in the presumed goal of a promise-breaker’s deceit: Duplicitous men attempting to get sex were replaced as the targets of premarital law by duplicitous women attempting to get material goods.

If the reason for having a unique rule for engagement rings grows out of a history

of sexist views of women, does that support the majority's conclusion?

17.17. *Cooper v. Smith*, 800 N.E.2d 372 (Ohio Ct. App. 2003), concluded that the engagement ring was a conditional gift recoverable without fault, but that other premarital gifts to a then-fiancee—including a car, a computer, a tanning bed, and horses—were irrevocable *inter vivos* gifts unless they were expressly conditioned on the occurrence of the marriage, and gifts to ex-fiancee's mother were also irrevocable:

The engagement ring has a special significance because it symbolizes the couple's promise to marry. As a symbol of the promise to marry, what value does the ring have for the donee once the engagement is ended?* Moreover, we realize that a donor proposing to his or her beloved is unlikely to expressly condition the gift of the engagement ring on the occurrence of the marriage. Not only do we realize how unlikely this is, we recognize how unromantic such a requirement would be. Thus, because of the engagement ring's symbolic significance, we are willing to imply a condition to the gift of the engagement ring. Unless the parties have agreed otherwise, the donor is entitled to recover the engagement ring (or its value) if the marriage does not occur, regardless of who ended the engagement.

While we are willing to imply a condition concerning the engagement ring, we are unwilling to do so for other gifts given during the engagement period. Unlike the engagement ring, the other gifts have no symbolic meaning. Rather, they are merely "token[s] of the love and affection which [the donor] bore for the [donee]." . . . "Many gifts are made for reasons that sour with the passage of time." Unfortunately, gift law does not allow a donor to recover/revoke an *inter vivos* gift simply because his or her reasons for giving it have "soured."

. . . If we were to imply a condition on gifts given during the engagement period, then every gift the donor gave, no matter how small or insignificant, would be recoverable. . . . We believe that the best approach is to treat gifts exchanged during the engagement period (excluding the engagement ring) as absolute and irrevocable *inter vivos* gifts unless the donor has ex-

*As a symbol of the promise to marry, what value does the ring have for the *donor* once the engagement is ended? —Eds.

pressed an intent that the gift be conditioned on the subsequent marriage.

What's the difference between a gift being "symbolic" and a gift being a "token[]" of "love and affection"—aren't those synonyms? Why not then imply the same conditions on other premarital gifts?

Does it matter that willingness and ability to perform, and not actual performance, is the usual rule for all conditional gifts except for the engagement ring? This would roughly equate to the older fault rule in broken engagement cases. See *Curtis v. Anderson*, 106 S.W.3d 251 (Tex. Ct. App. 2003) (agreement that fiancee would return ring if marriage did not occur had to be in writing to be enforceable; applying fault rule and finding that donor, as person responsible for calling off marriage, was not entitled to return of engagement ring under conditional gift doctrine). But is it actually "fault" to break an engagement where at least one party doesn't want to get married?

17.18. How will this rule affect the behavior of engaged couples in Montana? (Did you know the majority no-fault rule before reading this section?)

17.19. Susan and Sarah announce their engagement. Numerous gifts arrive before the day of the wedding, some at a "bridal shower" and some just before the wedding. On the morning of the wedding, Susan and Sarah call off their engagement. Who owns the gifts? (If you think the gifts don't have to be returned, how should Susan and Sarah split them?) What if Sarah has a stroke and dies the day before the wedding? If Susan and Sarah marry on Sunday and divorce on Monday?

17.20. **Other odious conditions.** *Tennessee Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. Ct. App. 2005), involved a 1933 donation from the UDC of \$50,000 to Peabody College. The gift came with the express condition that a dormitory must be maintained with the inscription "Confederate Memorial Hall." In 1979, Peabody College merged into Vanderbilt University, which in 2002 sought to change the name to repudiate the association with slavery and racial exclusion. The court of appeals found that Vanderbilt could not do so unless it returned the present value of the gift. Is that the right result? The court said that it wasn't within the court's mandate "to resolve the larger cultural and social conflicts regarding whether and how those who fought for the Confederacy should be honored or remembered." A concurring judge commented that a majority of those who fought for the Confederacy owned no slaves, and called Vanderbilt's stance a "misperception." (Query: Is the alleged misperception about what Confederate soldiers fought

to preserve?)

Was the problem merely that the court of appeals didn't find the condition odious *enough*? In fact, the agreement between the UDC and Peabody apparently called for Peabody to house young women descended from Confederate soldiers for free in the dormitory. Vanderbilt stopped the free housing, with no objection. In the litigation, Vanderbilt argued that the conditions were never properly put in place, but the court of appeals rejected its arguments. Should Vanderbilt be required either to reinstate the free housing for descendants of Confederate soldiers or pay up? (Laws against racial discrimination would make the first alternative impossible.) Ultimately, Vanderbilt changed the name on all official documents and the university's website, but kept "Confederate Memorial Hall" on the building itself. As you will see, this condition—apparently destined to persist forever—raises issues of "dead hand" control by past owners, issues we have seen before and will see again.

17.5 Review Problems

1. Abbie Mills lends her friend Ichabod Crane a book when Ichabod is visiting her home. A week later, she calls Ichabod and tells him to keep the book. Does he own the book? At what point did he come to own the book?
2. Walter Bishop, on his deathbed, tells Olivia Dunham, "Because I love you like a daughter and I want to ensure your financial security, I want you to have my house in Disturbia City. Continue to rent it out as I have done and you will always have an income." He hands her the deed to the house, then dies. Walter's will leaves all his property to Peter Bishop. For the last five years, the property has been rented to Astrid Farnsworth as a furnished dwelling. Peter Bishop sues Dunham for possession of the furniture in the house as well as the rare book collection stored on the bookshelves of the house. Who owns the furniture, and why? Who owns the rare book collection, and why?
3. Victoria Grayson hires Amanda Clarke as nanny to her children, Charlotte and Daniel Grayson. One day, Clarke praises one of Victoria Grayson's diamond necklaces. Grayson says, "You can have it if Charlotte and Daniel are accepted into Evernight Academy. In the meantime, you can wear it." Clarke thanks Grayson and wears the necklace thereafter. Right before the Evernight entrance results are released, Grayson fires Clarke, telling

her, “I despise you and I will never do anything for you!” Clarke leaves, taking the necklace with her. A day later, Charlotte and Daniel are accepted into Evernight. A day after that, Victoria Grayson sends a letter to Clarke demanding the return of the necklace. Who owns the necklace and why?

4. Damon and Stefan Salvatore, brothers, owned their family home. They fought, and, in an attempt to placate Stefan, Damon executed a deed transferring his ownership interest in the home to Stefan. Damon went to Stefan’s study and handed him the deed. Stefan dropped the deed (it landed on his desk) and yelled, “You’ll never buy my forgiveness!” Then he punched Damon and left town. Damon continued to live in the house. Two years later, with Stefan still gone, Damon executed a new deed transferring his ownership interest to Elena Gilbert, who had no idea about the previous deed. Damon handed the deed to Elena, telling her, “With all my family has done to yours, this is the least I can do.” She thanked him. A year later, Stefan returned. Damon’s first deed was still on Stefan’s desk, albeit very dusty. At that point, Stefan put the deed in his safety deposit box at the bank and thanked Damon for the gesture. Damon said, “No problem.” Which gift was completed first?
5. Fox Mulder gives Dana Scully a keychain with an Apollo 11 medallion on it. But when she tries to put her keys on it, the ring doesn’t work. He tells her, “Let me have that fixed for you,” and she lets him have the keychain. Afterwards, he decides that he doesn’t want her to have the keychain. Who owns the keychain?

Chapter 18

Wills and Intestacy

Lon L. Fuller, *Consideration and Form*

41 COLUM. L. REV. 799 (1941)

§ 2. *The Evidentiary Function.*—The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulatio, which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

§ 3. *The Cautionary Function.*—A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer-symbol in the popular mind of legalism and weightiness-was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

§ 4. *The Channeling Function.*— . . . That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. . . . The thing which characterizes the law of contracts and conveyances is that in

this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.

John H. Langbein, *Substantial Compliance with the Wills Act*
88 HARV. L. REV. 489 (1975)

4. *The Protective Function.*—Courts have traditionally attributed to the Wills Act the object “of protecting the testator against imposition at the time of execution.” The requirement that attestation be made in the presence of the testator is meant “to prevent the substitution of a surreptitious will.” Another common protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.

Stevens v. Casdorph
203 W. Va. 450 (1988)

PER CURIAM: . . .

On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will. Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his

estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. . . .⁴

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in W.Va. Code § 41-1-3 (1997). The statute reads:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms. Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. . . .

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell*, 131 W. Va. 247, 46 S.E.2d 804 (1948), that "testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the

⁴As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. . . .

dictates of W.Va. Code § 41-1-3. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade*, 119 W. Va. 596 (1938), this Court permitted a narrow exception to the stringent requirements of the W.Va. Code § 41-1-3. This narrow exception is embodied in syllabus point 1 of *Wade*:

Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

Wade stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of W.Va. Code § 41-1-3. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of W.Va. Code § 41-1-3.

WORKMAN, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of West Virginia Code 41-1-3 that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at

the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

Notes and Questions

18.1. **Wills Act Formalities.** The requirements to make a valid will vary from state to state, but in general a will must be in writing, signed by the testator, and attested by two witnesses. How well do these formalities serve the various purposes identified by Fuller and Langbein? Which of them failed in *Stevens v. Casdorph*? How? Why is the court so stringent about enforcing the formalities?

18.2. **Informal Wills.** Whether out of ignorance about the law, skittishness in thinking about their own death, or bad advice, people do all kinds of things that blatantly fail to qualify as wills under the traditional test. They write chatty

emails to family members explaining what they want to happen to their property after their death; they scrawl marginalia on old wills, crossing out specific bequests and adding new ones; they leave behind multiple conflicting undated “last” wills. What should courts do in such cases? In one memorably tragic case, Cecil George Harris used his pocketknife to scratch the words, “In case I die in this mess, I leave all to the wife. Cecil Geo Harris” into the fender of a tractor he was fatally pinned under. It was upheld as a valid **holographic will**: a will that has been handwritten and signed by the testator. A majority of states recognize holographic wills, although their specific requirements vary and an estates attorney should never rely on the validity of one. (For example, Maryland recognizes holographic wills only by testators serving in the armed services abroad. MD. CODE ESTATES & TRUSTS § 4-103(a)).

18.3. Interpretive Problems. The general interpretive rule for wills is the “intent of the testator.” Is there any reason this might be a harder problem for wills than for other types of legal instruments? Consider:

- T’s will leaves “all my property to my daughters A and B.” Five years after making the will but ten years before his death, T and his wife have another child, C.
- T’s will leaves “my red Toyota to my nephew A.” After making the will, T wrecks the red Toyota and buys a blue Toyota to replace it.
- T’s will leaves \$10,000 to A, \$10,000 to B, and his antique writing desk to C. After expenses, T’s estate consists of \$5,000 in cash and the writing desk.
- T’s will leaves his estate equally to his sisters A and B. A dies in the same car accident as T. She leaves behind two children, C and D. T has one child of his own, E, from whom he is estranged.

Maryland Code, Estates and Trusts

§3-101. Order of distribution of net intestate estate

Any part of the net estate of a decedent not effectively disposed of by his will shall be distributed by the personal representative to the heirs of the decedent in the order prescribed in this subtitle.

§3-102. Share of surviving spouse

(a) In general.—The share of a surviving spouse shall be as provided in this section.

- (b) Surviving minor child.—If there is a surviving minor child, the share shall be one-half.
- (c) No surviving minor child, but surviving issue.—If there is no surviving minor child, but there is surviving issue, the share shall be the first \$ 15,000 plus one-half of the residue.
- (d) No surviving issue, but surviving parent.—If there is no surviving issue but a surviving parent, the share shall be the first \$ 15,000 plus one-half of the residue.
- (e) No surviving issue or parent.—If there is no surviving issue or parent, the share shall be the whole estate. . . .

§3-103. Division among surviving issue

The net estate, exclusive of the share of the surviving spouse, or the entire net estate if there is no surviving spouse, shall be divided equally among the surviving issue. . . .

§3-104. Distribution when there is no surviving issue

. . . .

- (b) Parents and their issue.—. . . it shall be distributed to the surviving parents equally, or if only one parent survives, to the survivor; or if neither parent survives, to the issue of the parents, by representation.
- (c) Grandparents and their issue.—. . .
- (d) Great-grandparents and their issue.—. . .
- (e) No surviving blood relative.—If there is no surviving blood relative entitled to inherit under this section, it shall be divided into as many equal shares as there are stepchildren of the decedent. . . .

Notes and Questions

18.4. If you don't make a will, the state will make one for you. This portion of the Maryland Code describes the default inheritance rules for people who die domiciled in Maryland without a will. How well do you think they track people's expectations about what will happen to their property after they die? In addition to *total intestacy*—dying without a will—the intestacy statute also applies in cases of *partial intestacy*—dying with a will that fails to dispose of all of one's property. How might that happen?

Chapter 19

Land Transactions

In 1250, to transfer ownership of land, the grantor and grantee would physically go to the land. The grantor would physically (or perhaps metaphysically) put the grantees in possession by handing over a clod of dirt. The grantees would swear homage to the grantor, and the grantor would swear to defend the grantees's title. This was a public ceremony, performed in front of witnesses who could later be called on to recall what had happened if necessary. In contrast, written conveyances—called “charters”—were treated with skepticism; they were considered an inferior form of evidence because of the risk of forgery.

In the seven and a half centuries since, this attitude has completely flipped. Now, land transactions are paper transactions: the Statute of Frauds almost always requires a written conveyance—now called a **deed**—to transfer an interest in real property. Transfers by operation of law (primarily through adverse possession and intestacy) are very much the exception. In addition, land transactions are influenced by the common law's attitude that land is of distinctive importance, so that parties dealing with it need especial clarity about their rights, and by the fact that land transactions are often high-stakes, with hundreds of thousands, millions, or sometimes even billions of dollars at issue. This section focuses on the written instruments at the heart of land transactions. It considers when a deed is required, when a deed is effective, how deeds are interpreted, and what they promise about the property and the interest being conveyed.

Indiana Code

§ 32-21-1-1—Requirement of written agreement; agreements or promises covered

- (a) This section does not apply to a lease for a term of not more than three (3) years.
- (b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: . . .
- (4) An action involving any contract for the sale of land.

§32-21-1-13—Conveyance of land; written deed required

Except for a bona fide lease for a term not exceeding three (3) years, a conveyance of land or of any interest in land shall be made by a deed that is:

- (1) written; and
(2) subscribed, sealed, and acknowledged by the grantor . . . or by the grantor's attorney.

Notes and Questions

19.1. What is the difference between these two sections? Why are both necessary?

19.2. Consider the following sequence of text messages:

- **A:** still want apt 4C @ 321 sesame st?
- **B:** \$450,000 ok?
- **A:** deal. :-) -A
- **B:** yay! kthx bai

Can either of the parties treat this as an enforceable contract for the sale of land?

Harding v. Ja Laur
315 A.2d 132 (Md. Ct. Spec. App. 1974)

GILBERT, Judge: . . .

The bill alleged that a deed had been obtained from the appellant through fraud practiced upon her by the agent of Ja Laur Corporation. The bill further averred that the paper upon which the appellant had affixed her signature was "falsely and fraudulently attached to the first page of a deed identified as the same deed" through which the appellee, Ja Laur Corporation, and its assigns, the other appellees, claim title. . . .

There is no dispute that the appellant signed some type of paper. Her claim is not that her signature was forged in the normal sense, i.e., someone copied or wrote it, but rather that the forgery is the result of an alteration. Mrs. Harding alleges that at the time that she signed a blank paper she was told that her signature was necessary in order to straighten out a boundary line. She represents that she did not know that she was conveying away her interest in and to a certain 1517 acres of land in Montgomery County.

The parcel of land that was conveyed by the allegedly forged deed is contiguous to a large tract of real estate in which Ja Laur and others had "a substantial interest." It appears from the bill that Mrs. Harding's land provided the access from the larger tract to a public road, so that its value to the appellees is obvious. Mrs. Harding excuses herself for signing the "blank paper" by averring that she did so at the instigation of an attorney, an agent of Ja Laur, who had "been a friend of her deceased husband, and . . . represented her deceased husband in prior business and legal matters, and that under [the] circumstances [she] did place her complete trust and reliance in the representations made to her . . ." by the attorney. The "blank paper" was signed "on or about April 2, 1970." Mrs. Harding states that she did not learn of the fraud until the "summer of 1972." At that time an audit, by the Internal Revenue Service, of her deceased husband's business revealed the deed to Ja Laur, and its subsequent conveyance to the other appellees.

In *Smith v. State*, 256 A.2d 357, 360 (1970), we said that:

Forgery has been defined as a false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. More succinctly, forgery is the fraudulent making

of a false writing having apparent legal significance. It is thus clear that one of the essential elements of forgery is a writing in such form as to be apparently of some legal efficacy and hence capable of defrauding or deceiving.

Perkins, *Criminal Law* ch. 4, § 8 (2d ed. 1969) states, at 351:

A material alteration may be in the form of (1) an addition to the writing, (2) a substitution of something different in the place of what originally appeared, or (3) the removal of part of the original. The removal may be by erasure or in some other manner, such as by cutting off a qualifying clause appearing after the signature.

A multitude of cases hold that forgery includes the alteration of or addition to any instrument in order to defraud. That a deed may be the subject of a forgery is beyond question.

The Bill of Complaint alleges that the signature of Mrs. Harding was obtained through fraud. More important, however, to the issue is whether or not the bill alleges forgery. In our view the charge that appellant's signature was written upon a paper, which paper was thereafter unbeknown to her made a part of a deed, if true, demonstrates that there has been a material alteration and hence a forgery. . . .

We turn now to the discussion of whether *vel non* the demurrsers of Macro Housing, Inc. and Montgomery County, the other appellees, should have been sustained. There was no allegation in the bill that their agent had perpetrated the fraud upon Mrs. Harding. If they are to be held in the case, it must be on the basis that they are not *bona fide* purchasers without notice. The title of a *bona fide* purchaser, without notice, is not vitiated even though a fraud was perpetrated by his vendor upon a prior title holder. A deed obtained through fraud, deceit or trickery is voidable as between the parties thereto, but not as to a *bona fide* purchaser. A forged deed, on the other hand, is void *ab initio*. . . .

[T]he common law rule that a forger can pass no better title than he has is in full force and effect in this State. A forger, having no title can pass none to his vendee. Consequently, there can be no *bona fide* holder of title under a forged deed. A forged deed, unlike one procured by fraud, deceit or trickery is void from its inception. The distinction between a deed obtained by fraud and one that has been forged is readily apparent. In

a fraudulent deed an innocent purchaser is protected because the fraud practiced upon the signatory to such a deed is brought into play, at least in part, by some act or omission on the part of the person upon whom the fraud is perpetrated. He has helped in some degree to set into motion the very fraud about which he later complains. A forged deed, on the other hand, does not necessarily involve any action on the part of the person against whom the forgery is committed. So that if a person has two deeds presented to him, and he thinks he is signing one but in actuality, because of fraud, deceit or trickery he signs the other, a bona fide purchaser, without notice, is protected. On the other hand, if a person is presented with a deed, and he signs that deed but the deed is thereafter altered e.g. through a change in the description or affixing the signature page to another deed, that is forgery and a subsequent purchaser takes no title.

In the instant case, the Bill of Complaint, for the reasons above stated, alleged a forgery of the deed by which Ja Laur took title from Mrs. Harding. This allegation, if true, renders that deed a nullity. Ja Laur could not have passed title to the other appellees, Macro Housing, Inc. and Montgomery County. Those two appellees would therefore have no title to the land of Mrs. Harding. . . .

Notes and Questions

19.3. What is the point of the distinction between forging a deed (sometimes called **fraud in the factum**) and tricking someone into signing it (**fraud in the inducement**)? As between the fraudster and the victim, is there a significant difference? What about once third parties get involved?

19.4. Mrs. Harding signs a blank piece of paper, which Ja Laur then staples to a deed. Forgery? What if she signs the same piece of paper *after* it is stapled to the deed? Do the policy reasons for distinguishing forgery from fraud provide a convincing reason to treat these cases differently?

Walters v. Tucker

281 S.W.2d 843 (Sup. Ct. Mo. 1955)

This is an action to quiet title to certain real estate situate in the City of Webster Groves, St. Louis County, Missouri. Plaintiff and defendants are the owners of adjoining residential properties fronting northward on Oak Street. Plaintiff's property, known as 450 Oak Street, lies to the west

of defendants' property, known as 446 Oak Street. The controversy arises over their division line. Plaintiff contends that her lot is 50 feet in width, east and west. Defendants contend that plaintiff's lot is only approximately 42 feet in width, east and west. The trial court, sitting without a jury, found the issues in favor of defendants and rendered judgment accordingly, from which plaintiff has appealed.

The common source of title is Fred F. Wolf and Rose E. Wolf, husband and wife, who in 1922 acquired the whole of Lot 13 of West Helfenstein Park, as shown by plat thereof recorded in St. Louis County. In 1924, Mr. and Mrs. Wolf conveyed to Charles Arthur Forse and wife the following described portion of said Lot 13:

The West 50 feet of Lot 13 of West Helfenstein Park, a Sub-division in United States Survey 1953, Twp. 45, Range 8 East, St. Louis County, Missouri

Plaintiff, through mesne conveyances carrying a description like that above, is the last grantee of and successor in title to the aforesaid portion of Lot 13. Defendants, through mesne conveyances, are the last grantees of and successors in title to the remaining portion of Lot 13.

At the time of the above conveyance in 1924, there was and is now situate on the tract described therein a one-story frame dwelling house (450 Oak Street), which was then and continuously since has been occupied as a dwelling by the successive owners of said tract, or their tenants. In 1925, Mr. and Mrs. Wolf built a 1 1/2-story stucco dwelling house on the portion of Lot 13 retained by them. This house (446 Oak Street) continuously since has been occupied as a dwelling by the successive owners of said portion of Lot 13, or their tenants.

Despite the apparent clarity of the description in plaintiff's deed, extrinsic evidence was heard for the purpose of enabling the trial court to interpret the true meaning of the description set forth therein. At the close of all the evidence the trial court found that the description did not clearly reveal whether the property conveyed "was to be fifty feet along the front line facing Oak Street or fifty feet measured Eastwardly at right angles from the West line of the property . . . "; that the "difference in method of ascertaining fifty feet would result in a difference to the parties of a strip the length of the lot and approximately eight feet in width"; that an ambiguity existed which justified the hearing of extrinsic evidence; and that the "West fifty feet should be measured on the front or street line facing Oak

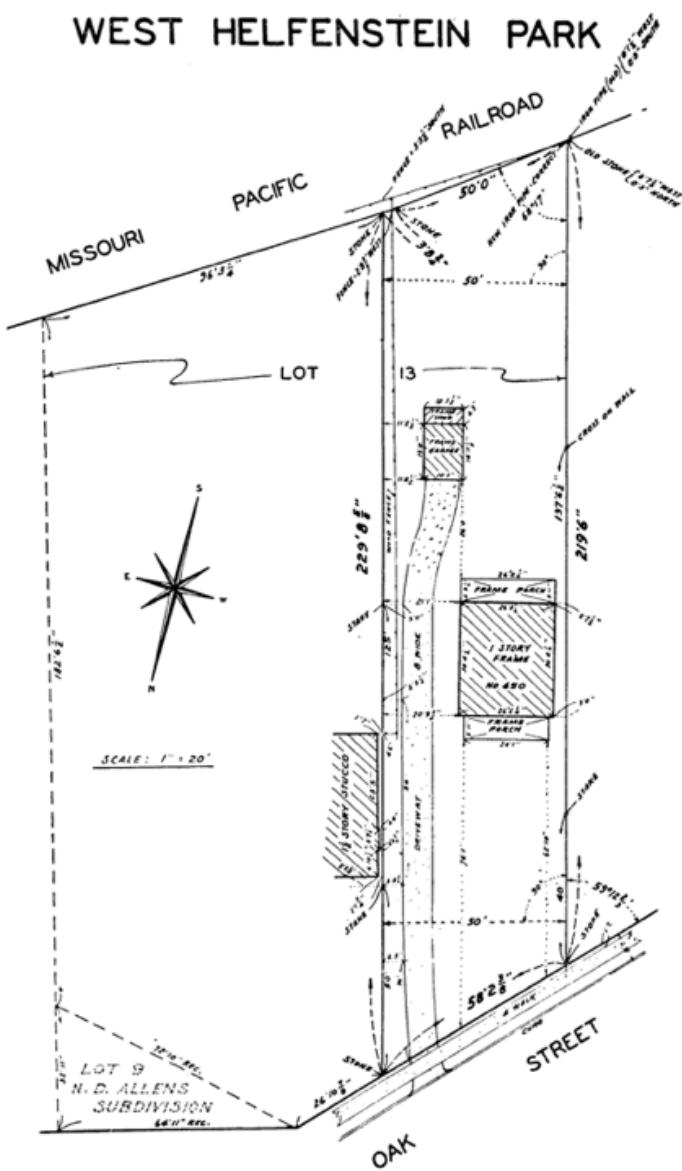


Figure 19.1: The plaintiff's survey plat of the land in question.

Street." The judgment rendered in conformity with the above finding had the effect of fixing the east-west width of plaintiff's tract at about 42 feet.

Plaintiff contends that the description in the deed is clear, definite and unambiguous, both on its face and when applied to the land; that the trial court erred in hearing and considering extrinsic evidence; and that its finding and judgment changes the clearly expressed meaning of the description and describes and substitutes a different tract from that acquired by her under her deed. Defendants do not contend that the description, on its face, is ambiguous, but do contend that when applied to the land it is subject to "dual interpretation"; that under the evidence the trial court did not err in finding it contained a latent ambiguity and that parol evidence was admissible to ascertain and determine its true meaning; and that the finding and judgment of the trial court properly construes and adjudges the true meaning of the description set forth in said deed.

[The plaintiff and defendants introduced dueling survey plats. The one included here is the plaintiff's. North is at the bottom. Note in particular the locations of the two houses and of the driveway. It may help to mark on the plat where the defendant's proposed line would fall.]

It is seen that Lot 13 extends generally north and south. It is bounded on the north by Oak Street (except that a small triangular lot from another subdivision cuts off its frontage thereon at the northeast corner). On the south it is bounded by the Missouri Pacific Railroad right of way. Both Oak Street and the railroad right of way extend in a general northeast-southwest direction, but at differing angles. . . .

Both plats show a concrete driveway 8 feet in width extending from Oak Street to plaintiff's garage in the rear of her home, which, the testimony shows, was built by one of plaintiff's predecessors in title. The east line of plaintiff's tract, as measured by the Joyce (plaintiff's) survey, lies 6 or 7 feet east of the eastern edge of this driveway. Admittedly, the driveway is upon and an appurtenance of plaintiff's property. On the Elbring (defendants') plat, the east line of plaintiff's lot, as measured by Elbring, is shown to coincide with the east side of the driveway at Oak Street and to encroach upon it 1.25 feet for a distance of 30 or more feet as it extends between the houses. Thus, the area in dispute is essentially the area between the east edge of the driveway and the line fixed by the Joyce survey as the eastern line of plaintiff's tract. . . .

The description under which plaintiff claims title, to wit: "The West 50 feet of Lot 13 . . . ", is on its face clear and free of ambiguity. It purports to

convey a strip of land 50 feet in width off the west side of Lot 13. So clear is the meaning of the above language that defendants do not challenge it and it has been difficult to find any case wherein the meaning of a similar description has been questioned.

The law is clear that when there is no inconsistency on the face of a deed and, on application of the description to the ground, no inconsistency appears, parol evidence is not admissible to show that the parties intended to convey either more or less or different ground from that described. But where there are conflicting calls in a deed, or the description may be made to apply to two or more parcels, and there is nothing in the deed to show which is meant, then parol evidence is admissible to show the true meaning of the words used.

No ambiguity or confusion arises when the description here in question is applied to Lot 13. The description, when applied to the ground, fits the land claimed by plaintiff and cannot be made to apply to any other tract. When the deed was made, Lot 13 was vacant land except for the frame dwelling at 450 Oak Street. The stucco house (446 Oak Street) was not built until the following year. Under no conceivable theory can the fact that defendants' predecessors in title (Mr. and Mrs. Wolf) thereafter built the stucco house within a few feet of the east line of the property described in the deed be construed as competent evidence of any ambiguity in the description. . . .

Whether the above testimony and other testimony in the record constitute evidence of a mistake in the deed we do not here determine. Defendants have not sought reformation, and yet that is what the decree herein rendered undertakes to do. It seems apparent that the trial court considered the testimony and came to the conclusion that the parties to the deed did not intend a conveyance of the "West 50 feet of Lot 13", but rather a tract fronting 50 feet on Oak Street. And, the decree, on the theory of interpreting an ambiguity, undertakes to change (reform) the description so as to describe a lot approximately 42 feet in width instead of a lot 50 feet in width, as originally described. That, we are convinced, the courts cannot do.

Notes and Questions

- 19.5. Why does the court apply such a strict integration rule?
- 19.6. The boundary line as enforced by the court comes within inches of

the defendants' house. This does not seem like an ideal state of affairs. (Then again, the defendant's theory would have drawn the boundary line through the plaintiffs' driveway.) Are there any doctrines that can clean up the messes that result when (by accident or otherwise) strict interpretation of deeds produces results at odds with natural features, structures, or uses of land?

19.7. The deed here used three different techniques to describe the land. Start at the end. "United States Survey 1953, Twp. 45, Range 8 East, St. Louis County, Missouri" is a reference to a government survey. Townships are standard 36-square-mile tracts established by federal government survey; "Twp. 45, Range 8 East" identifies a specific township in Missouri. Next, "of Lot 13 of West Helfenstein Park" is a reference to the *subdivision plat* filed by the developer who laid out the neighborhood; the plat is a survey map filed in the county recording office that shows the boundaries of individual parcels. Finally, "The West 50 feet" is a (crude attempt at) a *metes and bounds* description of the property in terms of its boundaries. Metes and bounds descriptions may refer to geospatial coordinates (e.g. latitude and longitude as measured by GPS), to natural landmarks ("Millers' Creek"), artificial markers ("the survey stake labelled G34"), and distances and directions ("300 feet along a course at 45°"). How precise are these various means of description? Which of them strike you as most prone to error?

19.8. Note that the boundary lines as shown on the survey map are at an angle to the north-south axis. Does this affect how the court should interpret the deed?

Loughran v. Kummer

146 A. 534 (Pa. 1929)

KEPHART, J.

Appellee, a bachelor 67 years of age, conveyed, for \$1, land in Pittsburgh to Mrs. Kummer, appellant, who was one of his tenants. A bill was filed to set aside this deed; the grounds laid were confidential relationship, undue influence, and impaired mentality. Inasmuch as the facts must again be considered, we will mention only such as raise the legal question on which the case was decided; we venture no opinion on the other facts.

The court below found from the evidence that a deed absolute on its face had been executed, acknowledged, and delivered to appellant by ap-

peltee, on condition that it should not be recorded until the latter's death; that undoubtedly in his mind this meant that the deed was not to take effect until after his death; and that he, demanding the return of the deed within a very few days after the delivery, thus revoked it and with that revocation revoked the gift. Appellant deceived appellee when she stated the deed had been destroyed. The excuse given was appellee was worried and she wanted to ease his mind by making him believe that it had been destroyed. . . .

The question we are asked to consider is whether a deed absolute on its face, acknowledged, executed, and delivered under circumstances as here indicated, vested such title in the grantee as could be revoked for the above reasons. It amounts in substance to this, that the grantor said the deed should not be recorded until after his death, and the grantee in accepting the deed took it on that condition. The evidence on which this finding was based was all oral, and the scrivener and defendant denied any such condition was imposed when the deed was delivered. All control over the deed was relinquished when it was handed appellant. The presumption must be that at that time it was the intention to pass title. "The general principle of law is that the formal act of signing, sealing and delivering is the consummation of the deed, and it lies with the grantor to prove clearly that appearances are not consistent with truth. The presumption stands against him, and the burden is on him to destroy it by clear and positive proof that there was no delivery and that it was so understood at the time. . . . Where we have, as here, a deed, absolute and complete in itself, attacked as being in fact otherwise intended, . . . there is a further presumption that the title is in conformity with the deed, and it should not be dislodged except by clear, precise, convincing and satisfactory evidence to the contrary." *Cragin's Estate*, 117 A. 445 (Pa. 1922).

The gift here was executed, and that defendant was not to record it was not of the slightest consequence when viewed as against these major actions, delivery and passing of title. It was merely a promise the keeping of which lay in good faith, the breach of which entailed no legal consequences. To have effected the grantor's purpose, the intervention of a third party was absolutely essential. There are circumstances where acknowledgement, together with physical possession of the deed in the grantee, does not conclusively establish an intention to deliver, and the presumption arising from signing, sealing, and acknowledging, accompanied by manual possession of the deed by the grantee, is not irrebuttable, but this

presumption can be overcome only by evidence that no delivery was in fact intended and none made. Such evidence is not present in this case. Here the grantor by his own testimony intended the grantee to get the land. The only question was when it was to take effect.

Here is one of the instances in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. Therefore the legal effect of such delivery is not altered by the fact that both parties suppose the deed will not take effect until recorded, and that it may be revoked at any time before record, or by contemporaneous agreements looking to the reconveyance of the property to the grantor or to the third party upon the happening of certain contingent events or the nonperformance of certain conditions.

The reason for these rules is obvious. It is quite possible to prove in most deliveries that some parol injunction was attached to the formal delivery of the deed; if they are to be given the effect her[e] contended, there would be no safety in accepting a deed under most circumstances. It opens the door to the fabrication of evidence that would inevitably be appalling and go far toward violating the security of written instruments. We have so held in matters of less import than the conveyance of land. The rule must not be relaxed as to realty. Such conveyances are vastly more important, as they involve instruments of title and ownership which are used as a means of extending credit. Title to land ought not to be exposed to the peril of successful attack except where the right is clear and undoubted, and whatever may be our desire to recognize circumstances argued as unfortunate, we cannot go to the extent of overthrowing principles of law governing conveyances of real estate that have stood the test of ages.

In *Cragin's Estate*, supra, the deeds were in a tin box for more than 23 years in an envelope indorsed with the words: "To be recorded upon Mrs. Cragin's death, if before me." The deed was in grantee's possession, and it was urged the delivery was conditional. We said that indorsement may have been placed on the envelope for other reasons than to defer the transfer of title. In the present case it was evident appellee did not want his relatives to learn of the conveyance. Recording would be necessary to pass a title examiner's inspection, but nonrecording did not prevent the title from passing. It has been quite generally held that an oral understanding on the delivery of a deed that it should not be recorded will not affect the absolute character of the conveyance if free of other conditions. An agree-

ment to deliver a deed in escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If delivered under such an agreement, it will be deemed an absolute delivery and a consummation of the execution of the deed. . . .

Notes and Questions

19.9. The old phrase is that a deed was effective when it was “signed, sealed, and delivered.” But the seal is obsolete, so the principal elements are that it be a sufficient writing (discussed above), that it be signed, and that it be delivered. Delivery of deeds has much in common with delivery in the law of gifts; it too can be a subtle question. In a famous passage of his landmark 17th-century treatise, *Institutes of the Lawes of England*, Edward Coke wrote, “As a deed may be delivered to a party without words, so may a deed be delivered by words without any act of delivery.” That sounds paradoxical, but Coke continued, “as if the writing sealed lies upon the table, and the [grantor] says to the [grantee], ‘Go and take up that writing, it is sufficient for you;’ or ‘it will serve your turn;’ or ‘Take it as my deed;’ or the like words; either is a sufficient delivery.” Is that better?

19.10. In *Wiggill v. Cheney*, 597 P.2d 1351 (Utah 1979), Lillian Cheney executed a deed to Flora Cheney and put it in a safety deposit box in the names of Lillian Cheney and Francis E. Wiggill. Lillian told Francis that his name was on the box, that on her death he would be granted access to the box, and that “in that box is an envelope addressed to all those concerned. All you have to do is give them that envelope and that’s all.” On her death, he gained access to the box, took the deed, and gave it to Flora. Delivery?

19.11. There are at least two ways to do delivery “right.” One is to sign and hand over a deed at closing, when all of the necessary parties are in the same room and can execute all of the appropriate documents effectively simultaneously. Another is to use an escrow: a third party who receives custody of the signed deed along with instructions to deliver it to the grantee when appropriate events have taken place. What if the escrow agent disregards her instructions and hands over the deed early? Can a grantor who is concerned the transaction will fall through demand the deed back from the escrow agent?

19.12. *Loughran* is more complicated because the parties intended a conditional gift that would take effect at Loughran’s death, rather than immediately. Grantors often try to put other kinds of conditions on transfers. In *Martinez v. Martinez*, 678 P.2d 1163 (N.M. 1984), Delfino and Eleanor Martinez gave their

son Carlos and his wife Sennie a deed to a property in exchange for assuming a mortgage in it. Delfino and Eleanor instructed Carlos and Sennie to take the deed to the bank to be held in escrow until Carlos and Sennie had paid off the mortgage, but they recorded it first. Carlos and Sennie had marital difficulties and fell behind on the mortgage; eventually Delfino and Eleanor paid off the balance. Who owns the property?

19.13. The *Loughran* court says the parties “have not adopted the proper legal means of accomplishing their object.” What does it mean? Is there anything they could have done differently that would avoided this mess?

New York Real Property Law

§258—Short forms of deeds and mortgages.

The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

Statutory Form A (Individual)

DEED WITH FULL COVENANTS.

This indenture, made the _____ day of _____ nineteen hundred and _____, between _____ (insert residence) party of the first part, and _____ (insert residence) party of the second part,

Witnesseth, that the party of the first part, in consideration of _____ dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, _____ and assigns forever, all _____ (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, _____ and assigns forever. And said _____ covenants as follows:

First. That said _____ is seized of said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said _____ will forever warrant the title to said premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

Statutory Form D. (Individual)

QUITCLAIM DEED.

This indenture, made the _____ day of _____ nineteen hundred and _____ between _____ (insert residence), party of the first part, and _____ (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of _____ dollars, lawful money of the United States, paid by the party of the second part, does hereby remise, release, and quitclaim unto the party of the second part, _____ and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, _____ and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

Notes and Questions

19.14. What is the difference between these two deed forms? Why would a grantee ever accept a quitclaim deed?

McMurray v. Housworth
638 S.E.2d 421 (Ga. Ct. App. 2006)

PHIPPS, Judge:

Michael and Deborah Housworth sold a 24-acre tract of land which

the purchasers—Lance and Melanie McMurray, and James and Alberta McMurray—subdivided into two tracts. A lake created by a dam is situated on the property. The McMurrays brought this suit against the Housworths for breach of their general warranty of title upon discovering after purchasing the property that the owner and operator of the dam holds a floodwater detention easement that burdens the tract. The superior court awarded summary judgment to the Housworths on the ground that this easement is not such an encumbrance on the property as breaches the title warranty. We disagree and reverse.

Lance and Melanie McMurray purchased one of the twelve-acre parcels from the Housworths for \$120,000 in 2004. On the same date, James and Alberta McMurray purchased the other parcel for the same price. The parcels were conveyed by warranty deeds that contained general warranties of title without any limitations applicable here. The McMurrays informed the Housworths that they were buying the property to build single-family residences on each parcel.

Apparently, however, the McMurrays failed to discover that recorded within the chain of title to their property in 1962 was a “floodwater retarding structure” easement which had been granted to the Oconee River Soil Conservation District. This easement is for construction, operation, and maintenance of a floodwater retarding structure or dam; for the flowage of waters in, over, upon, or through the dam; and for the permanent storage and temporary detention of any waters that are impounded, stored, or detained by the dam. It also reserved in the grantor and his successors the right to use the easement area for any purpose not inconsistent with full use and enjoyment of the grantee’s rights and privileges, i.e., it is nonexclusive. After learning of the easement following their purchase of the property, the McMurrays demanded that the Housworths compensate them for the damages they would suffer as a result of the restrictions thereby placed on their usage.

Because the Housworths failed to comply with these demands, the McMurrays brought this suit against them seeking damages for breach of their warranties of title. ...

1. The McMurrays contend that the superior court erred in analogizing the floodwater detention easement to a public roadway easement or zoning regulation and in thereby concluding that a floodwater detention easement is not the type of easement that breaches a general warranty of title.

(a) Each of the deeds in this case contained a general warranty of title in which the grantors agreed to "defend the right and title to the above described property, unto [the grantees], their heirs, assigns, and successors in title, against the claims of all persons." Under OCGA § 44-5-62, "[a] general warranty of title against the claims of all persons includes covenants of a right to sell, of quiet enjoyment, and of freedom from encumbrances." "An incumbrance has been defined as 'Any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee,' and this definition . . . encompasses an easement or right of way." OCGA § 44-5-63 provides that "[i]n a deed, a general warranty of title against the claims of all persons covers defects in the title even if they are known to the purchaser at the time he takes the deed."

(b) The rule in Georgia, as established in the early case of *Desvergers v. Willis*, 56 Ga. 515 (1876), is that the existence of a public road on land, of which the purchaser knew or should have known at the time of the purchase, is not such an encumbrance as would constitute a breach of a general warranty of title. The *Desvergers* rule is thus an exception to the general rule stated in OCGA § 44-5-63 that a general warranty of title by deed covers even defects known to the purchaser at the time he takes the deed.

Although the *Desvergers* rule is not uniform throughout the country, it is the majority rule. In adopting the rule, the court in *Desvergers* concluded that a contrary holding would produce a "crop of litigation" that would be "almost interminable." The reason, as later explained by the Supreme Court of Iowa in *Harrison v. The Des Moines & Ft. Dodge R. Co.*, was that the immense number of warranty deeds then in existence rarely contained exceptions as to public roadways because of the universal belief that roadway access was a benefit rather than a burden to land. Therefore, a determination that public roadway easements were warranty-breaching encumbrances would have created innumerable liabilities where none had been thought to exist.

Courts in other states have also based their adoption of the *Desvergers* rule on the broader ground that where easements are open, notorious, and presumably known to the purchaser at the time of the purchase, that knowledge will exclude the easement from operation of a title warranty. These courts have reasoned that where the encumbrance involves an open and obvious physical condition of the property, the purchaser is presumed to have seen it and fixed his price with reference to it. In view, however, of the Georgia rule that knowledge of a title defect will not ex-

clude it from operation of a general warranty of title, creation of an exception for easements for public roadways or other purposes must be based on other grounds. And courts in other states have ultimately concluded that public roadway easements should not be regarded as encumbrances on the additional ground that “public highways are not depreciative, but, on the contrary, they are highly appreciative, of the value of the lands on which they constitute an easement, and are a means without which such lands are not available for use, nor sought after in the markets.”

For a number of reasons, we do not find the floodwater detention easement in this case analogous to a public roadway easement. (1) We do not anticipate that we would open the litigation floodgates, so to speak, by holding that a floodwater detention easement breaches a general title warranty. (2) Moreover, a floodwater detention easement does not benefit the land to which it is subject. Although the property is benefitted by the lake or other body of water that creates the need for the easement (to the extent that the one enhances the value or enjoyment of the other), the easement burdens the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream. (3) The McMurrays brought this action for damages because of the easement, not the lake. And even though the lake is certainly open and obvious, the same cannot necessarily be said of the easement. Although the superior court found that the dam is visible on the McMurrays’ property, the McMurrays correctly point out that there is no evidence of record to support this finding. As argued by the McMurrays, not every lake is created by a dam or burdened by a floodwater detention easement. (4) And although the McMurrays’ constructive notice of the easement by reason of its recordation within their chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, OCGA § 44-5-63 provides otherwise. (5) The recording of the easement certainly renders it binding on the McMurrays insofar as concerns the rights of the easement holder; but the question here is whether the existence of the easement gives rise to a claim against the grantor for breach of the warranty against encumbrances. For these reasons, the superior court erred in concluding that the floodwater detention easement should be excepted from the rule of OCGA § 44-5-63 in view of the exception for public roadways.

(c) The McMurrays also contend that the superior court erred in equating floodwater detention easements with zoning regulations, which have

been held not to breach a general warranty of title. Because the floodwater detention easement does not function in the same manner as a zoning regulation in all respects, we agree with this contention.

The floodwater detention easement does more than impose zoning-type restrictions on development activities on the property. It also grants the county soil and water conservation district rights for the storage and detention of impounded waters on the property. And it grants the district a right of ingress and egress upon the property. Easement rights such as these constitute an interest in property that must be acquired either by agreement of the property owner or by condemnation. And although the easement does impose limitations on the McMurrays' use of their property that duplicate restrictions imposed under zoning-type regulations applicable to the property, the two do not appear to be coextensive. ...

Where an encumbrance is a servitude or easement which can not be removed at the option of either the grantor or grantee, damages will be awarded for the injury proximately caused by the existence and continuance of the encumbrance, the measure of which is deemed to be the difference between the value of the land as it would be without the easement and its value as it is with the easement.

Notes and Questions

19.15. Even the general warranty given by the Housworths is subject to significant exceptions, including one for public roadways and one for zoning regulations. What is the point of these exceptions? Did the court correctly interpret those underlying policies as not covering the floodwater detention easement?

19.16. The exception for zoning regulations can be tricky. Suppose that the property is a vacant lot and that local zoning laws restrict houses to 15 feet in height? Is this an encumbrance? What if the property contains a house 30 feet high? Would it make a difference in either case if the restriction came from a private neighborhood covenant rather than a public zoning law?

19.17. What should the Housworths (or rather, their attorney) have done? Presumably, the Oconee River Soil Conservation District is not interested in terminating its easement. Are the Housworths stuck with an unsaleable tract of land?

Engelhart v. Kramer
570 N.W.2d 550 (S.D. 1997)

GILBERTSON, Justice.

A \$34,800 judgment was rendered against Crystal Kay Kramer based on violation of SDCL ch 43-4 and for failure to properly disclose a defect in the home she sold to Karen Engelhart. The case was tried without a jury before the Second Judicial Circuit Court. Kramer appeals the award claiming that Engelhart did not show that Kramer failed to meet the required standard in completing the seller's property disclosure statement.¹ We affirm.

Facts and Procedure

In May of 1991, Crystal Kay Kramer purchased a home in Sioux Falls, South Dakota for \$35,000. Over the next few years Kramer made several improvements. Four days prior to putting the home on the market, in September, 1993, Kramer enlisted the support of friends and family and began an extensive cleaning of the basement. There were several large cracks in the basement's cement walls and pieces of various sizes had fallen off. They removed old sheet rock and put up wood paneling over the basement walls. The basement project was memorialized by Kramer with several photographs depicting the before, during and after condition of the walls.

During this period Karen Engelhart was searching for a home commensurate with her income level. Engelhart was a first-time home buyer and was assisted by Dorothy Ecker, a real estate agent. Engelhart viewed Kramer's home, became interested, and then decided to purchase it.

Kramer was represented by Shirley Ullom, a Century 21 Advantage, Inc. real estate agent. Kramer completed the detailed "property condition disclosure statement" form required by SDCL 43-4-44. Part two of the form required the seller to disclose certain structural information. Specifically, question 2 asked "Have you experienced water penetration in the basement . . . within the past two years?" Kramer replied, "Small amt of H2O penetration in NW + NE corners [when it] rains." (emphasis added). In answering question 3 "[a]re there any cracked walls or floors?" Kramer responded "basement floor, some spots in basement walls, East

¹Kramer also argues that the trial court erred in finding Kramer's actions constituted fraud and deceit. In light of our disposition of the case on the disclosure requirement issue, the fraud and deceit issue need not be addressed.

bedroom walls." Under § 5, Miscellaneous Information, Kramer was required to disclose any additional problems that were not previously mentioned. Kramer offered, "*basement cement walls have some crumbling*, behind paneling, basement floor cracked [and] uneven in spots." (emphasis added).

The trial court found that Engelhart relied upon, among other things, Kramer's disclosure statement with regard to the condition of the basement walls and that Engelhart believed "some spots" and "some crumbling" to mean the problems were minimal. Kramer allegedly offered to remove the paneling to expose the basement walls but the trial court concluded that the offer was "a gambit, or a bluff . . . without any real intention of performing" and that the typical buyer in Engelhart's position would be "reluctant to remove paneling from someone else's house." Kramer admitted taking photographs before installing the paneling and that showing the photos to a potential purchaser would have been easier than removing it. Kramer could not explain why she did not offer the photos.

Engelhart purchased the property in October 1994. In March of 1995, she discovered water seepage through the south wall of the basement. The paneling was removed and water was discovered running through cracks in the south wall. Also noted were several other large cracks, including a large horizontal crack running around the basement. Engelhart hired a structural engineer, Chester Quick (Quick) to diagnose the problem. Quick issued a report in which he found the basement walls "very badly cracked" and testified that the cement had "leached out" which allowed dirt and water to pass into the basement.²

Further, Quick noted that the concrete was showing "considerable disintegration especially at the south wall" which was not repairable. He concluded that the foundation had to be replaced and that "As bad as [the walls] are cracked they could collapse at any time." When asked whether the disclosure statement adequately described the condition of the basement Quick testified that, although accurate in part, "some crumbling" did not adequately describe the damage that existed behind the paneling.

Engelhart brought suit against Kramer based upon misrepresentations made in the disclosure statement. The trial court ruled in favor of En-

²Quick testified that the wall was "a mixture of sand, cement [which holds the mixture together], and usually some rock, and over time with excess water and cracks the cement 'leeches out' of the mixture and you wind up with nothing but sand and rock."

gelhart on failure to comply with South Dakota's Disclosure Statutes and fraud. Kramer appeals the \$34,800 award entered against her. . . .

Legal Analysis and Decision

Whether Kramer failed to complete the disclosure statement in good faith as required by SDCL Ch 43-A?

In 1993 the South Dakota legislature enacted specific requirements for disclosures in certain real estate transfers. SDCL §§ 43-4-38 to -44. SDCL 43-4-38 provides:

The seller of residential real property shall furnish to a buyer a completed copy of the disclosure statement before the buyer makes a written offer. If after delivering the disclosure statement to the buyer or the buyer's agent and prior to the date of closing for the property or the date of possession of the property, whichever comes first, the seller becomes aware of any change of material fact which would affect the disclosure statement, the seller shall furnish a written amendment disclosing the change of material fact.

SDCL 43-4-41 requires that "The seller shall perform each act and make each disclosure in good faith." SDCL 43-4-40 absolves sellers of liability for defects in certain circumstances by providing:

Except as provided in § 43-4-42, a seller is not liable for a defect or other condition in the residential real property being transferred if the seller *truthfully completes* the disclosure statement.

(Emphasis added). The disclosure form mandated by SDCL 43-4-44 establishes that beyond the above obligations, there is no warranty passing from the seller to the buyer:

THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY.... IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR ANY AGENT REPRESENTING ANY PARTY IN THIS TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PARTIES MAY WISH TO OBTAIN.

(Capitals in original).

Kramer relies on SDCL 43-4-40 and contends that even if her description of the basement was inadequate or under Kramer's phraseology, an innocent misrepresentation, that it was truthful nonetheless and therefore no liability should attach. It is important to note that in SDCL 43-4-40, the terms "truthfully" and "complete" do not operate independently to the exclusion of the other. A plain reading of the terms together evince a more exacting standard than truth alone.

Until today, this Court has not addressed the scope of the disclosure statutes at issue. Of central concern to our resolution is what is required by the term "good faith," in the absence of a definition in SDCL 43-4-41, and whether the disclosure of "some crumbling" violates that standard? We recognize that the concept of "good faith" may, at times, seem as elusive as the "reasonableness" that is spoken of in the law of torts. However, there exists several sources from which meaning can be found.

Statutory guidance can be found at SDCL 2-14-2(13) which states that "good faith" is:

an honest intention to abstain from taking any unconscionable advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscionable;

Black's Law Dictionary 693 (6th ed 1990) offers the following:

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.... In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom of intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.

Case law decided under different contexts has provided additional meaning to the term "good faith" to include "honesty in fact," *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990) (contractual context; meaning of good faith "varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations

of the other party”), and an “honest belief in the suitability of the actions taken.” *B.W. v. Meade Co.*, 534 N.W.2d 595, 598 (S.D. 1995), (in the context of reporting and investigating child abuse). In the case now before us the trial court properly relied upon the definition found in SDCL 2-14-2(13).

Kramer contends that since she described the condition of the basement walls as having “some spots” and “some crumbling,” she fulfilled her duty of good faith by truthfully completing the Disclosure Statement. Kramer argues that to hold otherwise would, in effect, result in a strict liability standard on sellers of real estate. We disagree.

SDCL 43-4-42 provides:

A transfer that is subject to §§ 43-4-37 to 43-4-44, inclusive, is not invalidated solely because a person fails to comply with §§ 43-4-37 to 43-4-44, inclusive. However, a person *who intentionally or who negligently* violates §§ 43-4-37 to 43-4-44, inclusive, is liable to the buyer for the amount of the actual damages and repairs suffered by the buyer as a result of the violation or failure. A court may also award the buyer costs and attorney fees. Nothing in this section shall preclude or restrict any other rights or remedies of the buyer.

(Emphasis added).

Kramer relies on *Amyot v. Luchini*, 932 P.2d 244 (Alaska 1997), for the proposition that a disclosure statement can be truthful yet not “perfect” and that “innocent misrepresentations” do not violate good faith. However, it must be noted that Kramer’s representation of the issue to this Court incorrectly assumes that the misrepresentation of the basement walls was found merely innocent by the trial court. To the contrary, the trial court specifically found that the Kramer’s paneling of the walls four days before putting the house on the market was not “solely for aesthetic purposes” and was completed deliberately³ in an attempt to hide their true condition. Kramer’s colorful attempt to characterize her description of the basement as an innocent misrepresentation is inaccurate.

³The trial court relied on Kramer’s deposition and trial testimony in that when she purchased the house “[t]he walls were crumbling with cracks in places,” that the residue she had discovered on the basement floor was “Part of the basement wall . . . whatever makes up the wall was there in a pile” and further that Kramer admitted in her disclosure statement that no water ever came in on the south wall.

In 1993, Alaska enacted residential real property disclosure statement statutes (substantially similar to that of South Dakota enacted the same year). Alaska Stat. §§ 34.70.010 to 34.70.090 (Michie 1996).⁴ The *Amyot* court stated:

Prior to the enactment of [the mandatory disclosure statutes], sellers of real property were not required to make any representations about the property. However, sellers were strictly liable for those representations they made. (Citation omitted.) Under the disclosure statute a seller is now required to make representations about a wide range of the property's features and characteristics. We conclude that the legislature intended to offset the seller's increased disclosure responsibilities by the lower liability standard for misrepresentations.

Amyot, 932 P.2d at 246.

We agree with the *Amyot* court and hold that strict liability is not the requisite standard under South Dakota's disclosure statutes. A plain reading of SDCL 43-4-42 tells us that liability will not attach unless an intentional or negligent violation occurs. The legal maxim "*expressio unius est exclusio alterius*" means "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990). The maxim is a general rule of statutory construction. Applying the general rule to SDCL 43-4-42, we find the language "intentionally or . . . negligently" is exclusive and negates strict liability.

It is fair to presume that sellers know the character of the property they convey. At present, when Kramer became aware of Engelhart's concern over the basement she could have simply shown the pictures of its true condition. Her failure to do so was unreasonable and amounts to negligence. SDCL 43-4-42. It must be noted that Kramer admitted taking the photographs before installing the paneling and that showing the photos would have been easier than removing it. Kramer could not explain why she did not offer the photos.

⁴The Alaska disclosure statutes did not define "good faith" but held that "good faith" envisioned an "honest and reasonable belief." *Id.* at 247. *Amyot* is distinguishable from the present facts in that the court held an "innocent misrepresentation" did not violate the good faith standard. South Dakota does not attach liability in this context unless the seller's conduct amounts to an "intentional or negligent" violation the disclosure statutes. SDCL 43-4-42.

We hold that with the adoption of South Dakota's detailed disclosure statutes the doctrine of caveat emptor has been abandoned in favor of full and complete disclosure of defects of which the seller is aware. We are not inferring, as Kramer suggests, that a seller must possess the expertise of a structural engineer to pass good faith muster. Nor are we suggesting that a seller will be liable for defects of which she is unaware. Those claims are clearly disposed of in the closing section of the mandated disclosure form of SDCL 43-4-44:

The Seller hereby certifies that the information contained herein is true and correct to the best of the Seller's information, knowledge and belief as of the date of the Seller's signature below.... THE SELLER AND THE BUYER MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO OBTAIN A TRUE REPORT AS TO THE CONDITION OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN ANY CONTRACT OF SALE AS NEGOTIATED BETWEEN THE SELLER AND THE BUYER WITH RESPECT TO SUCH PROFESSIONAL ADVICE AND INSPECTIONS.

(Capitals in original). It is clear that, as per SDCL § 43-4-41 and 43-4-44, a seller's "good faith" is determined under a reasonable person standard.

Affirmed.

Notes and Questions

19.18. In *Lucero v. Van Wie*, 598 NW 2d 893 (S.D. 1999), the seller failed to provide the statutorily required disclosure statement, but the contract of sale contained the following clause:

The buyer acknowledges that she has examined the premises and the same are in satisfactory condition and they accept the property in the "as-is" condition

This time, the South Dakota Supreme Court held that the buyer could not recover for undisclosed defects in the property; she "entered into an enforceable contract and purchased the property 'as is,' the result of which was to waive disclosure requirements." After *Lucero*, what do you expect happened to real estate sales contracts in South Dakota? What do you expect the South Dakota courts will do in cases where the sales contract contains an "as-is" clause but

the buyer alleges that the seller affirmatively lied about the condition of the property – e.g., “No, the roof has never leaked.”

19.19. In addition to the distinction between unknown defects and defects known to the seller, some courts draw a distinction between latent and apparent defects. Only hidden defects – e.g., rotting support beams in the walls – need to be disclosed, while readily visible defects, or ones that a reasonable inspection could discover – e.g., nonworking plumbing on the second floor – need not. The theory, at least, is that the buyer depends on the seller to tell her about conditions she could not reasonably discover herself. But isn’t there a connection between defects the buyer doesn’t know about and defects the seller doesn’t know about, either? Cases like *Engelhart* are one thing, where the Seller literally plasters (or at least panels) over the problem. But who should bear the loss if a previously unknown sinkhole surprises everyone by swallowing up the back porch the day after closing? Consider, in this regard, a seller who doesn’t know whether her home’s attic walls contain asbestos insulation, and a buyer whose offer to buy the house is contingent on drilling into the walls to confirm that they do not contain asbestos. If you represented the seller, would you advise your client to accept this contingency?

19.20. What kinds of conditions must be disclosed? A leaky roof? A leaky faucet? The presence of lead paint on the walls? The fact that a previous inhabitant of the home was gruesomely murdered by a family member? That the homeowner regularly gave “ghost tours” on which she pretended to tourists that the house was haunted? The fact that a registered sex offender lives on the block? The fact that there is a municipal garbage dump half a mile away?

19.21. In many states, new-home builders are required to give a non-waivable warranty of habitability that substantially parallels the warranty of habitability required of landlords. What might account for the decision to hold sellers of new houses to a higher standard than sellers of existing houses? When should the statute of limitations on breach of warranty claims start running? Should subsequent purchasers be able to sue the original builder for breach of the warranty if the defects become apparent only after a resale?

Brush Grocery Kart, Inc. v. Sure Fine Market, Inc.

47 P.3d 680 (Colo. 2002)

JUSTICE COATS delivered the opinion of the court: . . .

In October 1992 Brush Grocery Kart, Inc. and Sure Fine Market, Inc.

entered into a five-year “Lease with Renewal Provisions and Option to Purchase” for real property, including a building to be operated by Brush as a grocery store. Under the contract’s purchase option provision, any time during the last six months of the lease, Brush could elect to purchase the property at a price equal to the average of the appraisals of an expert designated by each party.

Shortly before expiration of the lease, Brush notified Sure Fine of its desire to purchase the property and begin the process of determining a sale price. Although each party offered an appraisal, the parties were unable to agree on a final price by the time the lease expired. Brush then vacated the premises, returned all keys to Sure Fine, and advised Sure Fine that it would discontinue its casualty insurance covering the property during the lease. Brush also filed suit, alleging that Sure Fine failed to negotiate the price term in good faith and asking for the appointment of a special master to determine the purchase price. Sure Fine agreed to the appointment of a special master and counterclaimed, alleging that Brush negotiated the price term in bad faith and was therefore the breaching party.

During litigation over the price term, the property was substantially damaged during a hail storm. With neither party carrying casualty insurance, each asserted that the other was liable for the damage. The issue was added to the litigation at a stipulated amount of \$60,000. ... The court then found that under the doctrine of equitable conversion, Brush was the equitable owner of the property and bore the risk of loss. It therefore declined to abate the purchase price or award damages to Brush for the loss.

Brush appealed the loss allocation, and the court of appeals affirmed on similar grounds.

In the absence of statutory authority, the rights, powers, duties, and liabilities arising out of a contract for the sale of land have frequently been derived by reference to the theory of equitable conversion. This theory or doctrine, which has been described as a legal fiction, is based on equitable principles that permit the vendee to be considered the equitable owner of the land and debtor for the purchase money and the vendor to be regarded as a secured creditor. The changes in rights and liabilities that occur upon the making of the contract result from the equitable right to specific performance. Even with regard to third parties, the theory has been relied on to determine, for example, the devolution, upon death, of the rights and liabilities of each party with respect to the land, and to ascertain the powers of creditors of each party to reach the land in payment of their claims.

The assignment of the risk of casualty loss in the executory period of contracts for the sale of real property varies greatly throughout the jurisdictions of this country. What appears to yet be a slim majority of states places the risk of loss on the vendee from the moment of contracting, on the rationale that once an equitable conversion takes place, the vendee must be treated as owner for all purposes. Once the vendee becomes the equitable owner, he therefore becomes responsible for the condition of the property, despite not having a present right of occupancy or control. In sharp contrast, a handful of other states reject the allocation of casualty loss risk as a consequence of the theory of equitable conversion and follow the equally rigid "Massachusetts Rule," under which the seller continues to bear the risk until actual transfer of the title, absent an express agreement to the contrary. A substantial and growing number of jurisdictions, however, base the legal consequences of no-fault casualty loss on the right to possession of the property at the time the loss occurs. This view has found expression in the Uniform Vendor and Purchaser Risk Act, and while a number of states have adopted some variation of the Uniform Act, others have arrived at a similar position through the interpretations of their courts. . . .

In *Wiley v. Lininger*, 204 P.2d 1083, [(1949)] where fire destroyed improvements on land occupied by the vendee during the multi-year executory period of an installment land contract, we held, according to the generally accepted rule, that neither the buyer nor the seller, each of whom had an insurable interest in the property, had an obligation to insure the property for the benefit of the other. We also adopted a rule, which we characterized as "the majority rule," that "the vendee under a contract for the sale of land, being regarded as the equitable owner, assumes the risk of destruction of or injury to the property *where he is in possession*, and the destruction or loss is not proximately caused by the negligence of the vendor." *Id.* (emphasis added). The vendee in possession was therefore not relieved of his obligation to continue making payments according to the terms of the contract, despite material loss by fire to some of the improvements on the property. . . . Those jurisdictions that indiscriminately include the risk of casualty loss among the incidents or "attributes" of equitable ownership do so largely in reliance on ancient authority or by considering it necessary for consistent application of the theory of equitable conversion. Under virtually any accepted understanding of the theory, however, equitable conversion is not viewed as entitling the purchaser to every

significant right of ownership, and particularly not the right of possession. As a matter of both logic and equity, the obligation to maintain property in its physical condition follows the right to have actual possession and control rather than a legal right to force conveyance of the property through specific performance at some future date. See 17 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 50:46, at 457-58 (Richard A. Lord ed., 4th ed. 1990) (“[I]t is wiser to have the party in possession of the property care for it at his peril, rather than at the peril of another.”).

The equitable conversion theory is literally stood on its head by imposing on a vendee, solely because of his right to specific performance, the risk that the vendor will be unable to specifically perform when the time comes because of an accidental casualty loss. It is counterintuitive, at the very least, that merely contracting for the sale of real property should not only relieve the vendor of his responsibility to maintain the property until execution but also impose a duty on the vendee to perform despite the intervention of a material, no-fault casualty loss preventing him from ever receiving the benefit of his bargain. Such an extension of the theory of equitable conversion to casualty loss has never been recognized by this jurisdiction, and it is neither necessary nor justified solely for the sake of consistency.

By contrast, there is substantial justification, both as a matter of law and policy, for not relieving a vendee who is entitled to possession before transfer of title, like the vendee in *Wiley*, of his duty to pay the full contract price, notwithstanding an accidental loss. In addition to having control over the property and being entitled to the benefits of its use, an equitable owner who also has the right of possession has already acquired virtually all of the rights of ownership and almost invariably will have already paid at least some portion of the contract price to exercise those rights. By expressly including in the contract for sale the right of possession, which otherwise generally accompanies transfer of title, the vendor has for all practical purposes already transferred the property as promised, and the parties have in effect expressed their joint intention that the vendee pay the purchase price as promised. ...

In the absence of a right of possession, a vendee of real property that suffers a material casualty loss during the executory period of the contract, through no fault of his own, must be permitted to rescind and recover any payments he had already made. ...

Here, Brush was clearly not in possession of the property as the equi-

table owner. Even if the doctrine of equitable conversion applies to the option contract between Brush and Sure Fine and could be said to have converted Brush's interest to an equitable ownership of the property at the time Brush exercised its option to purchase, neither party considered the contract for sale to entitle Brush to possession. Brush was, in fact, not in possession of the property, and the record indicates that Sure Fine considered itself to hold the right of use and occupancy and gave notice that it would consider Brush a holdover tenant if it continued to occupy the premises other than by continuing to lease the property. The casualty loss was ascertainable and in fact stipulated by the parties, and neither party challenged the district court's enforcement of the contract except with regard to its allocation of the casualty loss. Both the court of appeals and the district court therefore erred in finding that the doctrine of equitable conversion required Brush to bear the loss caused by hail damage.

Notes and Questions

19.22. Why is the risk of loss during the executory period even a thing? Why would the parties leave time between signing a contract of sale and closing? Why not just hand over a deed on the spot?

19.23. If the grocery store had been damaged by hail during the five-year lease preceding the sale, who would have borne the risk of loss? Would it matter whether Brush had taken possession of the property? Who bears the risk of loss if Brush owns a grocery store subject to Sure Fine's mortgage? Does it matter whether Colorado follows the title or lien theory of mortgages?

Chapter 20

Foreclosures and the Mortgage Crisis

20.1 Introduction: What is a Mortgage?

A **mortgage** is an interest in land. It is not a possessory interest: the owner of a mortgage has no right to use the property, the way the owner of the fee or an easement owner would. Instead, mortgages exist to secure loans. A secured loan is backed, or secured, by a specific asset such as a house or a car, which the lender can seize in case of default. An unsecured loan is not secured by any specific asset—for example, credit card debt and student loans are unsecured. The borrower owes the money, and the lender can go after the borrower's unsecured assets in case of default, but if those assets are too small, the unsecured lender is out of luck. Secured loans are generally considered less risky than unsecured loans, for obvious reasons, and should bear lower interest rates (absent some foolery on the part of the lender or government intervention into the market, both of which do happen).

Most mortgages are residential mortgages. Usually, homebuyers in the United States can't afford to pay the entire purchase price of a house at the time they buy it. Instead, they take out a loan—a mortgage—to pay the bulk of the purchase price. They will sign a **promissory note** (the note) that creates personal liability for the borrowers if they fail to pay, and also sets out the terms of the mortgage such as the repayment period and the interest rate. They will also sign a mortgage, a written instrument that grants the lender an interest in their newly purchased land. Usually, this transaction occurs at the time the

buyers buy the land, though mortgages can also be refinanced or taken out on already-owned property.

The homebuyers are the **mortgagors**. The lender is the **mortgagee**. Over time, the buyers pay off the loan. As they pay off the loan, they build “equity” in their homes. Equity is the difference between what a home is worth and what the homeowners owe on their mortgage.¹ As a result of deliberate policy choices, the model residential mortgage in the United States is for no more than 80% of the value of the house at time of purchase; has a fixed interest rate; and amortizes over a period of years, usually twenty or thirty. Amortization means that the payments are the same throughout the period of the mortgage: at the beginning, most of the payments go to interest on the loan, while over time more and more of the payments go to reduce the loan principal.

The mortgagors can transfer the land at will. However, any transfer will not free the land from the mortgage (nor will a transfer free them from their contractual promise to pay the debt); the mortgage **runs with the land**. Thus, a sensible transferee will not be willing to pay full value for the land—the fair market value of the land is reduced by the amount of the mortgage. A transferee can either take “subject to the mortgage,” which means that the original mortgagors still owe the debt and the transferee is at risk if they don’t pay, or “assuming the mortgage,” which means that the new owner agrees to pay the mortgage directly. When the purchaser assumes the mortgage, the seller still has a duty to pay the mortgage if the buyer doesn’t, but the seller can pursue the buyer for reimbursement if that happens. However, this all risks some big messes; to avoid problems associated with transfers, many mortgages have “due on sale” clauses, which means that the full amount of the mortgage comes due (“accelerates”) when the mortgagor sells the property. One important feature of a due on sale clause is that it enables lenders to reprice loans: if the interest rate has risen since the initial mortgage loan, the buyer can’t just assume the existing loan and receive a lower interest rate than would otherwise be available to him.

Suppose Joan Watson wants to sell her house to Sherlock Holmes. She still owes \$400,000 on her house; Holmes will be buying it for \$500,000. But she doesn’t have \$400,000 in the bank to pay off her mortgage, which has a due on sale clause. How can she accomplish the sale? The answer is that a series of transactions take place together. The day of the sale, Holmes will give Wat-

¹This terminology has a historical basis in the “equity of redemption,” which was a means by which early chancellors protected early mortgagors from abuses by lenders. Over time, the equitable procedures created by courts gave way to legislation establishing rules for how foreclosures could occur.

son a check for \$500,000 (most of which will likely come from Holmes' own new mortgage on the property). Watson will then pay her lender \$400,000 and keep \$100,000. As you can see, there will be some time at which both Holmes and Watson are relying on the value of the underlying property—Holmes to get his mortgage and Watson to pay hers off. For this reason, real estate transactions regularly involve the use of multiple third parties, including escrow agents, to facilitate and guarantee the sale.

If the mortgagors **default** on the mortgage by failing to pay the appropriate amounts at the appropriate times, the mortgagee can **foreclose**. Foreclosure can be time-consuming and expensive, so in some circumstances the mortgagee may accept a “deed in lieu of foreclosure,” by which the mortgagor surrenders the property to the mortgagee and the mortgagee accepts the deed. However, deeds in lieu of foreclosure are relatively rare; most of the time, if a default is not cured and the loan is not modified, the result will be a foreclosure.

Either by a private sale (**nonjudicial foreclosure**) or under judicial supervision (**judicial foreclosure**), the mortgagee can have the property sold and apply the proceeds of the sale to the amount due on the note. The foreclosure is so called because it forecloses the mortgagee's ability to get the property back by paying off the mortgage debt; after the foreclosure, it is too late to become current.²

In a number of states, it is possible to avoid judicial foreclosure—which takes more time and money than nonjudicial foreclosure—through the use of a “deed of trust,” which is recognized in most jurisdictions. Under a deed of trust, the borrower conveys title to the property to a person to hold in trust to secure the debt. If the borrower defaults, the trustee has the power of sale without needing to go to court. However, almost all states that allow this procedure do impose some procedural safeguards, such as notice and public sale. Other than the ability to avoid judicial foreclosure, you can expect a deed of trust to be treated like a mortgage.

In addition, there are two different types of secured loans: recourse and nonrecourse loans. For a **nonrecourse loan**, the only way the lender can get its money back in case of default is by seizing the asset, and if there's not enough

²At common law, the equity of redemption allowed the mortgagor to redeem the property from the mortgagee. This equity of redemption was extinguished by foreclosure sale. In about half of the states, there is also a statutory right to redeem the property from the *purchaser* at a foreclosure sale for a certain period of time. This right is rarely used, because most people would already have paid, if they could, before the sale.

money to satisfy the debt from the asset, too bad for the lender. The lender has no “recourse” against any of the borrower’s other assets. A **recourse loan** is different: in case of default, the lender can seize and sell the asset, and if there’s not enough money to satisfy the debt, the lender is now an unsecured creditor for the remaining balance (the deficiency) and can go after any of the borrower’s other assets, such as her bank account. Foreclosure wipes out the lender’s interest in the land, which means that the land can then be resold free of the lender’s interest. However, with a recourse loan, foreclosure will not wipe out the borrower’s debt, if it is greater than the foreclosure sale amount.

Obviously, lenders ordinarily prefer recourse loans, but will grant nonrecourse loans in various circumstances.³ Many businesses can get nonrecourse loans based on their assets. Some states bar deficiency judgments for residential mortgages, which makes them nonrecourse loans. Other states bar deficiency judgments unless there is a judicial foreclosure, with its greater expense and greater procedural protections for the borrower. Still others limit the amount of any deficiency judgment to the difference between the principal balance and the property’s fair market value at the time of foreclosure—this limit recognizes that foreclosed properties often sell for below market value for a variety of reasons, including buyers’ uncertainty about the true condition of the property and the limited number of potential buyers who bid at foreclosure sales. (Historically, the mortgagee is often the only bidder at a foreclosure sale. Why would this be true?)

Even states that allow deficiency judgments generally recognize an exception: if the sale price shocks the conscience, then a deficiency judgment may not be allowed. More generally, even in the absence of a potential deficiency judgment, the foreclosing entity has a limited duty of good faith to the mortgagor in seeking an acceptable price at the sale. However, mere inadequacy of price will not invalidate a sale in the absence of fraud, unfairness, or procedural problems that deterred bidding. As a result, very low sale prices are sometimes accepted by courts. Compare *Moeller v. Lien*, 30 Cal. Rptr. 2d 777 (Ct. App. 1994) (sale at 25% of market value was acceptable where sale was to bona fide purchaser and there was no irregularity in the sale procedure), with *Murphy v. Fin. Dev. Corp.*, 495 A.2d 1245 (N.H. 1985) (finding that mortgagee violated duty to mortgagor

³In fact, the basic idea of a corporation is a way of limiting a lender’s recourse: before the corporate form, if a business owner went bust, creditors could go after the owner’s personal assets until they were gone. The corporation allows shareholders/owners to limit their liability to the extent of the corporation’s assets. If a person owned shares of Lehman Brothers, its creditors could make her shares worthless, but they couldn’t make her pay Lehman Brothers’ debts.

when (1) sale was rescheduled and poorly advertised, (2) sale price was so low that it wiped out substantial equity for homeowners, and (3) mortgagee quickly resold property at substantially higher price).

One final introductory point: it is possible to take out a second and even a third mortgage. The first mortgage has **priority** over the second mortgage: it will be paid first at foreclosure. Only if there is money remaining after the first mortgage is paid off will the holder of the second mortgage be paid. As a result of the greater risk involved in second mortgages, they generally bear higher interest rates than first mortgages.

Problem

20.1. Betty Finn buys a house for \$450,000. She puts down \$90,000 and takes out a mortgage for \$250,000 from Heather Chandler, and a second mortgage for \$110,000 from Veronica Sawyer. When Betty defaults, the house is sold for \$500,000 at foreclosure. Assuming the amounts due on the mortgages haven't changed at all, how should the proceeds be distributed? What would the answer be if the house brought \$350,000 at foreclosure?

20.2 Crystals and Mud in Property Law

We have skimped on the history of mortgage law, which is a long struggle between creditors and debtors. Mostly, legislatures and courts act to protect debtors, who are usually seen as the more vulnerable parties, from sharp dealing by creditors. As rules stretch to be more equitable and less hard-edged, pressure grows to create new clear rules, which then grow their own exceptions and qualifications.

Carol Rose describes the legal seesawing in the following excerpt, which has important lessons for property law generally:

Carol M. Rose, *Crystals And Mud In Property Law**
40 STAN. L. REV. 577 (1988)

Property law, and especially the common law of property, has always been heavily laden with hard-edged doctrines that tell everyone exactly

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where they stand. Default on paying your loan installments? Too bad, you lose the thing you bought and your past payments as well. Forget to record your deed? Sorry, the next buyer can purchase free of your claim, and you are out on the street. Sell that house with the leak in the basement? Lucky you, you can unload the place without having to tell the buyer about such things at all.

In a sense, hard-edged rules like these—rules that I call “crystals”—are what property is all about. If, as Jeremy Bentham said long ago, property is “nothing but a basis of expectation,” then crystal rules are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests. Thus, I should inspect the property, record my deed, and make my payments if I don’t want to lose my home to unexpected physical, legal, or financial impairments. I know where I stand and so does everyone else, and we can all strike bargains with each other if we want to stand somewhere else.

Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it. We draw these ever-sharper lines around our entitlements so that we know who has what, and so that we can trade instead of getting into the confusions and disputes that would only escalate as the goods in question became scarcer and more highly valued.

At the root of these economic analyses lies the perception that it costs something to establish clear entitlements to things, and we won’t bother to undertake the task of removing goods from an ownerless “commons” unless it is worth it to us to do so. What makes it worth it? Increasing scarcity of the resource, and the attendant conflicts over it. To use the example given by Harold Demsetz, one of the most notable of the modern economists telling this story, when the European demand for fur hats increased demand for (and scarcity of) fur-bearing animals among Indian hunters, the Indians developed a system of property entitlements to the animal habitat. Economic historians of the American West tell a similar story about the development of property rights in various minerals and natural resources. Easy-going, anything-goes patterns of appropriation at the outset came under pressure as competition for resources increased, and were finally superseded by much more sharply defined systems of entitlement. In effect, as our competition for a resource raises the costs of

conflict about it, those conflict costs begin to outweigh the costs of taking it out of the commons and establishing clear property entitlements. We establish a system of clear entitlements so that we can barter and trade for what we want instead of fighting.

The trouble with this “scarcity story” is that things don’t seem to work this way, or at least not all the time. Sometimes we seem to substitute fuzzy, ambiguous rules of decision for what seem to be perfectly clear, open and shut, demarcations of entitlements. I call this occurrence the substitution of “mud” rules for “crystal” ones.

Thus, . . . over time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing, to the point that the various claimants under real estate contracts, mortgages, or recorded deeds don’t know quite what their rights and obligations really are. And the same pattern has occurred in other areas too. . . .

Quite aside from the wealth transfer that may accompany a change in the rules, then, the change may sharply alter the *clarity* of the relationship between the parties. But a move to the uncertainty of mud seems disruptive to the very practice of a private property/contractual exchange society. Thus, it is hardly surprising that we individually and collectively attempt to clear up the mud with new crystal rules—as when private parties contract out of ambiguous warranties, or when legislatures pass new versions of crystalline record systems—only to be overruled later, when courts once again reinstate mud in a different form. . . .

Early common law mortgages were very crystalline indeed. They had the look of pawnshop transactions and were at least sometimes structured as conveyances: I borrow money from you, and at the same time I convey my land to you as security for my loan. If all goes well, I pay back my debt on the agreed “law day,” and you reconvey my land back to me. But if all does not go well and I cannot pay on the appointed day, then, no matter how heartrending my excuse, I lose my land to you and, presumably, any of the previous payments I might have made. As the fifteenth century commentator Littleton airily explained, the name “mortgage” derived from the rule that, if the debtor “doth not pay, then the land which he puts in pledge . . . is gone from him for ever, and so dead.”

This system had the advantage of great clarity, but it sometimes must have seemed very hard on mortgage debtors to the advantage of scoundrelly creditors. Littleton’s advice about the importance of specify-

ing the precise place and time for repayment, for example, conjures up images of a wily creditor hiding in the woods on the repayment day to frustrate repayment; presumably, the unfound creditor could keep the property. But by the seventeenth century, the intervention of courts of equity had changed things. By the eighteenth and nineteenth centuries, the equity courts were regularly giving debtors as many as three or four “enlargements” of the time in which they might pay and redeem the property before the final “foreclosure,” even when the excuse was lame. One judge explained that an equity court might well grant more time even after the “final” order of “foreclosure absolute,” depending on the particular circumstances.

The muddiness of this emerging judicial remedy argued against its attractiveness. Chief Justice Hale complained in 1672 that, “[b]y the growth of Equity on Equity, the Heart of the Common Law is eaten out, and legal Settlements are destroyed; . . . as far as the Line is given, Man will go; and if an hundred Years are given, Man will go so far, and we know not whither we shall go.” Instead of a precise and clear allocation of entitlements between the parties, the “equity of redemption” and its unpredictable foreclosure opened up vexing questions and uncertainties: How much time should the debtor have for repayment before the equitable arguments shifted to favor the creditor? What sort of excuses did the debtor need? Did it matter that the property, instead of dropping in the lap of the creditor, was sold at a foreclosure sale?

But as the courts moved towards muddiness, private parties attempted to bargain their way out of these costly uncertainties and to reinstate a crystalline pattern whereby lenders could get the property immediately upon default without the costs of foreclosure. How about a separate deal with the borrower, for example, whereby he agrees to convey an equitable interest to the lender in case of default? Nothing doing, said the courts, including the United States Supreme Court, which in 1878 stated flatly that a mortgagor could not initially bargain away his “equity of redemption.” Well, then, how about an arrangement whereby it looks as if the lender already owns the land, and the “borrower” only gets title if he lives up to his agreement to pay for it by a certain time? This seemed more promising: In the 1890s California courts thought it perfectly correct to hold the buyer to his word in such an arrangement, and to give him neither an extension nor a refund of past payments. By the 1960s, however, they were changing their minds about these “installment land contracts.” After all, these

deals really had exactly the same effect as the old-style mortgages—the defaulting buyer could lose everything if he missed a payment, even the very last payment. Human vice and error seemed to put the crystal rule in jeopardy: In a series of cases culminating with a default by a “willful but repentant” little old lady who had stopped paying when she mistakenly thought that she was being cheated, the California Supreme Court decided to treat these land contracts as mortgages in disguise. It gave the borrower “relief from forfeiture”—a time to reinstate the installment contract or get back her past payments.

With mortgages first and mortgage substitutes later, we see a back-and-forth pattern: crisp definition of entitlements, made fuzzy by accretions of judicial decisions, crisped up again by the parties’ contractual arrangements, and once again made fuzzy by the courts. Here we see private parties apparently following the “scarcity story” in their private law arrangements: when things matter, the parties define their respective entitlements with ever sharper precision. Yet the courts seem at times unwilling to follow this story or to permit these crystalline definitions, most particularly when the rules hurt one party very badly. The cycle thus alternates between crystal and mud.

Notes and Questions

20.2. Bear in mind that crystals don’t just help lenders, and mud doesn’t just help borrowers. It all depends on the particulars of the situation. In fact, as you read the materials, consider whether insistence on hard-edged rules might aid *borrowers* under today’s circumstances, and whether this would be justified.

20.3. Carol Rose later describes the situations in which courts muddy crystalline rules as cases involving “ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them.” As you read through the rest of this chapter, consider whether that is a fair characterization of the parties to the various disputes we will be studying.

20.3 The Rise of Mortgage Securitization

Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title**

63 DUKE L.J. 637 (2013)

...

II. The Shift in Mortgage Financing to Securitization

Securitization is a relatively recent development in residential mortgage lending. Residential mortgages began to be securitized in 1970, but securitization remained a relatively small part of American housing finance prior to the 1980s. In 1979 only 10 percent of outstanding mortgages by dollar amount were securitized. Instead, mortgage lending was primarily a local affair . . . so mortgage loans were rarely transferred.

... By 1983, 20 percent of outstanding mortgages by dollar amount were securitized, and a decade later fully half of outstanding mortgages by dollar amount were securitized. Today nearly two-thirds of mortgage dollars outstanding are securitized.

A firm can raise funds on potentially more advantageous terms if it can borrow solely against its assets, not its assets and liabilities. Securitization enabled such borrowing. To do so, a firm sells assets to a legally separate, specially created entity. The legally separate entity pays for the assets by issuing debt. Because the entity is designed to have almost no other liabilities, the debt it issues will be priced simply on the quality of the transferred assets, without any concern about competing claims to those assets. Therefore, ensuring that the assets are transferred and are free of competing claims is central to securitization.

Although residential-mortgage securitization transactions are complex and vary somewhat depending on the type of entity undertaking the securitization, there is still a core standard transaction. First, a financial institution (the “sponsor” or “seller”) assembles a pool of mortgage loans either made (“originated”) by an affiliate of the financial institution or purchased from unaffiliated third-party originators. Second, the pool of loans is sold by the sponsor to a special-purpose subsidiary (the “depositor”) that has no other assets or liabilities and is little more than a legal entity

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with a mailbox. This is done to segregate the loans from the sponsor's assets and liabilities. Third, the depositor sells the loans to a passive, specially created, single-purpose vehicle (SPV), typically a trust in the case of residential-mortgage securitization. The trustee will then typically convey the mortgage notes and security instruments to a document custodian for safekeeping. The SPV issues certificated debt securities to raise the funds to pay for the loans. As these debt securities are backed by the cash flow from the mortgages, they are called mortgage-backed securities (MBS). . . .

Notes and Questions

20.4. You may not feel that you fully understand **securitization**. It will get clearer with time. Perhaps the most important thing to understand is that the entity that claims to own, and tries to enforce, the mortgage debt in case of default is usually not the entity that originated the loan. It's common to discuss "banks" and "lenders" without paying much attention to the details of the actual mortgage transactions, and the problem is worsened because the entities involved are often related and even bear highly similar names. But lawyers often need more precision.

20.5. Among other things, non-originator owners can claim that equitable defenses—such as fraudulent inducement, which was unconscionably common in the run-up to the mortgage crisis—are unavailable to homeowners/mortgagors under the "holder in due course" doctrine. The holder in due course doctrine is similar to the rule, discussed in *O'Keeffe v. Snyder*, that a good faith purchaser who buys property from a fraudster acquires good title, even though the fraudster did not have good title. With a mortgage, that means that a homeowner who was deceived into taking a predatory loan, as discussed in the next section, is still bound to pay back the loan according to its terms as long as the mortgage was transferred to a holder in due course. See, e.g., Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder-in-Due-Course Doctrine*, 35 CREIGHTON L. REV. 502 (2002). Recently, some reforms have attempted to limit the holder in due course doctrine, at least with respect to loans with specific bad features.

20.6. Another important thing to understand about securitization is that it involves the creation of new property rights from old. Investors in mortgage-backed securities do not own individual mortgages. Rather, they own the right to benefit from the stream of payments from mortgagors to the trusts that hold the mortgages. This right has been turned into a separate property right

through the magic of securitization. But the *value* of this right is still, as investors discovered to their sorrow, dependent on the value of the underlying assets.

20.4 Predatory Lending

Along with the actors in the mortgage securitization chain described by Levitin, many mortgage loans, particularly subprime loans, were made with the assistance of a mortgage broker, who matched borrowers with lenders. As you will see, the broker's incentives did not line up with those of his or her borrower-clients.

Reading notes: Focus on the elements that made these loans bad loans. The discrimination is important, but so is how it was carried out. If you don't understand a loan provision, consider whether an average borrower would—and then look it up!

McGlawn v. Pennsylvania Human Relations Commission

891 A.2d 757 (Commonwealth Ct. Penn. 2006)

This case involves an issue of first impression: whether the Pennsylvania Human Relations Act (Act) extends to a mortgage broker's predatory lending activities known as "reverse redlining."¹ We affirm the Commission's holding that the Act prohibits reverse redlining. However, we vacate part of the Commission's award of actual damages and remand for further proceedings.

Respondent McGlawn and McGlawn, Inc. (Broker) a state-licensed mortgage broker, and Respondent Reginald McGlawn (Reginald McGlawn) petition for review of the decision of the Pennsylvania Human Relations Commission (Commission). The decision held Respondents violated Sections 5(h)(4)(loan provision)² and 5(h)(8)(i)(real estate trans-

¹In *United Cos. Corp. v. Sergeant*, 20 F. Supp. 2d 192 (D. Mass. 1998), the United States District Court defined "redlining" as[:]

"the practice of denying the extension of credit to specific geographic areas due to the income, race or ethnicity of its residents. The term was derived from the actual practice of drawing a red line around certain areas in which credit would be denied. Reverse redlining is the practice of extending credit on unfair terms to those same communities."

²Section 5(h)(4) of the Act, 43 P.S. § 955(h)(4), makes it unlawful to

"[d]iscriminate against any person in the terms or conditions of any loan of money,

action provision)³ of the Act by discriminating against Complainants and other similar situated persons (collectively, Complainants), in mortgage loan transactions, because of their race and the racial composition of their neighborhoods. The Commission's final order directed Respondents to (1) cease and desist from discriminating against African Americans because of their race; (2) pay Complainants actual damages;⁴ (3) pay Complainants damages for embarrassment and humiliation;⁵ and (4) pay a civil penalty of \$25,000.00. Further, the Commission's order directed Broker to (5) provide employee training to its employees designed to educate them in their responsibility to treat clients in a non-discriminatory manner consistent with the provisions of the Act; and to (6) develop and implement a record-keeping system designed to accurately record information about Broker's charges in all mortgage transactions.⁶ The order also required Respondents to report the means of compliance and directed the Commission to contact the Department of Banking so that it may take such licensing action as it deemed appropriate.

whether or not secured by a mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of housing accommodation or commercial property because of . . . race . . .”

³Section 5(h)(8)(i) of the Act, 43 P.S. § 955(h)(8)(i), makes it an unlawful to[:]

“[d]iscriminate in real estate related transactions, as described by and subject to the following: (i)[i]t shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction or in the terms [or] conditions of such a transaction because of race . . .”

⁴The Commission awarded Complainants actual damages in these amounts: Taylor, \$45,770.68; Poindexter, \$24,447.80; Brunson, \$63,996.34; Jackson, \$74,875.74; Slaughter, \$29,685.46; Jacobs, \$47,549.62; Hawkins, \$41,952.72; Miles, \$101,562.81; Watts, \$116,298.87; and Norwood, \$154,209.11.

⁵The Commission awarded Complainants damages for embarrassment and humiliation in the following amounts: Taylor, \$25,000.00; Poindexter, \$15,000.00; Brunson, \$15,000.00; Jackson, \$20,000.00; Slaughter, \$20,000.00; Jacobs, \$20,000.00; Hawkins, \$20,000.00; Miles, \$10,000.00; Watts, \$20,000.00; and Norwood, \$20,000.00.

⁶In particular, Broker must accurately record the following data for each transaction: (a) the dollar amount and percentage of the broker's fee charged; (b) any other fees paid; (c) the amount and type of the loan; and (d) the employee involved in the transaction. Broker shall submit this information to the Commission on a bi-annual basis for three years.

I. Background

A.

Broker, a corporation which brokers mortgage loans, refinancing and insurance for its customers, was founded in 1985 by its chief officers, Reginald McGlawn, and his brother, Anthony McGlawn. Reginald McGlawn is Broker's mortgage loan specialist, and Anthony McGlawn is Broker's insurance specialist. Broker also employs other McGlawn family members.

Broker specializes in arranging sub-prime mortgage loans for its customers. The prime lending market provides credit to those considered good credit risks. The sub-prime lending market provides credit to people the financial industry considers enhanced credit risks. These people generally have a flawed credit history or a debt-to-income ratio outside the range the financial industry considers acceptable for prime credit. As discussed hereafter, sub-prime interest rates are usually two to three percentage points higher than prime rates.

In 1998-2000, Broker arranged sub-prime mortgage loans for Complainants, who own real property in Philadelphia County. Broker is an African American-owned company. Complainants are African Americans who reside in predominantly African American neighborhoods.

In April 2001, Complainant Lucrecia Taylor (Taylor) filed a verified complaint with the Commission alleging Broker unlawfully discriminated against her in the terms and conditions of a real estate-related transaction and loan of money because of her race and the racial composition of her neighborhood, African American. Specifically, Taylor alleged Broker targeted her, as an African American, for a mortgage loan transaction containing predatory and unfair terms in violation of the Act's loan and real estate transaction provisions. Significantly, Taylor stated her allegations were made not only on her own behalf, but on behalf of all other similarly situated persons affected by Broker's discriminatory practices. After the pleadings were closed, the Commission notified Taylor and Broker that probable cause existed to credit Taylor's allegations.

In August 2002, Complainant Lynn Poindexter (Poindexter) filed a like complaint against Broker on behalf of herself and all other similarly situated persons. The Commission subsequently found probable cause existed to credit Poindexter's allegations. The Commission consolidated the two cases

The Commission was thereafter able to identify other individuals affected by Broker's alleged discriminatory practices

B.

In its decision, the Commission found Broker engaged in predatory brokering activities regarding all Complainants. Those actions resulted in unfair and predatory mortgage loans. It also found Broker engaged in an aggressive marketing plan targeting African Americans and African American neighborhoods in the Philadelphia area. Nearly all of Complainants contacted Broker in response to radio, television and newspaper advertisements.

Broker's predatory practices, the Commission noted, included arranging loans containing onerous terms such as high interest rates, pre-payment penalties, balloon payments and mandatory arbitration clauses. In addition, Broker charged Complainants high broker fees, undisclosed fees, yield spread premiums and various other additional closing costs. Broker's predatory practices also included falsification of information on loan documents, failure to disclose information regarding terms of the loan, and high pressure sales tactics.

. . . The seminal case prohibiting reverse redlining is *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000). There, the United States District Court adopted a two-pronged test for discrimination under the FHA [Fair Housing Act] based on reverse redlining. First, the plaintiffs must establish the defendant's lending practices and loan terms were predatory and unfair. *Hargraves*. Second, the plaintiffs must establish that defendant intentionally targeted them because of their race or that the defendant's lending practices had a disparate impact on the basis of race.

Citing *Hargraves* and the opinions of Complainants' experts, the Commission concluded Complainants established a prima facie reverse redlining claim against Broker under the *Hargraves* test. The Commission rejected Broker's arguments that (1) it did not discriminate because it did not arrange loans for non-African Americans on more preferable terms, (2) it had a legitimate business necessity for its actions, (3) it is not responsible for the terms and conditions of the loans or the disclosure of information relating to the loans, and (4) all mortgage brokers are predators.

As a result, the Commission held Respondents violated the loan provisions and the real estate transaction provisions of the Act by unlawfully discriminating against Complainants in the terms and conditions of real

estate-related transactions

III. Substantial Evidence

Respondents . . . assert the Commission's conclusion Broker engaged in reverse redlining is not supported by substantial evidence.¹⁴ In particular, Respondents maintain the evidence does not show Broker engaged in predatory lending practices or targeted African Americans.

"It is well settled that the party asserting discrimination bears the burden of proving a *prima facie* case of discrimination." "Once a *prima facie* case is established, a rebuttable presumption of discrimination arises." "The burden then shifts to the defendant to show some legitimate, nondiscriminatory reason for its action." . . .

A. Predatory Lending

Respondents first argue Broker did not engage in predatory or unfair lending practices because it did not approve Complainants' loans or lend them the money. Therefore, they were not responsible either for the terms and conditions of Complainants' loans or for the disclosure of information related to the loans. Those responsibilities belong to the lending institutions that set the terms and approved the loans.

The Commission accepted the testimony of Complainants' expert witnesses. Michelle Lewis, President and Chief Executive Officer of Northwest Counseling Service, Inc. (Complainants' first expert), stated that a mortgage broker is significantly involved in making the loan. The broker is the middleman who creates the loan opportunity. The broker's customer relies on the broker's expertise in lending matters and has an expectation that the broker will be able to obtain the best available deal.

The Commission also relied on Ira Goldstein, Director of Public Policy and Program Assessment for the Reinvestment Fund (Complainants' second expert), who testified that, in brokered transactions, the broker's customer—the borrower, never actually meets the lender. As a result, in the borrower's mind, the broker is the lender. Complainants' second expert also testified that in loan transactions where a yield spread premium¹⁷

¹⁴"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "Further, substantial evidence supporting a finding of racial discrimination may be circumstantial and based on inferences."

¹⁷In *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509 (M.D. Ala. 1998), the United States District Court defined "yield spread premiums" as:

is used, the broker plays a significant role in establishing the interest rate of the loan.

As additional support for its determination, the Commission cited Reginald McGlawn's testimony. He testified, "[W]hen people come to us, I provide loans." Reginald McGlawn also testified he chooses which lender receives the borrower's loan application. He also stated he sets the broker fee and gives the borrower the option of using a yield spread premium, which has the effect of increasing the interest rate.

1.

There is substantial evidence to support the Commission's determination that Respondents engaged in brokering activities that resulted in predatory and unfair loans.

. . . Broker's activities were a substantial part of the loan transactions at issue. In particular, Broker selected which lender received Complainants' loan applications. Broker was the sole negotiator for Complainants with the ultimate lender. Also, Broker influenced the ultimate interest rates in loans involving yield spread premiums. Further, Broker received substantial sums directly from loan proceeds, such as broker fees and insurance premiums. As the Commission properly concluded, these items are considered terms of a loan transaction

2.

We next review the Commission's determination that Respondents' practices were predatory and unfair. . . .

In finding Broker arranged predatory and unfair loans for Complainants, the Commission applied the *Hargraves* definition of "predatory lending practices." The *Hargraves* Court stated predatory lending practices are indicated by loans with unreasonably high interest rates and loans based on the value of the asset securing the loan rather than the borrower's capacity to repay it. The Court also recognized predatory lending practices include "loan servicing procedures in which excessive fees are charged."

payments made by a mortgage lender to a mortgage broker on an "above par" loan brought to the lender by the broker. To be "above par" is to be above the going rate, to be above the lowest rate that a lender will offer without charging "discount points." In crude terms, therefore, the yield spread premium is (allegedly) simply a payment made by the lender to the broker in return for the broker having brought the lender a high interest loan.

The Commission also noted the New Jersey Superior Court's decision in *Assocs. Home Equity Servs., Inc. v. Troup*, 343 N.J.Super. 254, 778 A.2d 529 (2001). The *Troup* Court explained the term "predatory lenders" refers to those lenders who target certain populations for credit on unfair or onerous terms. Characteristically, predatory loans do not fit the borrower either because the borrower's needs are not met or because the terms are so onerous there is a strong likelihood the borrower will be unable to repay the loan.

In determining what lending practices are predatory and unfair, the Commission also accepted as credible Complainants' experts opinions as to what constitutes a predatory loan. Complainants' first expert testified there are a number of loan features which are characteristic of a predatory loan. They include high interest rates, paying off a low interest mortgage with a high interest mortgage, payment of points, yield spread premiums, high broker fees, undisclosed fees, balloon payments, pre-payment penalties, arbitration clauses and fraud. A predatory and unfair loan may include any combination of these characteristics.

Complainants' second expert testified that, even assuming a borrower is an enhanced credit risk, the difference in interest rates between a sub-prime and prime market loan is usually no greater than three percentage points. Anything higher than a three-point difference is indicative of a predatory loan. This expert also testified predatory loan practices include, among other things: flipping (successive refinancing of the same loan); hiding critical terms, establishing loan terms the borrower cannot meet; packing (including unnecessary products such as insurance policies); charging improper fees for items outside the settlement sheet; creation of false documents; and failing to advise borrowers of their rescission rights.

The Commission examined the terms of Complainants' loans and their experiences with Respondents in light of the foregoing. We briefly review the Commission's findings regarding Complainants Taylor and Poindexter.

Taylor. Taylor contacted Broker in October 2000 in order to obtain a refinancing loan of \$10,000.00 to make some emergency home repairs (leaky roof, doors and windows, plumbing repair). In 2000, she owed \$7,300.00 on her home. Her home mortgage had a 3% interest rate with a monthly payment of \$110.90. Taylor's sole income source was social security disability.

Broker arranged a 30-year mortgage loan for Taylor with Delta Fund-

ing Corporation (Delta) in the amount of \$20,500.00 with a 13.09% interest rate. Taylor was not given an opportunity to review any of the documents before signing them. Taylor was told to sign the documents.

The Commission found Taylor's loan transaction had several predatory characteristics. Taylor's was charged \$4,276.60 in total settlement costs, or approximately 20% of the loan.²⁰ Two days after Taylor signed the loan documents, her uncle reviewed them and advised her to cancel the loan. Taylor called Aaron McGlawn, a Broker employee, and stated she did not want the loan. He did not advise Taylor she could legally rescind the loan within a three-day period; rather, he told Taylor she could cancel the loan if she had the money to pay the people Broker already paid.

The settlement sheet indicates Taylor received \$8,902.07. At closing, Reginald McGlawn informed Taylor she owed an additional \$1,200.00 fee because of where she lived. Anthony McGlawn cashed the check and gave Taylor the money. He then asked Taylor for the \$1,200.00 fee. Taylor paid the fee out of the cash; but she was not given a receipt. This fee was not reflected on the settlement sheet.

Complainants' second expert reviewed Taylor's loan transaction. He noted several predatory characteristics. First, Taylor's 13.09% interest rate was substantially above the three-point spread between sub-prime and prime loans. The Commission noted Broker arranged a loan for Taylor at twice the amount she requested and increased her interest rate from 3% to 13.09%. Such loans are considered to be deceptive and detrimental.²¹ In addition, Taylor's loan included an additional undisclosed \$1,200.00 broker fee.

The Commission found Broker engaged in predatory brokering activ-

²⁰Taylor was charged \$440.00 for a broker fee and \$410.00 for a yield spread premium. Taylor testified she was unaware her loan contained a yield spread premium or that it would raise her interest rate. Her loan also included a \$370.31 charge for a homeowner's insurance policy even though she was covered by another policy. Taylor was unaware of this charge and stated her house was already insured. Taylor's settlement sheet also reflected charges for debts she did not owe at the time of closing, including a \$83.81 water bill and two ambulance bills (\$477.50 and \$250.00). Though Broker told Taylor this money would be returned to her, she never received it.

²¹In addition to the higher interest rate, the Commission found Broker's charges for the homeowners' policy and broker fees to be predatory and unfair. It also found Broker's refusal to either inform Taylor of her rescission rights or permit her to cancel her loan within the three-day rescission period was a predatory practice intended to process the loan transaction despite Taylor's desire to cancel it.

ties on Taylor's behalf. These Broker actions resulted in a predatory and unfair refinancing loan. This finding is supported by substantial evidence.

Poindexter. Poindexter testified by deposition that she acquired her home as a gift from her grandfather and owned it free and clear. She described the neighborhood as being African American.

In response to a radio advertisement, Poindexter contacted Broker to obtain a small loan to pay off her bills; she did not want a mortgage. She eventually met with Reginald McGlawn. Poindexter told him she was going to college and working part time at a grocery store.

During their conversations, Reginald McGlawn informed Poindexter she did not make enough money but that he would "take care of things." Broker subsequently submitted documentation to Gelt Financial Corporation indicating Poindexter had a second job as a receptionist with Ivory Towers, Contractors, Inc. Poindexter stated she did not prepare these documents, was never employed by Ivory Towers and was unaware of these documents.

Poindexter's settlement sheet indicates her loan was approved for \$22,400.00. It listed a broker fee of \$2,240.00 (10% of the loan amount) and a \$423.87 charge for a homeowner's insurance policy. Poindexter's loan also contained a balloon payment of \$20,193.79 and a pre-payment penalty. At the time she signed the documents, Poindexter was unaware of either the balloon payment or the pre-payment penalty. Prior to settlement, Poindexter never discussed the interest rate with Respondents. She did not have time to review the loan documents before signing them.

The Commission found Broker engaged in predatory brokering activities regarding Poindexter, which resulted in a predatory and unfair loan. This finding is supported by substantial evidence.

Similarly situated persons. The Commission also found Broker engaged in predatory brokering practices on behalf of the eight similarly situated persons (Brunson, Jackson, Slaughter, Jacobs, Hawkins, Miles, Watts and Norwood), which resulted in unfair and predatory loans. The Commission noted the terms of these individuals' mortgage loans, as well as their factual circumstances, were "disturbingly similar" to those of Taylor and Poindexter. These findings are also supported by substantial evidence.

In view of the foregoing, we conclude Complainants proved Respondents engaged in predatory and unfair lending practices. Respondents' actions resulted in onerous loans containing terms of a predatory nature

designed to benefit Broker, not Complainants. Therefore, Complainants met the first requirement for proving a reverse redlining claim.

B. Intentional Discrimination

The second element of a reverse redlining claim is a showing that the defendant either intentionally targeted on the basis of race or that there was a disparate impact on the basis of race. Here, the Commission determined Broker intentionally targeted African Americans and African American neighborhoods. The Commission also found ample evidence of disparate impact.

. . . In reverse redlining cases, evidence of the defendant's advertising efforts in African American communities is sufficient to show intentional targeting on the basis of race.

The Commission reviewed Broker's advertisements. On its website, Broker states “[i]t is one of the first African American owned and operated Mortgage and Insurance Financial Services in Philadelphia and the surrounding area.” Broker's website also states “[o]ur primary focus is to assist financially challenged customers in purchasing and or refinancing their existing mortgage, as well as providing various types of insurance.”

In addition, Anthony McGlawn, Broker's co-founder and insurance specialist, testified Broker engaged in extensive advertising on radio and television, in the newspapers and in the yellow pages. Several of these sources are oriented toward African American audiences and readers. Reginald McGlawn also testified the majority of Broker's customers are African Americans.

. . . Complainants also testified the decision to contact Broker was influenced by the fact that it was an African American company. For example, both Taylor and Poindexter testified this fact played a role in their decisions to use Broker's services.

The record also indicates Broker's business activities have a disparate impact on African American neighborhoods. This can be established by statistical evidence. *Hargraves*. The Commission accepted the testimony of Radcliffe Davis, a Commission investigator (Investigator). In response to Taylor and Poindexter's complaints, Investigator visited Broker's office and reviewed 100 customer loan applications for things such as refinancing, debt consolidation and home improvement. Of those 100 applications, 66 identified the race of the applicant. Of those 66 applicants, 65 were African American.

In addition, Complainants' second expert testified he prepared a document mapping the 11 properties involved in this matter. Nine of these properties were in areas that have at least a 90% African American population. The other two areas have a 50-75% African American population.

Considering the foregoing, the Commission's conclusion regarding intentional discrimination is supported by substantial evidence and is in accord with applicable law. *Hargraves*. Complainants also established by statistical evidence that Broker's business activities had a disparate impact on African Americans and African American neighborhoods.

In sum, Complainants met their burden of establishing a *prima facie* reverse redlining claim against Broker.

C. Rebuttal

"Once a *prima facie* case is established, a rebuttable presumption of discrimination arises." "The burden then shifts to the defendant to show some legitimate, nondiscriminatory reason for its action." In predatory lending cases, the financial institution may avoid liability by showing its lending practices were legitimate.

Respondents contend Complainants did not prove Broker's business activities were discriminatory because they did not establish Broker made loans to non-African Americans on more preferable terms. This argument was rejected in *Hargraves*. Citing *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), the *Hargraves* Court recognized that injustice cannot be permitted merely because it is visited exclusively upon African Americans. We adopt this reasoning now.

Respondents also argue that any mortgage broker which arranges sub-prime loans could be considered a predator. We disagree. The interest rates of Complainants' loans are far in excess of the three-point difference usually separating prime and sub-prime loans. In addition, Broker's high broker fees, undisclosed fees and padded closing costs benefited Broker, not Complainants. These types of loans do not serve the borrower's wants or needs. See *In re Barker* (broker's motivation for arranging this type of loan was not to serve borrower's interest, "but to serve its own interest of obtaining a handsome broker's fee.") 251 B.R. at 260. "Such self-dealing constitutes a flagrant violation of the Broker's fiduciary duties to the [borrower]."

Respondents further argue Broker had no legal obligation to ensure Complainants could repay their loans.

Whether or not a broker must ensure a client's ability to repay a loan, a broker cannot ignore circumstances suggesting an inability to repay. Indeed, one of the clearest indicators of a predatory and unfair loan is one which exceeds the borrower's needs and repayment capacity.

On several occasions, Broker arranged loans in excess of the amounts Complainants sought. Moreover, Broker discouraged several Complainants from canceling their loans within the three-day rescission period. Broker also submitted falsified documents with Complainants' loan applications indicating Complainants possessed greater income or assets than they really did. Broker's disregard of Complainants' ability to repay their loans strongly supports the Commission's decision to reject the legitimate practice defense.

Respondents also assert they did not target African Americans or African American neighborhoods. Rather, Respondents claim Complainants, who are poor credit risks, came to Broker after being turned down by other brokers.

. . . [N]early all Complainants contacted Broker in response to one of its radio, television or newspaper advertisements targeting individuals with poor credit. Further, Broker concentrated its advertising efforts in the African American media. The Commission did not err in concluding Broker intentionally targeted African Americans for sub-prime mortgage loans. *Hargraves*.

Accordingly, no error is evident in the Commission's rejection of the Respondents' legitimate practice defense.

[The court upheld damages constituting the amounts paid to the broker out of the loan proceeds for items that only benefited the broker, such as the disclosed and undisclosed broker fees and yield spread premiums. It remanded for further calculation of the damages constituting the difference between the total amount of interest Complainants would be paying as a result of the predatory loans and the total amount of interest they would have paid with a loan at the prevailing mortgage interest rate "realistically available" to them given their credit ratings.]

. . . Here, Complainants' testified regarding the emotional distress suffered as a result of their dealings with Broker. Taylor testified she no longer trusts anyone and does not socialize anymore. She further stated she frequently cries and suffers from anxiety-related sleep and appetite disturbances. All of these difficulties resulted from her dealing with Broker. The Commission awarded her \$25,000.00.

Poindexter also testified she suffers from depression as a result of her dealings with Broker. Her self-esteem was shattered and she relives the experience with every payment. Poindexter further stated she suffers from headaches and sleeplessness. She feels like she was stabbed in the back by people she trusted. The Commission awarded Poindexter \$15,000.00.

The Commission reviewed each of the similarly situated Complainants' testimony regarding the emotional and physical distress they suffered as a result of their experiences with Broker and awarded each of them damages for humiliation and embarrassment.

Given the direct evidence of emotional distress as well as the circumstances of fraud, deceit, and betrayal of trust, we conclude the awards for embarrassment and humiliation were within the Commission's statutory authority. . . .

Notes and Questions

20.7. Some commentary on unaffordable mortgages asks "why would borrowers take out loans that were doomed to foreclosure?" Does the opinion offer any insights into this question? See Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 Cornell L. Rev. 1073 (2009); see also Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 Ohio St. L.J. 763 (2010) (arguing that the explanation of key terms, even in non-predatory loans, was simply insufficient for ordinary borrowers to understand). Here's another question: "why would *lenders* give out loans that were doomed to foreclosure?" As it turns out, given the collapse of the housing market, most foreclosures do not return enough to the lender to pay back the initial loan.

20.8. Resistance to helping homeowners at risk of foreclosure often focuses on the problem of "moral hazard"—if people weren't forced either to pay back the loans on the terms on which those loans were granted or to lose their homes, some argued, that would encourage irresponsible borrowing. More broadly: when we seek to hold one party responsible for harm, we often make another party less responsible. As a result of the subprime mortgage collapse, many banks failed or were bailed out by the federal government. However, homeowners generally were not bailed out.

20.9. For some larger context, consider this excerpt from Ta-Nehisi Coates' *The Case for Reparations*, THE ATLANTIC, May 2014:

In 2010, Jacob S. Rugh, then a doctoral candidate at Prince-

ton, and the sociologist Douglas S. Massey published a study of the recent foreclosure crisis. Among its drivers, they found an old foe: segregation. Black home buyers—even after controlling for factors like creditworthiness—were still more likely than white home buyers to be steered toward subprime loans. Decades of racist housing policies by the American government, along with decades of racist housing practices by American businesses, had conspired to concentrate African Americans in the same neighborhoods. . . . [T]hese neighborhoods were filled with people who had been cut off from mainstream financial institutions. When subprime lenders went looking for prey, they found black people waiting like ducks in a pen.

“High levels of segregation create a natural market for sub-prime lending,” Rugh and Massey write, “and cause riskier mortgages, and thus foreclosures, to accumulate disproportionately in racially segregated cities’ minority neighborhoods.”

Plunder in the past made plunder in the present efficient. The banks of America understood this. In 2005, Wells Fargo promoted a series of Wealth Building Strategies seminars. Dubbing itself “the nation’s leading originator of home loans to ethnic minority customers,” the bank enrolled black public figures in an ostensible effort to educate blacks on building “generational wealth.” But the “wealth building” seminars were a front for wealth theft. In 2010, the Justice Department filed a discrimination suit against Wells Fargo alleging that the bank had shunted blacks into predatory loans regardless of their creditworthiness. This was not magic or coincidence or misfortune. It was racism reifying itself. According to The New York Times, affidavits found loan officers referring to their black customers as “mud people” and to their subprime products as “ghetto loans.”

“We just went right after them,” Beth Jacobson, a former Wells Fargo loan officer, told The Times. “Wells Fargo mortgage had an emerging-markets unit that specifically targeted black churches because it figured church leaders had a lot of influence and could convince congregants to take out subprime loans.”

In 2011, Bank of America agreed to pay \$355 million to settle charges of discrimination against its Countrywide unit. The following year, Wells Fargo settled its discrimination suit for

more than \$175 million. But the damage had been done. In 2009, half the properties in Baltimore whose owners had been granted loans by Wells Fargo between 2005 and 2008 were vacant; 71 percent of these properties were in predominantly black neighborhoods.

20.10. African-American and other minority borrowers were disproportionately steered to expensive subprime loans even though they qualified for cheaper conventional loans—high-income African American borrowers were six times as likely to get subprime loans as white borrowers with similar incomes. However, it is not the case, as is sometimes asserted, that unwise loans to African-Americans driven by federal mandates for equality in lending were responsible for the crash. In fact, institutions subject to federal fair lending rules made loans which were less likely to default than loans from institutions that were not subject to such rules. David Min, *Faulty Conclusions Based on Shoddy Foundations* (Feb. 2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/02/pdf/pinto.pdf>; NATIONAL CONSUMER LAW CENTER, WHY RESPONSIBLE MORTGAGE LENDING IS A FAIR HOUSING ISSUE (Feb. 2012), https://www.nclc.org/images/pdf/credit_discrimination/fair-housing-brief.pdf.

20.11. In recent years, legislatures and regulators have attempted to regulate mortgage lending to stamp out the worst origination abuses, such as the yield spread premium. Much regulation focuses on the concept of “suitability”: loans that the borrowers are likely to be able to repay, rather than loans based merely on the market value of the house. Loans based on the value of property alone, without sufficient attention to borrower characteristics, encouraged lenders to believe that they could profit even in case of a default, or sometimes that they could profit even more from default than from payment. In 2014, the Consumer Financial Protection Bureau (CFPB) issued rules on high-cost loans and homeownership counseling, implementing the Home Ownership and Equity Protections Act and subsequent additions. Consumer Financial Protection Bureau, *High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X)* (last updated apr 21 2015), <http://www.consumerfinance.gov/regulations/high-cost-mortgage-and-homeownership-counseling-amendments-to-regulation-z-and-homeownership-counseling-amendments-to-regulation-x/>. Under these rules, loans considered “high cost” are subject to a number of limitations; high

cost loans are those that specify high interest rates, high fees rolled into the mortgage amount (as in *McGlawn*), or prepayment penalties that last more than 36 months or exceed more than 2% of the prepaid amount. Under the new rules, for high-cost loans, balloon payments are generally banned, with limited exceptions. Creditors are prohibited from charging prepayment penalties and financing points and fees. Late fees are restricted to four percent of the payment that is past due, and certain other fees are limited or banned. Before a lender gives a high-cost mortgage, they must confirm with a federally approved counselor that the borrower has received counseling on the advisability of the mortgage.

20.12. Whether or not borrowers are seeking high-cost loans, lenders are now subject to a rule requiring them to assess a borrower's ability to repay, though that rule does not cover home equity lines of credit, timeshare plans, reverse mortgages, or temporary loans. The lender must not use a "teaser" or introductory interest rate to calculate the borrower's ability to repay; for adjustable-rate mortgages, it must consider ability to repay under the highest possible rate allowed by the mortgage. Certain so-called "plain vanilla" mortgages—fixed-rate, fully amortized (with no balloon payments) loans for no longer than 30 years—are presumptively acceptable under the regulations. In addition, lenders have to make counseling information available to all borrowers. Although loan information remains complex, the CFPB has tested different versions of mandatory disclosures, trying to find the most understandable ways of communicating the costs and risks of mortgages to non-lawyers. See CFPB Finalizes "Know Before You Owe" Mortgage Forms, Nov. 20, 2013, <http://www.consumerfinance.gov/newsroom/cfpb-finalizes-know-before-you-owe-mortgage-forms/>. Take a look at the forms. (<http://www.consumerfinance.gov/newsroom/cfpb-finalizes-know-before-you-owe-mortgage-forms/>) Now that you have read this far, can you understand them?

20.5 The Mortgage Crisis

Predatory lending was a significant contributor to the housing crash of 2007-2008. Many people, whether or not they accept this proposition, believe that poor people were taking out the mortgages at issue. However, middle and high income borrowers took on more mortgage debt than poor people, and also contributed most significantly to the increase in defaults after 2007. Manuel Adelino, Antoinette Schoar, & Felipe Severino, *Loan Originations and Defaults in the Mortgage Crisis: Further Evidence* (NBER Working Paper July 2015), <https://>

www.nber.org/papers/w21320.

When home prices started to drop and defaults to accumulate, the mortgage-backed securities that had previously seemed so attractive to investors began to spread the damage widely, as payments dried up. The economic impact was multiplied by a variety of sophisticated financial instruments that, in the end, amounted to little more than bets that U.S. housing prices would never drop. When they did drop, the world economy did as well.

From 1942 to 2005, about 4% of mortgages were delinquent at any given time, and about 1% were in foreclosure. At the peak of the crisis in 2010, up to 15% of mortgages were delinquent, and 4.6% were in foreclosure. Foreclosures Public Data Summary Jan 2015. As of late 2014, less than 8% of mortgages were delinquent and more than 3% were in the foreclosure process, or about one million homes. The good news is that most of the still-troubled loans were originated before 2007, and new foreclosures are now less one-half of one percent of all mortgages. Still, between 2007 and 2015, about six million homes were sold at foreclosure sales. This foreclosure crisis has already outlasted the foreclosure crisis of the Great Depression.

Even homeowners who kept up with their payments often found themselves “underwater”: owing more than their homes were worth. Nearly one-third of mortgaged homes were underwater in 2012, though the number dropped to 15.4% in early 2015. Homes with lower value were more likely to be underwater, contributing to income inequality. Michelle Jamrisko, *This Is the Housing Chart That Keeps One Economist Up at Night*, BloombergBusiness, Jun. 12, 2015. Unsurprisingly, underwater homeowners are substantially more likely to default on their mortgages than homeowners with equity, no matter the size of their monthly payments or their interest rates. Moreover, underwater homeowners who don’t default find it very difficult to sell their homes, and are therefore constrained in where they can take jobs. This is a problem because job mobility historically has been a major contributor to improved economic prospects in the U.S.

Even when “strategic default” might be in a homeowner’s best interest—where the homeowner is deeply underwater and lives in a non-recourse state, and alternative housing is readily available—Americans remain relatively unlikely to default if they have any alternatives. Most borrowers will run up credit card bills, drain retirement savings, and put off medical care to avoid default for as long as possible. Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547 (2011) (reporting that even though defaulting on a mortgage may be in an individual’s finan-

cial self-interest, feelings of moral obligation may prevent or delay default). Under what circumstances might you counsel a client to engage in a strategic default? Default will have consequences for the defaulter's credit score and therefore possibly her ability to get other housing or even a job, depending on her location and her field of work. But then again, draining her retirement account, possibly only to postpone and not avoid foreclosure, will have negative repercussions as well.

20.6 Foreclosure Abuses

One ongoing problem is that the complicated structure of post-securitization mortgage lending left responsibility for problems diffuse, and even put incentives in precisely the wrong places. Because the trusts that own the mortgages and package them into mortgage-backed securities are passive legal vehicles with no employees or activities of their own, they contracted with mortgage servicers, often divisions of the same banks that initially sponsored the mortgage originators. The basic job is straightforward: servicers collect payments from homeowners and pass them along to the trust that represents the investors. Servicers are also responsible for handling foreclosures. In exchange, servicers typically get a small percentage of the value of the outstanding loans each year in fees. For a \$200,000 loan to a borrower with good credit, a servicer might collect about \$50 per month, with income decreasing as the balance of the loan drops. Servicers also make money from the "float"—interest earned during the short time the servicer holds the loan payment.

It is standard for servicers to be contractually required to keep paying the trust every month, even when there's a default, until there's a foreclosure. This would seem a strong incentive to do everything possible to help homeowners avoid a default, which is usually what investors want. The holder of a mortgage loses an average \$60,000 on a foreclosure, according to figures announced by the federal government.

But the systems weren't set up that way. Among other things, servicers hired very few people with the ability to work with borrowers to find an affordable repayment; they were largely set up to take in money and pass it on. When the crisis hit, they were overwhelmed with troubled loans. Further, at the beginning of the foreclosure crisis, servicers often took the position that they were contractually prohibited from negotiating with borrowers by their agreements

with the trusts, which allegedly did not allow them to reduce mortgagors' nominal obligations without the consent of the trust. (Recall that the trusts are not functioning companies with humans making day-to-day decisions, so the servicers' position meant that *no one* could agree to a renegotiation.)

Separately, servicers had incentives that conflicted with borrowers' and investors' interests. Servicers can charge fees for late payments, title searches, property upkeep, inspections, appraisals and legal fees that can total hundreds of dollars each month and can all be charged against a homeowner's account. Servicers have first dibs on recouping those fees when a foreclosed home is sold, meaning they usually collect unless the home is essentially worthless. Moreover, when homeowners tried to catch up or make partial payments as they sought a renegotiated loan, servicers applied their payments first to the servicers' own fees rather than to the underlying loan. These fees can be lucrative. In 2010, major servicer Ocwen reported \$32.8 million in revenue from late fees alone, representing 9 percent of its total revenue. Professor Levitin, who has done extensive work on the legal and business structures resulting from securitization, concluded that a loan kept in default for a year or two could prove more profitable to a servicer than a typical healthy, performing loan.

The following case involves a trustee rather than a typical servicer, but otherwise it provides a sense of the problems that can arise when participants in the mortgage transaction are indifferent to the welfare of mortgagors.

Klem v. Washington Mutual Bank
176 Wash. 2d 771, 295 P.3d 1179 (Wash. 2013)

CHAMBERS, J.

Dorothy Halstien, an aging woman suffering from dementia, owned a home worth somewhere between \$235,000 and \$320,000. At about the time she developed dementia, she owed approximately \$75,000 to Washington Mutual Bank (WaMu), secured by a deed of trust* on her home. Because of the cost of her care, her guardian did not have the funds to pay her mortgage, and Quality Loan Services (Quality), acting as the trustee of the deed of trust, foreclosed on her home. On the first day it could, Quality sold her home for \$83,087.67, one dollar more than she owed, including fees and costs. A notary, employed by Quality, had falsely notarized the

*“Deed of trust” is defined in section I of the Analysis section below; it is a kind of mortgage.
—Eds.

notice of sale by predating the notary acknowledgment. This falsification permitted the sale to take place earlier than it could have had the notice of sale been dated when it was actually signed.

Before the foreclosure sale, Halstien's court appointed guardian secured a signed purchase and sale agreement from a buyer willing to pay \$235,000 for the house. Unfortunately, there was not enough time before the scheduled foreclosure sale to close the sale with that buyer. In Washington, the trustee has the discretion to postpone foreclosure sales. This trustee declined to consider exercising that discretion, and instead deferred the decision to the lender, WaMu. Despite numerous requests by the guardian, WaMu did not postpone the sale. A jury found that the trustee was negligent; that the trustee's acts or practices violated the Consumer Protection Act (CPA), chapter 19.86 RCW; and that the trustee breached its contractual obligations. The Court of Appeals reversed all but the negligence claim. We reverse the Court of Appeals in part and restore the award based upon the CPA. We award the guardian reasonable attorney fees and remand to the trial court to order appropriate injunctive relief.

Facts

The issues presented require a detailed discussion of the facts. In 1996, Halstien bought a house on Whidbey Island for \$147,500. In 2004, she borrowed \$73,000 from WaMu, secured by a deed of trust on her home. That loan was the only debt secured by the property, which otherwise Halstien owned free and clear. Unfortunately, by 2006, when Halstien was 74 years old, she developed dementia. At the time, Halstien's daughter and her daughter's boyfriend were living at the home with her.

Washington State's Adult Protective Services became concerned that Halstien was a vulnerable adult being neglected at home. After an investigation, protective services petitioned the court for the appointment of a professional guardian to protect Halstien. The court granted the petition and Dianne Klem, executive director of Puget Sound Guardians, was appointed Halstien's guardian in January 2007. Klem soon placed Halstien in the dementia unit of a skilled nursing facility in Snohomish County.

Halstien's care cost between \$3,000 and \$6,000 a month. At the time, Halstien received about \$1,444 a month in income from Social Security and a Teamsters' pension. The State of Washington paid the balance of her care and is a creditor of her estate.

Halstien's only significant asset was her Whidbey Island home, which at the time was assessed by the county at \$257,804. WaMu also had an appraisal indicating the home was worth \$320,000, nearly four times the value of the outstanding debt. Klem testified that if she had been able to sell the home, she could have improved Halstien's quality of life considerably by providing additional services the State did not pay for.

Selling the home was neither quick nor easy. Even after Halstien was placed in a skilled care facility, her daughter still lived in the home (without paying rent) and both the daughter and her brother strongly opposed any sale. The record suggests Halstien's children expected to inherit the home and, Klem testified, getting the daughter and her family to leave "was quite a battle." Ultimately, Puget Sound Guardians prevailed, but before it could sell the home, it had to obtain court permission (complicated, apparently, by the considerable notice that had to be given to various state agencies and to family members, and because some of those entitled to notice were difficult to find), remove abandoned animals and vehicles, and clean up the property.

During this process Halstien became delinquent on her mortgage. Quality, identifying itself as "the agent for Washington Mutual," posted a notice of default on Halstien's home on or around October 25, 2007. The notice demanded \$1,372.20 to bring the note current. The record establishes that the guardianship did not have available funds to satisfy the demand.

A notice of trustee sale was executed shortly afterward by Seth Ott for Quality. The notice was dated and, according to the notary jurat of "R. Tassle," notarized on November 26, 2007. However, the notice of sale was not actually signed that day. The sale was set for February 29, 2008.

This notice of sale was one of apparently many foreclosure documents that were falsely notarized by Quality and its employees around that time. There was considerable evidence that falsifying notarizations was a common practice, and one that Quality employees had been trained to do. While Quality employees steadfastly refused to speculate under oath how or why this practice existed, the evidence suggests that documents were falsely dated and notarized to expedite foreclosures and thereby keep their clients, the lenders, beneficiaries, and other participants in the secondary market for mortgage debt happy with their work. Ott acknowledged on the stand that if the notice of sale had been correctly dated, the sale would not have taken place until at least one week later.

On January 10, 2008, Puget Sound Guardians asset manager David Greenfield called Ott in his capacity as trustee. Greenfield explained that Halstien was in a guardianship and that the guardianship intended to sell the property. Greenfield initially understood, incorrectly, that the trustee would postpone the sale if Puget Sound Guardians presented WaMu with a signed purchase and sale agreement by February 19, 2008. Puget Sound Guardians sought, and on January 31, 2008, received, court permission to hire a real estate agent to help sell the house.

Unknown to Greenfield, Quality, as trustee, had an agreement with WaMu that it would not delay a trustee's sale except upon WaMu's express direction. This agreement was articulated in a confidential "attorney expectation document" that was given to the jury. This confidential document outlines how foreclosures were to be done and billed. It specifically states, "Your office is not authorized to postpone a sale without authorization from Fidelity or Washington Mutual." This agreement is, at least, in tension with Quality's fiduciary duty to both sides and its duty to act impartially. *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) (citing *GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW* § 7.21 (1979) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.")).¹

Regardless of what Washington law expected or required of trustees, David Owen, Quality's chief operations officer in San Diego, testified that Quality did what WaMu told it to do during foreclosures. Owen testified that there were two situations where Quality would postpone a sale without bank permission: if there was a bankruptcy or if the debt had been paid. Owen could not remember any time Quality had postponed a sale without the bank's permission.

By February 19, 2008, Puget Sound Guardians had a signed purchase and sale agreement, with the closing date set for on or about March 28, 2008. This was almost a month after the scheduled foreclosure sale, but well within the 120 day window a trustee has to hold the trustee's sale under RCW 61.24.040(6). Quality referred the guardians to the bank "to find out the process for making this happen." Klem testified Quality "told us on

¹Since then, the legislature has amended the deed of trust act to provide that the trustee owes a duty of good faith to both sides. LAWS OF 2008, ch. 153, § 1; RCW 61.24.010(4) (effective June 12, 2008).

two occasions that they unequivocally could not assist us in that area, that only the bank could make the decision."

Puget Sound Guardians contacted WaMu, which instructed them to send copies of the guardianship documents and a completed purchase and sale agreement. Over the next few days, WaMu instructed the guardians to send the same documents to WaMu offices in Seattle, Washington, southern California, and Miami, Florida. Klem testified that Puget Sound Guardians called WaMu on "[m]any occasions," and that if the bank ever made a decision, it did not share what it was. The guardian also faxed a copy of the purchase and sale agreement to various WaMu offices on February 19, 21, 26, 27, and 28. In all, the guardian contacted Quality or WaMu over 20 times in the effort to get the sale postponed. Simply put, Quality deferred to WaMu and WaMu was unresponsive.

Accordingly, the trustee's sale was not delayed and took place on February 29, 2008. Quality, as trustee, sold the Halstien home to Randy and Gail Preston for \$83,087.67, one dollar more than the amounts outstanding on the loan, plus fees and costs.⁴ The Prestons resold the house for \$235,000 shortly afterward.

Klem later testified it was "shocking when we found out that [the home] had actually been sold for \$83,000 Because we trusted that they would sell it for the value of the home." In previous cases where a ward's home had gone into foreclosure, Klem testified, either the trustee had postponed the sale to allow Puget Sound Guardians to sell the property or had sold the property for a reasonable price. Klem testified that if they had just one more week, it was "very possible" that they could have closed the sale earlier.

In April 2008, represented by the Northwest Justice Project, Puget Sound Guardians sued Quality for damages on a variety of theories, including negligence, breach of contract, and violation of the CPA. Later, with permission of the court, Quality's California sister corporation was added as a defendant. Halstien died that December.

Quality defended itself vigorously on a variety of theories. Initially successfully, Quality argued that any cause of action based on the trustee's duties was barred by the fact Klem had not sought an injunction to enjoin the sale. The record suggests that it would have been impossible for the guardianship to get a presale injunction due to the time frame, the need

⁴As of trial, Quality had not delivered that one dollar to the Halstien estate.

for court approval, and the lack of assets in the guardianship estate. While Judge Monica Benton dismissed some claims based on the failure of the estate to seek an injunction, she specifically found that the negligence, breach of contract, and CPA claims could go forward.

The case proceeded to a jury trial. The heart of the plaintiff's case was the theory that Quality's acts and practices of deferring to the lender and falsifying dates on notarized documents were unfair and deceptive and that the trustee was negligent in failing to delay the sale. David Leen, an expert on Washington's deed of trust act, chapter 61.24 RCW, testified that it was common for trustees to postpone the sale to allow the debtors to pay off the default. He testified that under the facts of this case, the trustee "would absolutely have to continue the sale."

By contrast, Ott, representing Quality as trustee in this case, testified that he did not take into account whether the house was worth more than the debt when conducting foreclosures. When asked why, Ott responded, "My job was to process the foreclosure . . . according to the state statutes." When pressed, Ott explained that he counted the days, prepared the forms, saw they were filed, and nothing more. He acknowledged that, prior to 2009, he would sometimes incorrectly date documents. He testified that he had been trained to do that. He also testified that Quality, as trustee, would not delay trustee sales without the lender's permission. And he testified that he had never actually read Washington's deed of trust statutes.⁵

The jury found for the plaintiff on three claims: negligence, CPA, and breach of contract. . . . The jury determined that the damages on all three claims were the same: \$151,912.33 (the difference between the foreclosure sale price and \$235,000)

Quality brought a blunderbuss of challenges to the trial court's decisions. . . . The Court of Appeals concluded . . . that the evidence was insufficient to uphold the breach of contract and CPA claims. . . .

Analysis

....

I. CPA Claims

To prevail on a CPA action, the plaintiff must prove an "(1) unfair or

⁵This inspired a juror's question, "If you never read the statute, how did you know you were following it, following Washington law?" Ott responded that he relied on his training. . . .

deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). The plaintiff argues that both Quality’s historical practice of predating notarized foreclosure documents and Quality’s practice of deferring to the lender on whether to postpone most sales, satisfies the first element of the CPA. Deciding whether the first element is satisfied requires us to examine the role of the trustee in nonjudicial foreclosure actions. A deed of trust is a form of a mortgage, an age-old mechanism for securing a loan. 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253, § 20.1, at 403 (2d ed. 2004). In Washington, it is a statutorily blessed “three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.” If the deed of trust contains the power of sale, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260–61; RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1)

A. Unfair or Deceptive Acts or Practices

The legislature has specifically stated that certain violations of the deed of trust act are unfair or deceptive acts or practices for purposes of the CPA. [The Supreme Court found that this list was not exclusive; other violations could be unfair or deceptive as determined by a common-law, evolutionary process: “It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again” (citation omitted).]

B. Failure To Exercise Independent Discretion To Postpone Sale

Until the 1965 deed of trust act, there was no provision in Washington law for a nonjudicial foreclosure. In 1965, the legislature authorized non-judicial foreclosure for the first time, subject to strict statutory requirements. Because of the very nature of nonjudicial foreclosures, Washington courts have not shied away from protecting the rights of the parties. . . .

The power to sell another person’s property, often the family home itself, is a tremendous power to vest in anyone’s hands. Our legislature has

allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law. This court has frequently emphasized that the deed of trust act “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” We have invalidated trustee sales that do not comply with the act.

As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. However, despite these pragmatic considerations and incentives

under our statutory system, a trustee is not merely an agent for the lender or the lender’s successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) (“The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”); *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985) (“[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.”) (citing GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21 (1979)).

In a judicial foreclosure action, an impartial judge of the superior court acts as the trustee and the debtor has a one year redemption period. In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. *Cox*, 103 Wash.2d at 389, 693 P.2d 683. While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person’s property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure.¹⁰

¹⁰Washington courts have a long tradition of guarding property from being wrongfully appropriated through judicial process. When “a jury . . . returned a verdict which displeased [Territorial Judge J.E. Wyche] in a suit over 160 acres of land” he threatened to set aside their verdict and remarked, “‘While I am judge it takes thirteen men to steal a ranch.’”

An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.¹¹

The trustee argues that we “should not hold that it is unfair and deceptive either to honor a beneficiary’s instructions not to postpone a sale without seeking its authorization, or to advise a grantor to contact her lender.” We note that Quality contends that it did not have a practice of deferring to the lender but merely followed its “legally-mandated respect for its Beneficiary’s instructions” and asserts that “[s]imply put, no competent Trustee would fail to respect its Beneficiary’s instructions not to postpone a sale without first seeking the Beneficiary’s permission.” We disagree. The record supports the conclusion that Quality abdicated its duty to act impartially toward both sides.

Again, the trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary’s directions. If the trustee acts only at the direction of the benefi-

¹¹We have not had occasion to fully analyze whether the nonjudicial foreclosure act, ch. 61.24 RCW, on its face or as applied, violates article I, section 3 of our state constitution’s command that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” While article I, section 3 was mentioned in passing in *Kennebec, Inc. v. Bank of the West*, 88 Wash.2d 718, 565 P.2d 812 (1977), where we joined other courts in concluding that the Fourteenth Amendment does not bar nonjudicial foreclosures, no independent state constitutional analysis was, or has since been done. Certainly, there are other similar “self help” statutes for creditors that are subject to constitutional limitations despite the State’s limited involvement. See, e.g., *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975) (innkeeper’s use of Arizona’s innkeeper’s lien statute to seize guest’s property was under color of law and subject to a civil rights claim). “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of state law.’” *Id.* at 428 (quoting *United States v. Classic*, 313 U.S. 299, 325–26 (1941)); accord *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93, 95 (5th Cir. 1975) (exercise of statute that allowed merchant to detain suspected shoplifters subject to civil rights claim); *Adams v. Joseph F. Sanson Inv. Co.*, 376 F. Supp. 61, 69 (C.D. Nev. 1974) (finding Nevada’s landlord lien act violated due process because it allowed landlord to seize tenant property without notice); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390, 398 (N.D. Ill. 1972) (finding Illinois innkeepers’ lien laws, which allowed an innkeeper to seize guest’s property without notice, violated due process); *Hall v. Garson*, 430 F.2d 430, 440 (5th Cir. 1970) (exercise of a statute giving a landlord a lien over the tenant’s property gave rise to a civil rights claim against private party).

ciary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction. If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower.

We hold that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA. Quality failed to act in good faith to exercise its fiduciary duty to both sides and merely honored an agency relationship with one.

C. Predating Notarizations

Klem submitted evidence that Quality had a practice of having a notary predate notices of sale. This is often a part of the practice known as "robo-signing." Specifically, in this case, it appears that at least from 2004-2007, Quality notaries regularly falsified the date on which documents were signed.

Quality suggests these falsely notarized documents are immaterial because the owner received the minimum notice required by law. This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary's acknowledgment under the law. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary's seal. This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974). As amicus Washington State Bar Association notes, "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." While the legislature has not yet declared that it is a per se unfair or deceptive act for the purposes of the CPA, it is a crime in both Washington and California for a notary to falsely notarize a document. . . . A notary jurat is a public trust and allowing them to be deployed to validate false

information strikes at the bedrock of our system. . . .

. . . We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.

The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary's oath. There remains, however, the factual issue of whether the false notarization was a cause of plaintiff's damages. That is, of course, a question for the jury. We note that the plaintiff submitted evidence that the purpose of predicated notarizations was to expedite the date of sale to please the beneficiary. Given the evidence that if the documents had been properly dated, the earliest the sale could have taken place was one week later. [sic] The plaintiff also submitted evidence that with one more week, it was "very possible" Puget Sound Guardians could have closed the sale. This additional time would also have provided the guardian more time to persuade WaMu to postpone the sale. But given the trustee's failure to fulfill its fiduciary duty to postpone the sale, there is sufficient evidence to support the jury's CPA violation verdict, and we need not reach whether this deceptive act was a cause of plaintiff's damages

Notes and Questions

20.13. What, if anything, is the relevance of the sale price of the home to the court's decision? Why would someone bid a dollar more than what was owed on the loan?

20.14. *Klem* involves a variant on what is known as "robo-signing"—the creation of documents with important legal effects on foreclosure, without sufficient personal knowledge or even understanding by the person signing the document.

Jay Patterson, a forensic accountant who has examined hundreds of mortgage loans in bankruptcy or foreclosure, concluded that "95 percent of these loans contain some kind of mistake," from an unnecessary \$15 late fee to thousands of dollars in fees and charges stemming from a single mistake that snowballed into a wrongful foreclosure. Most of these cases resulted in defaults, but when they were litigated, the facts could be telling. For example, one bankruptcy case, *In re Stewart*, involved a home in Jefferson Parish, New Or-

leans. Wells Fargo was the servicer. The debtor fell behind in her payments, and on September 12, 2005, Wells Fargo agents generated two opinions on the value of the home. Opinions require at least minimal inspection of the property. Stewart was charged \$125 for each opinion. However, on September 12, 2005, Jefferson Parish was under an evacuation order due to the devastation then being wrought by Hurricane Katrina. These were only two of the numerous fees the bankruptcy judge found had been wrongly charged to Stewart.

What ought to be done to rein in servicer misbehavior of this sort?

20.7 Chain of Title Problems

Klem features a foreclosure sale that did nothing to preserve the equity of the homeowner, as well as backdated documents that changed the time of sale. But documentation problems go much, much deeper than that evidenced in *Klem*—perhaps to the foundation of land title in the U.S.

U.S. Bank National Association v. Ibanez 458 Mass. 637 (2011)

After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 (plaintiffs) filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied.

Procedural history. On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under G.L. c. 240, § 6, which authorizes actions “to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto.” The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) in the property was extinguished by the foreclosure; (2) a declaration that there was no cloud on title arising from publication of the notice of sale in the Boston Globe; and (3) a declaration that title was vested in the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made after the foreclosure sale.

In both cases, the mortgagors—Ibanez and the LaRaces—did not initially answer the complaints, and the plaintiffs moved for entry of default judgment

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation of G.L. c. 244, § 14, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRace foreclosure) as the mortgage holders where they had not yet been assigned the mortgages. The judge found, based on each plaintiff’s assertions in its complaint, that the plaintiffs acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales.¹

The plaintiffs then moved to vacate the judgments. At a hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs leave to produce such documents, pro-

¹In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure “was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked.”

vided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted. In response, the plaintiffs submitted hundreds of pages of documents to the judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRace mortgages were purportedly included.

The judge denied the plaintiffs' motions to vacate judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

Factual background. We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate.

The Ibanez mortgage. On December 1, 2005, Antonio Ibanez took out a \$103,500 loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee.¹¹ The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

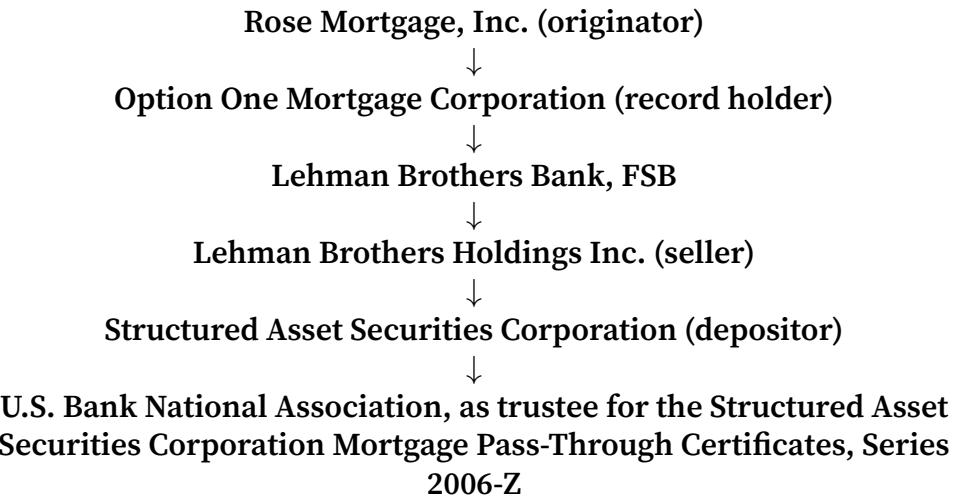
According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation,¹² which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series

¹¹This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to _____ all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez"

¹²The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that can be bought and sold by investors—a process known as securitization.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:



According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions of the trust agreement, including the representation that mortgages “will be” assigned into the trust. According to the PPM, “[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively.” The PPM also specifies that “[e]ach Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement.” However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act

(Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services.¹³ In the complaint, U.S. Bank represented that it was the “owner (or assignee) and holder” of the mortgage given by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston Globe the notice of the foreclosure sale required by G.L. c. 244, § 14. The notice identified U.S. Bank as the “present holder” of the mortgage.

At the foreclosure sale on July 5, 2007, the Ibanez property was purchased by U.S. Bank, as trustee for the securitization trust, for \$94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser) and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after recording of the sale, American Home Mortgage Servicing, Inc., “as successor-in-interest” to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust. This assignment was recorded on September 11, 2008.

The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a \$103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA).

¹³As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St. 1943, c. 57, as amended through St. 1998, c. 142.

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

Option One Mortgage Corporation (originator and record holder)

↓
Bank of America

↓
Asset Backed Funding Corporation (depositor)

↓
**Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed
Certificates, Series 2005-OPT 1**

Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, “does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date . . . all of its right, title and interest in and to each Mortgage Loan.” The agreement makes reference to a schedule listing the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed. The PSA provides that the depositor “does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust . . . all the right, title and interest of the Depositor . . . in and to . . . each Mortgage Loan identified on the Mortgage Loan Schedules,” and “does hereby deliver” to the trustee the original mortgage note, an original mortgage assignment “in form and substance acceptable for recording,” and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA,

which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for \$120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

Discussion. The plaintiffs brought actions under G.L. c. 240, § 6, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. To meet this burden, they were required "not merely to demonstrate better title . . . than the defendants possess, but . . . to prove sufficient title to succeed in [the] action." There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power

of sale, if such a power is granted by the mortgage itself.

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRace mortgages, it includes by reference the power of sale set out in G.L. c. 183, § 21, and further regulated by G.L. c. 244, §§ 11-17C. Under G.L. c. 183, § 21, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, “and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.” Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that “one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.”

....

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The “statutory power of sale” can be exercised by “the mortgagee or his executors, administrators, successors or assigns.” Under G.L. c. 244, § 14, “[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person” is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking “jurisdiction and authority” to carry out a foreclosure under these statutes is void. See *Davenport v. HSBC Bank USA*, 275 Mich.App. 344, 347-348 (2007) (attempt to foreclose by party that had not yet been assigned mortgage results in “structural defect that goes to the very heart of defendant’s ability to foreclose by advertisement,” and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G.L. c. 244, § 14. That statute provides that “no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale,” advance notice of the foreclosure sale has been provided to the mortgagee,

to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. “The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power.” *See Chace v. Morse, supra* (“where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure”). Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void. *See Roche v. Farnsworth, supra* (mortgage sale void where notice of sale identified original mortgagee but not mortgage holder at time of notice and sale).

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of G.L. c. 183, § 21, and G.L. c. 244, § 14, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez and LaRace mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. *See In re Schwartz*, 366 B.R. 265, 269 (Bankr. D. Mass. 2007) (“Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute”). *See also Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 1990) (per curiam) (foreclosure action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

The plaintiffs claim that the securitization documents they submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. In a “ti-

tle theory state” like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. *See Vee Jay Realty Trust Co. v. DiCroce*, 360 Mass. 751, 753 (1972), quoting *Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 128 Mass. 315, 316 (1880) (although “as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands,” mortgagee has legal title to property). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone’s home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish any evidence that the entity assigning the mortgage—Structured Asset Securities Corporation—ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that Option One ever assigned the mortgage to anyone before the foreclosure sale. Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S. Bank’s PPM, uses the language of a present assignment (“does hereby . . . assign” and “does hereby deliver”) rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity

the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title.

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14).

The judge did not err in concluding that the securitization documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments.

We now turn briefly to three other arguments raised by the plaintiffs on appeal. First, the plaintiffs initially contended that the assignments in

blank executed by Option One, identifying the assignor but not the assignee, not only “evidence[] and confirm[] the assignments that occurred by virtue of the securitization agreements,” but “are effective assignments in their own right.” But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment.

Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. [*Barnes v. Boardman*, 149 Mass. 106, 114, 21 N.E. 308 (1889)] (“In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity”). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to “the mortgagee or his executors, administrators, successors or assigns,” but not to a party that is the equitable beneficiary of a mortgage held by another.

Third, the plaintiffs . . . argue that the use of postsale assignments was customary in the industry, and point to Title Standard No. 58(3) issued by the Real Estate Bar Association for Massachusetts, which declares: “A title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee.” To the extent

that the plaintiffs rely on this title standard for the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is misplaced because this proposition is contrary to G.L. c. 183, § 21, and G.L. c. 244, § 14. If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment be treated as a preforeclosure assignment simply by declaring an “effective date” that precedes the notice of sale and foreclosure, as did Option One’s assignment of the LaRace mortgage to Wells Fargo. Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer.

However, we do not disagree with Title Standard No. 58(3) that, where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless whether the assignment has been recorded. Where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded. A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs’ request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. We have not done so here. The legal principles and requirements we set forth

are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

Conclusion. For the reasons stated, we agree with the judge that the plaintiffs did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

Judgments affirmed.

CORDY, J. (concurring, with whom Botsford, J., joins).

I concur fully in the opinion of the court, and write separately only to underscore that what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgaged-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated

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20.15. In a “title” theory state like Massachusetts, the mortgagee in theory has legal title to the property, though the mortgagee holds it in trust for the mortgagor, who has equitable title. The alternative “lien” theory holds that legal title remains in the mortgagor, and the mortgage is merely a lien on the property. Does the difference between title theory and lien theory make any difference in this case? (Because of the mortgagor’s equitable title in title theory states, the general modern answer is that there is no difference in the governing legal principles, but the reasoning may vary from state to state.) What about the fact that the foreclosure was done through a nonjudicial power of sale—should that make a difference?

20.16. One of the reasons the court gives for its judgment is that, in Massachusetts, assignment in blank isn’t allowed for an interest in land. Why might the legislature make such a rule? This is not the rule in all states, but amazingly the originators didn’t pay much attention to state by state variations.

20.17. Who owns the houses at issue, after the opinion? What steps should the banks take now? What is the effect of Massachusetts’ recording statute on a scenario in which a third party buys the property at the foreclosure sale and records?

20.18. Consider the following excerpt from Paul McMorrow, *A new act in foreclosure circus*, January 14, 2011, Boston Globe:

According to the real estate tracker the Warren Group, there have been more than 44,000 residential foreclosures recorded in Massachusetts since 2006. In the majority of those cases, the foreclosing bank turned around and re-sold the seized property. So there are now tens of thousands of Massachusetts residents living in homes that, until relatively recently, belonged to somebody else.

... I took a random sample of 30 foreclosure deeds from Chelsea (one of the cities hit hardest by foreclosures) since the beginning of 2006. Of those 30 foreclosure cases, 10 had paperwork on file with the Registry of Deeds that raised the sort of chain-of-custody concerns at the heart of the Ibanez decision. In one case, no mortgage was on file with the registry. Another showed no paperwork assigning the note to a mortgage servicer. In other cases, mortgage originators didn’t sign off on docu-

ments transferring the notes into mortgage pools, or transfer paperwork was filed after a foreclosure occurred. All of the properties have since been re-sold.

That's not to say any of those foreclosures will or should be overturned in court. But it is an indication of how pervasive sloppy record-keeping was, and how many foreclosures could be challenged on technical grounds based on the recent SJC decision. And it presents a series of terrible questions to anyone who bought a foreclosed house from a big bank. Among them: Is my mortgage valid? Will I be able to refinance or sell my home? Do I even really own my house?

How would you go about answering McMorrow's questions for a client?

20.19. Consider also Abigail Field, *Lawyers' Carelessness Was Key to the Mortgage Mess*, DailyFinance, Feb. 1, 2011:

The *Ibanez* case highlighted a basic, non-due-diligence problem too—one that, according to bankruptcy and legal-aid attorneys I speak with, is occurring across the country. The banks' lawyers can't produce complete sets of securitization contracts even after being given the specific opportunity to do so. In various cases, the banks have submitted unsigned drafts. They've submitted signed copies of some contracts, but not even drafts of others. And they've submitted contracts without their exhibits, like a list of the mortgages being securitized.

Every corporate deal I was ever involved with resulted in "closing sets," a series of binders containing every contract with each exhibit. . . . [A] key part of the value lawyers add is keeping the documents in good order and accessible to their clients when needed.

So, the issue of partial deal documents that came to light in *Ibanez* and continues to crop up elsewhere means one of three things:

1. Securitization deals were so carelessly done that, despite all the proper documents being created, closing sets don't exist.
2. Securitization deals were so carelessly done that not all the proper documents were created (such as lists of the mortgages involved) and so closing sets don't exist.

3. All the documents and closing sets are fine, and the big banks have grown so incompetent they can't give their foreclosure attorneys deal documents that they do have or could get from their securitization counsel.

I'm not sure which of these is worst.

What *should* the banks' lawyers have done with the documents they had available to use in the foreclosure process?

20.20. Review the alleged chain of title for the Ibanez/US Bancorp mortgage. US Bancorp took the mortgage from a now-bankrupt subsidiary of the now-bankrupt firm Lehman Brothers. Getting an assignment from Lehman may be difficult or even impossible. Among other things, because Lehman is bankrupt, it may not transfer assets out of its estate to particular creditors without going through extensive proceedings that are designed to be fair to all the creditors. Regardless, an assignment from Lehman would be insufficient: there is still the undocumented Option One-Lehman transfer. It might be simplest for US Bancorp to go straight to Option One and ask for an assignment. But US Bancorp didn't buy the mortgage from Option One. There is no contractual relationship between those two entities and thus no duty on Option One to do everything necessary to ensure that US Bancorp has good title. Even if US Bancorp asks Option One for an assignment, Option One likely regarded the mortgage as sold to Lehman many years back and may not have appropriate records. Furthermore, Option One may consider any attempt to assign a mortgage that was already sold to Lehman to be legally risky; it will certainly want US Bancorp to indemnify it and likely to pay extra for the privilege of getting the assignment. This problem is not confined to loans that passed through Lehman (though there were a great many that did)—many companies involved in the mortgage bubble have entered bankruptcy or changed ownership, making documentation of the assignments all but impossible.

20.21. Given that the mortgages were concededly in default, is there any reason to insist on the formalities in cases like this? After all, the one thing we know is that the homeowners weren't paying what they owed. See, e.g., Editorial, *The Politics of Foreclosure*, WALL ST. J., Oct. 9, 2010. *But see Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 832 (S.D.Tex. 2012) ("Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust."); David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505 (2012) (given the importance of

the home, and of the rule of law, formalities matter, and may also deter future careless lending).

20.22. Sometimes the sloppiness in record-keeping led to truly astonishing errors. In a random audit on WaMu Mortgage Pass-Through Certificates, Mortgage Loan Trusts, one loan was found in 6 different trusts, another loan was found in five trusts' original SEC loan level data, 39 were listed in 3 trusts, and 503 were listed in two separate trusts. The most extreme example, a New York condo, appeared in 6 different trusts from May through November 2006. Gary Victor Dubin, *Securitized Distrust*, Mar. 15, 2012, <https://deadlyclear.wordpress.com/2012/03/15/securitized-distrust/>.

20.23. Occasionally, evidence of these careless procedures appears in official title records. Recall that, in order to move the mortgage from its originator to its ultimate holder, an assignment was required—usually more than one, with a chain going from the originator, to the sponsor who lent the originator money to make the loan, to the depositor that funded the sponsor, to the trust that ultimately held the mortgages as assets underlying the mortgage-backed securities it issued. Who exactly is the assignee in this record from Nassau County, New York?

Document Type:	(ASG) ASSIGNMENT
Modified Date:	11/10/2008 9:31:36 AM
Record Date :	11/5/2008 3:10:48 PM
Grantor:	AMERICAN HOME MORTGAGE ACCEPTANCE INC PATTON ANN
Grantee:	BOGUS ASMTS
Book Type:	O
Book / Page:	1592 / 444
# of Pages:	1
Previous Related Docs:	200503882 - 1290/1969

Note on Subsequent Purchasers

Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 884 (2011), dealt with property owners with defective title resulting from *Ibanez*-style foreclosure problems earlier in the chain. In other words, the mortgagee (or, realistically, its representative/putative representative) had foreclosed in a manner held unlawful by *Ibanez*, then had sold the house again to a new buyer. The Mas-

sachusetts high court held that the new buyers could not clear title under the Massachusetts “try title” procedure, which is a way that an owner can quiet title and establish which of competing claims is valid. However, the court ruled, that procedure is only available to people who can plausibly claim to be owners. In *Bevilacqua*, the chain of title had been broken by the unsuccessful foreclosure before the purchase, and so the new buyer couldn’t bring a plausible claim. This is not a terribly surprising result: if someone records a deed to the Brooklyn Bridge, then brings a try title claim to confirm her ownership, title to the bridge is not conveyed magically even if the true owner fails to show up.

The *Bevilacqua* court left open the possibility that owners/lenders could try to put the chain of title back together and conduct a new, valid foreclosure, though this will certainly prove complicated in practice, as the notes above suggest. Another possibility is to track down the old preforeclosure owner (who is still the owner because of the *Ibanez* problem) and obtain a quitclaim deed from her. If you represented an old owner in this situation, what would you counsel? What if you represented a new buyer?

Is it fair to strip the new buyer of title, when the buyer is unlikely to have any responsibility (or even much understanding of) the shoddy recording practices that caused the problem? How else should we resolve the problem? Bevilacqua/his title insurer will have a claim against the seller, but we still need to know who gets the house—you should be able to see similarities from our discussion of stolen property.

20.8 MERS and Other Title Workarounds

Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title**
63 DUKE L.J. 637 (2013)

Securitization-Era Mortgage Title Systems

. . . MERS [Mortgage Electronic Registration Systems, Inc.] is a private, contractual superstructure that is grafted onto the public land-recordation system. Financial institutions that are members of MERS register the loans they service (but do not necessarily own) with the MERS System electronic

*Excerpts reprinted by permission. —Eds.

database. Each loan receives a unique identifier known as a MERS Identification Number (MIN). The MIN is sometimes stamped on the note or sometimes simply recorded in the lender's own records. MERS is then inserted in the local land records as the mortgagee, instead of the actual lender. Sometimes this involves an assignment of the mortgage from the lender to MERS, but the more prevalent arrangement has MERS recorded as the original mortgagee, thereby obviating any recordation of assignments. MERS serves as the mortgagee of record, but only as a nominee for the actual lender and supposedly for its successors and assigns. The language included in MERS mortgages is that MERS is acting "solely as nominee for Lender and Lender's successors and assigns." MERS claims no beneficial interest whatsoever in the loan.

MERS's goal is to immobilize mortgage title through a common-agency structure by acting as nominee for the lender and those subsequent transferees of the lender that are members of MERS. Although legal title remains in MERS's name, subsequent transfers are supposed to be tracked in MERS's database.

Thus, MERS aims to achieve the priority and enforcement benefits of public recordation while tracking beneficial ownership title in its own database. MERS's operation has two important implications. First, instead of paying county recordation and transfer fees, financial institutions pay only for MERS membership and MERS transaction fees. MERS thus o[FB00?]ers potential cost savings in the securitization process through the avoidance of local recording fees. Second, MERS's electronic database, not the county land records, represents the main evidentiary source for determining who is currently the real party in interest on a mortgage.

In theory, MERS's database tracks two distinct characteristics: the identity of the party with the rights to service the mortgage (often an agent for the trustee for the trust created for the ultimate beneficial owners of the mortgage loan) and the legal title to mortgages (for example, the trustee for the trust created for the ultimate beneficial owners of the mortgage). MERS's publicly available records do not track chain of title. It is impossible for outsiders to determine if transfers were made in the MERS system and when. Instead, MERS publicly tracks only the current servicer and sometimes the current beneficial owner of a loan.

A major problem with MERS as a title system is that it is not accurate and reliable in terms of what it reports. MERS's members are nominally required to report transfers of mortgage servicing rights to MERS, but MERS

does not actually compel reporting of servicing-rights transfers, and there is little incentive to be punctual with reporting. Indeed, the lack of record validation combined with voluntary reporting has led a federal judge to describe MERS as “the Wikipedia of land registration systems.” Not surprisingly, the information in the MERS database is often inaccurate or incomplete.

MERS does not even formally require any reporting of legal title to the mortgages, much less of transfers of legal title; any information about legal title is supplied through strictly voluntary reporting. . . .

MERS’s database functions as a do-it-yourself private mortgage recording system. Historically, MERS itself has had only around fifty employees who perform corporate and technology support functions. Employees of MERS’s members carry out most of the tasks done in MERS’s name, including the making of entries in the MERS database. These employees of MERS’s members are listed as assistant secretaries or vice presidents of MERS, but they have no actual employment relationship with MERS. There are over twenty thousand of these “corporate signing officers.” Accordingly, a transfer of either servicing or legal title in the MERS system involves nothing more than an employee of a MERS member entering the transfer in the MERS database.

A transfer within the MERS system involves voluntary self-reporting and nothing more and therefore fails to incentivize timely, accurate reporting. There are no formalities to a transfer in the MERS system. As a result, MERS may not in fact know who its principal is within the common-agency arrangement at any given point in time because MERS is relying on reporting from its members.

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20.24. Along with the “Wikipedia” characterization of MERS as freely editable, a Reuters investigation used a different metaphor: “MERS has served in effect as an instant teller machine for mortgage assignments. Servicers simply have their own employees sign the needed documents as MERS officials.” At least one bank has sued another bank for allegedly assigning the first bank’s mortgages to itself using MERS.

20.25. According to Donald J. Kochan, public recording serves a number of important purposes:

Recording creates a network of information supporting a

network of transactions. Property recording systems offer information to a number of constituencies, including: (1) owners, acting as sellers or as borrowers; (2) lenders, including mortgage providers; (3) other providers of capital; (4) buyers; (5) leaseholders; (6) title insurance companies; (7) governmental entities, such as police, regulators, and taxing authorities; and (8) other parties who may need to interact with the property at some time and know who the law deems to have ownership of the property. Recording allows all of these market and legal participants to connect. It is imperative that we recognize the variety of market players that use and benefit from the recording statutes and from the existence of reliable, verifiable records of ownership.

It is not just the owner and the most immediate lender that care about proper recording. Those who wish to invest in, contract with, lease from, or provide capital to property owners demand the existence of a recording system so that they can identify the ownership interests associated with the property, including determining whether and to what extent that property is encumbered by a mortgage. So, too, do prospective buyers of property require a verifiable repository of title information to guide their purchasing decisions. These other players must be able to discover the limits on title with a level of clarity. Similarly, those who wish to provide loans secured by property or to make other capital investments in property need assurances that the owner owns the property that he says he owns and that the system reflects all competitive claims to or liens on title.

... At the very least, fragmentation of interests by securitization makes ownership interests in real property harder to identify, necessitating the existence of an accurate and complete means for tracking and recording these interests. . . . [Securitization] is an important financial mechanism for the efficient provision of capital and should not be sacrificed in an effort to resolve the mortgage crisis or to prevent future crises. In fact, it is difficult to see the provision of loans in today's financial system without some reliance on securitization.

To make securitization effective, the loan-granting institution typically assigns its rights in both the note and the mort-

gage, sometimes to different parties. Due to transfers to the secondary market, securitization, and multiple assignments of notes and mortgages, it can become difficult to trace all of the steps along the way. This flurry of activity—and the number and variety of participants involved—can lead to problems in the chain of title and identifying who ultimately and currently holds the enforceable note and mortgage interests against the property owner. These problems are especially evident when the formalities of transfer, such as required endorsements of notes, are not satisfied and when the transfers are not recorded in some central repository.

Donald J. Kochan, *Certainty of Title: Perspectives after the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267 (2013). Could MERS fulfill the functions of recording in such a system? What would need to change?

20.26. Many laws require notice to be given to anyone with a properly recorded interest in property. If MERS is listed as the “nominee” of the lender, does it have such an interest? Suppose the mortgagor failed to pay county property taxes and her home was subject to a tax sale. The county sent notice to the mortgagee for whom MERS was listed as nominee, but that entity had long ago sold the mortgage and subsequently went out of business, so it didn’t respond. If the county had sent notice to MERS, it’s at least possible that MERS would have informed the current owner of the mortgage, which would have participated in the tax sale to protect its interest. Instead, because no representative of the mortgagee showed up at the tax sale, the property was sold to a new owner free of the mortgage. Did MERS suffer a redressable injury? See *Mortgage Elec. Regis. Sys., Inc. v. Ditto*, No. E2012-02292-SC-R11-CV (Tenn. Dec. 11, 2015) (MERS had none of the rights or duties of an owner; the fact that it wasn’t entitled to notice might cause harm to its business model, but that wasn’t enough to provide it a right to notice).

20.27. Why were large institutions so cavalier about record-keeping? Fannie Mae is a government-backed, now government-run institution that bought many mortgages. A 2006 internal Fannie Mae investigation explained:

Fannie Mae’s position is that it does not need to appear in the land records in order to have the benefit of the security provided by the mortgage [T]he transfer of an obligation secured by a security interest also transfers the security interest.

Thus, the transfer of the promissory note, which is the obligation, also transfers the mortgage, which is the security interest. Once the note is sold to Fannie Mae, the mortgage also transfers, despite the fact that the servicer, lender, or MERS' name appears in the land records. Borrowers thus cannot determine the chain of owners from public records

Fannie Mae believes that lost note affidavits are the servicer's responsibility and can not be effectively reviewed under the current system. Fannie Mae has delegated the execution of lost note affidavits to servicers. It does not believe that it is in a position to make a subjective call as to whether a servicer has lost a note Fannie Mae views such an investigation as unnecessary because document custodians are responsible for retaining mortgage documents and must bear an expense if they are unable to locate mortgage documents. For these reasons, Fannie Mae believes that *servicers are not likely to state that the notes are lost, stolen or missing if they in fact are not.* (emphasis added)

Can you spot the problem here? One entity, Lender Processing Services, at one point had a price list for "recreating" mortgage-related documents. A lost note affidavit was \$12.95, as was a note allonge (a document that is supposed to be stapled to the original note documenting a transfer); an intervening assignment to fill a gap in the record chain of title was \$35, and "recreating" an entire file was \$95.

An important point to remember here is that recording usually only matters when there's a bona fide purchaser contesting ownership. As long as the originator didn't sell the mortgage twice, an unrecorded interest is still valid against the mortgagor, assuming the claimant can prove that it owns the interest. That may be a faulty assumption, but Fannie Mae figured that risk was low.

20.28. The toxic brew of carelessness, unprecedented volume of foreclosures, and disregard for the rights of borrowers has finally begun to attract judicial attention. A bankruptcy judge recently identified

a general willingness and practice on Wells Fargo's part to create documentary evidence, after-the-fact, when enforcing its claims, **WHICH IS EXTRAORDINARY.** Moreover, [the Wells Fargo employee's] testimony does not stop at describing manufactured mortgage assignments. . . . [T]he "assignment team" included people tasked with endorsing notes [from other entities]

to Wells Fargo] . . . Frankly, it does not appear that [the Wells Fargo employee] understood the difference between preparing legitimate assignments and indorsements *by* Wells Fargo and improper assignments and indorsements *to* Wells Fargo. (emphasis in original)

In re Carrsow-Franklin, No. 10-20010 (S.D.N.Y. Bkcy. Jan. 29, 2015). What responsibility do lawyers have to train employees in charge of tasks with such legal relevance?

20.9 An Additional Puzzle Piece: The Mortgage and the Note

As previously discussed, what we conventionally call a “mortgage” actually has two parts. The “note” is the borrower’s promise to repay the debt: the note is governed by contract law, or more specifically commercial law. The note specifies the terms of the debt, including late fees and how interest is calculated. It can be replaced by a “Lost Note Affidavit,” but that’s supposed to be for special circumstances. The “mortgage” is the interest in land associated with the loan. It is a lien, governed by real estate law. The mortgage is the thing that should be filed and recorded. The mortgage is what gives the lender the right to take the collateral (the house) if the note isn’t paid by the borrower.

Why split things up in this way? It seems to offer more opportunities for things to go wrong. Is there a reason not to put the two documents together and require the “mortgage” to contain all the terms of the debt? What happens if the ownership of the two legal interests, and custody of the two documents, becomes separated? The standard rule is that “[t]he note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.” *Best Fertilizers of Ariz., Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App. 1977), *rev’d on other grounds*, 570 P.2d 179 (Ariz. 1977) (quoting Professor Chester Smith). That is, the note is the real debt; a mortgage with no associated note is worthless. However, a note with no associated mortgage is just an unsecured loan.

Because of this, the law does not favor separation of the note and the mortgage, and works very hard to impute a relationship between them that makes the mortgage enforceable. The Restatement (Third) of Property (Mortgages) states that “in general a mortgage is unenforceable if it is held by one who has no

right to enforce the secured obligation.” As a result, if the mortgagee transfers the mortgage to A and the note to B, neither can foreclose *unless* A can foreclose on B’s behalf. Thus, the Restatement concludes,

The [necessary] trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances. Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of B’s expectation of security.

See also Eaton v. Federal National Mortgage Association, 462 Mass. 569 (2012) (mortgage foreclosure may only be carried out by one who holds the mortgage and also either holds the note or acts on behalf of the note holder).

Most of our discussion, and most of the litigation over chain of title, has focused on problems with the mortgages, not the notes. It seems undeniable, however, that there are similar if not worse issues with the notes (and MERS never purported to track notes). Some have argued that transfers of the notes are governed by the Uniform Commercial Code’s provisions for negotiable instruments, not by state foreclosure statutes. See, e.g., Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21 (2013). A number of states seem to agree that the mortgagor has nothing to complain about if she’s in default, and that she lacks standing to challenge ownership of the note. If the wrong claimant takes the property, the right claimant can sue.

The contrary position relies on relativity of title: peaceable possessors have legitimate rights until someone proves better title. Just because a possessor doesn’t have a right to be on the property doesn’t mean that she can be ejected by someone with no better claim. See *Tapscott v. Lessee of Cobbs*, 11 Gratt. 172, 52 Va. 172 (1854); see also *Yvanova v. New Century Mortgage Corp.*, No. S218973 (Cal. Feb. 18, 2016) (borrower has standing to sue for wrongful foreclosure when the foreclosing party allegedly didn’t own the note and deed of trust; “[t]he borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security”).

20.10 What Now?

Despite all these flaws in the system, shouldn't the borrowers just have paid? After all, if they hadn't defaulted, they wouldn't have entered into the resulting hellscape.

Even if you excuse the victims of fraud from this claim—and there were many—it is important to remember that the mortgage contract is not just an agreement that the home may be sold upon a default on the loan. It's an agreement that if the homeowner defaults on the loan, the mortgagee may sell the property following the required legal procedure. A mortgage loan involves a bundle of rights, including procedural rights. These rights have a price: for example, loans in judicial foreclosure states have historically been more expensive than loans in nonjudicial foreclosure states. When the lender (or someone claiming rights as successor of the lender) ignores the rights, it's getting something it hasn't paid for.

Entirely separately, we might want people to be able to renegotiate their deals when renegotiation makes everyone better off—but with the system the way it is, that's proven extremely difficult. Procedural protections provide both time and negotiating leverage.

For an eye-opening account by one young lawyer of the messy process of seeking a loan modification for a borrower, see Wajahat Ali, Could It Be That the Best Chance To Save a Young Family from Foreclosure Is a 28-Year-Old Pakistani American Playright-Slash-Attorney Who Learned Bankruptcy Law on the Internet?, McSweeney's (Jan. 2010), <http://www.mcsweeney.net/articles/could-it-be-that-the-best-chance-to-save-a-young-family-from-foreclosure-is-a-28-year-old-pakistani-american-playright-slash-attorney-who-learned-bankruptcy-law-on-the-internet>. Essentially, Ali could never get the same answer twice from the servicer; it repeatedly denied receiving documents supporting his clients' request for modification; it denied modifications based on completely mistaken premises; and it didn't even tell him or his clients when it finally did grant a modification, leaving them expecting foreclosure. It took multiple threats to file bankruptcy, which would have automatically stayed a foreclosure, to induce the servicer to respond.

Federal bank regulators signed settlements in March 2011 with 14 loan servicers, who promised further internal investigations, remediation for some who were harmed, and a halt to the filing of false documents. The servicers claimed to have ended this behavior in late 2010. Reuters examined a large number of foreclosure filings and concluded that, to the contrary, robo-signing was ongoing.

ing. In February 2012 the servicers promised to stop again. There's very little indication that they've stopped. However, the major servicing companies did enter into a \$25 billion settlement with federal and many state officials that was supposed to compensate homeowners for servicing errors and require better behavior going forward. In response, property professor Mark Edwards wrote:

Let's say I hire an armed gang to expel you from your house. My gang removes all of your belongings, changes the locks, and warns you that you'd better not try to come back. I then sell your house to someone else. You might have called the police, but the armed gang I hired actually *are* the police. You might have gone to court to stop me, but the court is on my side, because I deliberately mislead the courts. Now let's say I did the same thing thousands and thousands of times to other people as well. And you can prove it. I'd be in pretty big trouble, wouldn't I? . . .

[The settlement provides for] \$1500 to \$2000 per home \$1500-2000 is less than the legal expenses banks incur when a foreclosure is challenged. It's less than title insurance on homes worth over \$200K.

Why would regulators agree to a settlement of this magnitude? What were the alternatives?

Mortgage crisis-related disputes continue. For example, in March 2015, the Department of Justice's U.S. Trustee Program (USTP), which oversees bankruptcy estates, entered into a national settlement agreement with JPMorgan Chase Bank N.A. requiring Chase to pay more than \$50 million to over 25,000 homeowners who are or were in bankruptcy. Among other things, Chase acknowledged that it filed more than 50,000 payment change notices that were improperly signed, under penalty of perjury, by persons who had not reviewed the accuracy of the notices.

In 2013, the Consumer Finance Protection Bureau issued national rules on mortgage servicing standards. Except for smaller servicers, mortgage servicers must make good faith efforts to contact borrowers by the 36th day of delinquency and tell them about loss mitigation options, such as short sales and loan modifications. By day 45, servicers must send written notice of these options and the name of a contact person. Servicers may only begin foreclosures if a homeowner is over 120 days delinquent, and a borrower's pending loss mitigation application precludes the initiation of a foreclosure. If the foreclosure has

been initiated when a borrower submits a loss mitigation application, the servicer may not move for final judgment or sale as long as the application is complete 37 days before the sale. Servicers may not “double-track”—pursue mitigation measures with a borrower while also continuing the foreclosure process. If the servicer denies the borrower’s application, it must give specific reasons and afford a right of appeal. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696 (codified at 12 C.F.R. § 1024) (2013).

As a result of changes in foreclosure procedures and servicer behavior, the average time between the beginning of a foreclosure and its end has increased substantially. In 2007, a foreclosure in New York took less than 300 days, while it took 1089 days by the end of 2012. California, which more commonly uses the speedier nonjudicial foreclosure process, experienced a more than doubled time of 347 days. RealtyTrak, 2013 Short Sale Trends (2013), <http://www.slideshare.net/fullscreen/RealtyTrac/2013-short-sale-trends/1>.

What are the possible benefits of delay for homeowners? What about the possible risks? In some cases, servicers initiate foreclosures but do not complete them, leading to so-called “zombie foreclosures.” Completing the foreclosure would make the mortgagee the legal owner of the property, subject to property taxes and to the duty to avoid creating a nuisance condition on the property. In markets with many empty houses, the mortgagee may well wish to avoid this outcome, because it won’t be able to sell the house quickly or otherwise recoup its maintenance costs. In addition, when people believe that they will soon be kicked out, they tend not to maintain the property, and some even deliberately inflict damage. However, the mortgagors are often unaware of their continuing legal duties, and abandon the property in the belief that the foreclosure will occur, exposing themselves to unforeseen liability and their communities to further deterioration of the tax base and the physical condition of homes. Is there anything law could do to mitigate the problem of such “zombie foreclosures”?

Various programs have attempted to help homeowners at risk of foreclosure, with generally modest results. The federal government set up the Home Affordable Modification Program (HAMP), which was supposed to keep four million homeowners in their homes by reducing interest rates and extending repayment times, though not by forgiving principal. Six years later, under 900,000 homeowners were participating in modifications. Servicers rejected four million applications, or 72% of requests. The main culprits were the fact that the program was voluntary, and that the servicers were allowed to run the process

on their own. In 38% of cases, the servicers claimed that the borrowers failed to supply all the paperwork or to make the first modified payment. Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), *Quarterly Report to Congress* (July 29, 2015), http://www.sigtarp.gov/Quarterly%20Reports/July_29_2015_Report_to_Congress.pdf. Not all of that paperwork was actually absent. In 2014, SIGTARP found that the employees of one servicer piled so many unopened Federal Express packages from homeowners containing their HAMP supporting documents into one room that eventually the floor buckled. SIGTARP also found that this servicer denied homeowners from HAMP en masse, without reviewing their applications at all.

Incompetence plays a large role, but that incompetence also may redound to the benefit of servicers: in one case, for example, a servicer delayed responding to a HAMP modification request four times over nearly two years, adding \$40,000 in interest, fees, and costs to the amount the borrower allegedly owed. The servicer first mistakenly denied a modification because it inexplicably decided that the borrower didn't live at the residence. Then it mistakenly denied a modification as unaffordable because it inexplicably used the wrong figures to calculate the borrower's income despite extensive documentation of the correct figures. Then it mistakenly denied a modification because the borrower allegedly had too much money in the bank to qualify; this money was in fact the amount the borrower had set aside in escrow to pay the mortgage, as directed by the court-appointed referee. The servicer also maintained that the borrower hadn't submitted complete documentation for his modification application, though when the referee directed a representative of the servicer to appear at a hearing, the representative (who had just testified to her personal knowledge of this incompleteness) was able to pull up the full application on her laptop. Finally, the servicer denied a modification as unaffordable, without further explanation of how it calculated affordability. See *US Bank N.A. v Sarmiento*, 121 A.D.3d 187 (N.Y. App. Div. 2014). The court found that the servicer's lack of good faith disqualified it from claiming the additional amount owed. As the lawyer for the borrower, how would you have dealt with two years of delay by the servicer?

In the absence of further federal legislation, states may have more options in dealing with foreclosure abuses, because foreclosure procedure is a state-law matter. See CENTER FOR RESPONSIBLE LENDING AND CONSUMERS UNION, CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE (May 2013). The most effective programs seem to be those that require mandatory mediation between the mortgagee and the homeowner be-

fore a foreclosure can proceed. The most effective of those require the mortgagee to send a representative with (1) authority to negotiate a modification and (2) proof of the chain of title to the mortgage. Why do you think that voluntary programs, under which homeowners are entitled to mediation but must affirmatively request it, are less effective than mandatory programs? What effects will requiring proof of the chain of title have on the parties' negotiations? If you were an attorney for a servicer, what would you ask for from homeowners in return for a modification that left them with the ability to stay in their homes?

Massachusetts law now prohibits a creditor from publishing notice of an intended foreclosure sale for many residential mortgages unless the creditor "has first taken reasonable steps and made a good faith effort to avoid foreclosure." Mass. Gen. L. ch. 244 §35B. The creditor must calculate the relative benefits of foreclosure and modification, and must offer the borrower a modified mortgage loan with an affordable payment (if the net present value of such a loan exceeds the anticipated recovery from foreclosure) or notify the borrower that he is not eligible for a modification and provide the borrower with copies of the creditor's net present value and affordable payment analyses. One might think that no law would be required to require creditors to maximize their profits from a loan, but creditors didn't want to engage in individualized determinations. Is the Massachusetts model a good one?

In New York, the courts implemented a requirement that lawyers filing for foreclosure had to certify that they had taken "reasonable" measures to verify the accuracy of documents submitted to the court, under penalty of sanctions. The month before this requirement went into place, roughly 100-200 foreclosures were filed each day. The next month, no more than 5 foreclosures were filed on any given day, with the exception of one day in which 22 foreclosures were filed. Amazingly, this requirement replaced a previous order requiring attorneys for foreclosing entities to certify that *to the best of their knowledge* there weren't any false statements of fact or law in their documents.

New York's system also includes pre-foreclosure conferences; although they are voluntary, they are encouraged, and the courts presently get 80% of foreclosure defendants to show up for a pre-foreclosure conference session. Thus, there is a real risk that someone will challenge the foreclosure documents if they're not in order. In order to make such programs work, it is important to convince homeowners that there is some hope—many have engaged in futile attempts to get a modification before. If they aren't encouraged, many of them believe that the judicial procedure is just another runaround. Is the New York model a good one?

20.11 Concluding Thoughts

The history of mortgages includes many episodes in which financial and legal innovations hurt borrowers by undercutting the various protections they traditionally could depend on, such as clarity in knowing who they were dealing with in a loan transaction. In the most recent iteration of the cycle, the same financial and legal innovations created systematic trouble on the lender side. This too is a property story: the securitized pools (a new kind of property distinct from the property rights in the underlying mortgages) helped create the moral hazard that led brokers to make bad loans and stick the mortgage-backed security buyers with toxic junk. The investors in the securities were unwilling or unable, or sometimes both, to examine individual loans and instead invested on the theory that *enough* loans in the pool would pay off to justify the investment, so they didn't pay enough attention to the quality of the individual underlying loans. Is it possible to split property up in so many ways that the new rights become dangerous instead of productive?

Finally: Frederic Bastiat wrote, "When plunder becomes a way of life for a group of men living together in society, they create for themselves in the course of time a legal system that authorizes it and a moral code that glorifies it." Does his claim help explain MERS? What about *Johnson v. M'Intosh*?

Chapter 21

Redlining

21.1 History

For much of the 20th century in the United States, many private lenders refused to extend mortgage credit—and federal agencies refused to extend or insure mortgage loans—on the basis of the racial composition of the neighborhood in which the mortgaged property was located. Community activists in the Austin neighborhood of Chicago coined the term “**redlining**” in the 1960s to describe the phenomenon:

Savings and loan associations, at the time the primary source of residential mortgages, drew red lines around neighborhoods they thought were susceptible to racial change and refused to make mortgages in those neighborhoods. Using the U.S. Department of Housing and Urban Development (HUD) appraisal methodology developed by Homer Hoyt from the University of Chicago, these lending institutions considered racially changing neighborhoods a bad credit risk because they assumed property values would decline. By extension, neighborhoods that were not racially changing but in close proximity to racially changing neighborhoods were labeled unstable and redlined. The resulting limitations on the availability of residential credit became a self-fulfilling prophecy as residents found it difficult to get a fair market price for their homes.

Jean Pogge, *Reinvestment in Chicago Neighborhoods: A Twenty-Year Struggle, in*

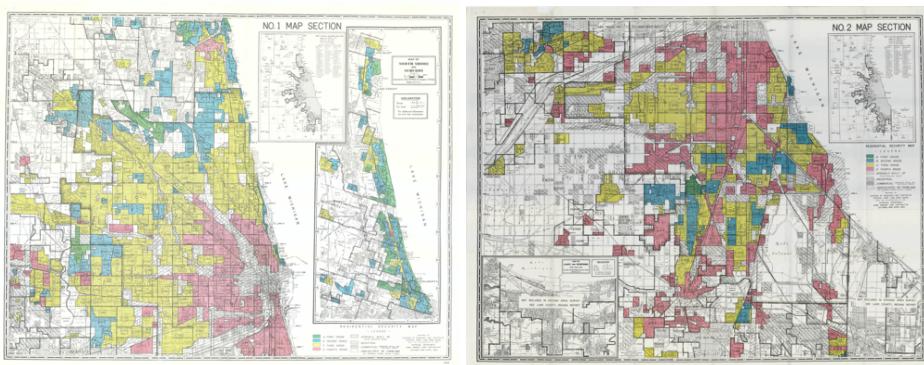


Figure 21.1: HOLC maps of Chicago.

FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT 133, 134 (Gregory Squires ed., Temple University Press 2011).

The term “redlining” refers to the practice of lenders, insurers, and government agencies of drawing literal red lines on city maps around neighborhoods that were *collectively* deemed an unacceptable credit risk. This “location-based” discrimination is distinct from discrimination against particular *individuals* on the basis of race, though the two forms of discrimination often go hand in hand.

In the 1980s, historian Kenneth Jackson showed that the practice of redlining could be traced back at least as far as the Home Owners Loan Corporation (HOLC), a federal agency created in 1933 to help stem the tide of foreclosures generated by the Great Depression. Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URB. HIST. 419 (1980). HOLC was largely responsible for introducing and popularizing the type of federally-backed, fully-amortized, long-term residential mortgage loan that is now the norm in the United States. But it also helped to systematize and institutionalize the appraisal theories and methods that gave rise to redlining, even creating what can now be recognized as the earliest extant redlined maps: HOLC’s “Residential Security Maps,” such as the maps of Chicago shown in Figure 21.1.

The University of Richmond Digital Scholarship Lab’s “Mapping Inequality” project has recently digitized HOLC’s maps and reports, converted them into standardized geographical data formats, and made the results available on their website. The project’s authors explain how HOLC’s appraisal methods

worked in practice:

Neighborhoods receiving the highest grade of “A”—colored green on the maps—were deemed minimal risks for banks and other mortgage lenders when they were determining who should receive loans and which areas in the city were safe investments. Those receiving the lowest grade of “D,” colored red, were considered “hazardous.” Conservative, responsible lenders, in HOLC judgment, would “refuse to make loans in these areas [or] only on a conservative basis.” HOLC created area descriptions to help to organize the data they used to assign the grades. Among that information was the neighborhood’s quality of housing, the recent history of sale and rent values, and, crucially, the racial and ethnic identity and class of residents that served as the basis of the neighborhood’s grade. These maps and their accompanying documentation helped set the rules for nearly a century of real estate practice.

Robert K. Nelson, LaDale Winling, Richard Marciano & Nathan Connolly et al., *Mapping Inequality*, AM. PANORAMA (Robert K. Nelson & Edward L. Ayers eds., version 3.0 Dec. 11, 2023), <https://dsl.richmond.edu/panorama/redlining/>.

Historians and sociologists have long argued over whether the HOLC maps were a *cause* of redlining, or were instead a *symptom* of the prevailing theories of real estate value that were widespread at the time that HOLC was created. The answer is probably a bit of both. HOLC certainly did not *invent* the practice of valuing real estate on the basis of the racial makeup of the neighborhood in which such real estate is located. For example, a leading real estate appraisal textbook from the early 1930s was merely restating conventional wisdom among real estate professionals when it said that “racial heritage and tendencies seem to be of paramount importance” in influencing land values, and that “there is one difference in people, namely race, which can result in a very rapid decline [in real estate values, which] can be partially avoided by segregation.” FREDERICK M. BABCOCK, THE VALUATION OF REAL ESTATE 86, 91 (1932). And indeed, HOLC itself did not even engage in redlining, insofar as it actually did most of its lending in areas it designated “declining” or “hazardous.” However, as Jackson argued in his influential book, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 199 (1985), HOLC and its parent agency, the Federal Home Loan Bank Board (FHLBB), “applied these notions of ethnic and racial worth to real-estate appraising on an unprecedented scale,” hiring and training

armies of appraisers and analysts to use these racial theories of neighborhood value in mapping out and categorizing nearly every residential parcel in over 200 American cities. Those professionals, the procedures they developed, and the maps they prepared, influenced private mortgage lenders as well as another New Deal agency of more lasting importance: the Federal Housing Administration (FHA), created in 1934.

FHA—which still exists today as a division of the department of Housing and Urban Development—plays an outsize role in the American residential mortgage market. FHA does not itself extend mortgage credit, but instead insures private mortgage loans that meet certain criteria. This mitigates the risk to lenders by allowing them to purchase insurance—backed by the full weight of the federal treasury—against losses arising from non-repayment of residential mortgage loans they originate. Such risk reduction, in turn, encourages more lending at lower prices, expanding access to mortgage credit. In order to qualify for FHA insurance, a mortgage loan must meet certain underwriting criteria designed by the agency to keep the risk of loss on any given insured loan within acceptable ranges. The strong demand for FHA insurance among mortgage lenders means that the agency's underwriting criteria exert tremendous influence on the availability (and cost) of residential mortgage loans in the private market.

FHA's underwriting criteria are collected in a series of manuals for appraisers, the earliest of which were prepared in large part by Frederick Babcock (who wrote the 1932 textbook quoted above, and was an early head of FHA's underwriting division). From its inception, FHA included neighborhood racial characteristics among its criteria for insurability. The agency's manual for 1936 allocated 20% of its location risk rating points to "Protection from Adverse Influences." Among those adverse influences were "infiltration of business and industrial uses, lower-class occupancy, and inharmonious racial groups." FED. Hous. Admin., UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT pt. II, paras. 226–233 (1936), https://www.google.com/books/edition/_/HTrVAAAAMAAJ. With respect to the latter, the agency instructed as follows:

The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to

be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values Once the character of a neighborhood has been established it is usually impossible to induce a higher social class than those already in the neighborhood to purchase and occupy properties in its various locations.

Id. pt. II, para. 233. The head of FHA's Division of Economics and Statistics instructed staff members applying these criteria "to outline blocks with 'a considerable number' of populations commonly associated with low real estate values, such as 'Italians or Jews in the lower income group,' as well as those with 10 percent or more 'negroes or race other than white.'" Jennifer Light, *Discriminating Appraisals: Cartography, Computation, and Access to Federal Mortgage Insurance in the 1930s*, 52 TECH. & CULTURE 485, 499 (2011) (quoting Instructions for Dividing the City into Neighborhoods (Fed. Hous. Admin. n.d.)). Staff members were similarly encouraged to reflect local prejudices in downgrading neighborhoods populated by immigrants of other disfavored national origins and their descendants. See generally Jennifer S. Light, *Nationality and Neighborhood Risk at the Origins of FHA Underwriting*, 36 J. URB. HIST. 634 (2010).

These FHA evaluations looked not only to current conditions but also to likely future developments, on the theory that once a nonwhite resident entered a White neighborhood the White residents would relocate to more homogeneously White neighborhoods in an accelerating cascade—a phenomenon that came to be known as "White Flight."¹ Jackson notes that "In a March 1939 map of Brooklyn, for example, the presence of a single, non-white family on any block was sufficient to mark that entire block black." JACKSON, CRABGRASS FRONTIER, *supra*, at 208–09. FHA's theory of race and home values led it to

¹In the mid-20th century, real estate speculators developed a practice of stoking fears of nonwhite neighbors and falling property values among residents of homogeneously White neighborhoods in order to profit from changing racial demographics. These speculators often spread rumors that Black families were moving in to a neighborhood, hoping to induce White homeowners to sell their homes at a discount out of fear that if they waited until the racial balance of their neighborhood had changed, they would have to accept an even lower price. The speculators often snapped up the homes of these panicky White homeowners for cash and then resold the homes to Black families at a substantial markup—often under onerous financing terms such as installment contracts that Black families were compelled to accept because of their inability to access mortgage credit through mainstream channels. This practice, known as "blockbusting," accelerated so-called "white flight" from urban neighborhoods to the suburbs from the late 1950s through the 1980s, and is unlawful under the Fair Housing Act. See 42 U.S.C. § 3204(e); 24 C.F.R. § 100.85.

recommend that deeds to parcels of residential real estate include covenants “[p]rohibit[ing] of the occupancy of properties except by the race for which they are intended.” FED. Hous. ADMIN., *supra*, pt. II, para. 284(3)(g).²

“There are striking similarities between the survey methods and questionnaires used by FHA and FHLBB [HOLC’s parent agency], as well as their maps and grading system, and it is hard to imagine that the two agencies were not working together.” Amy Hillier, *Redlining and the Homeowners’ Loan Corporation*, 29 J. URBAN HIST. 394, 403 (2003). But even though FHA clearly had access to HOLC’s maps, it also clearly conducted its own independent analyses and even made maps of its own. Indeed, many private lenders of the period were also using similar methods to generate similar maps—the predecessors of the maps that became the focus of neighborhood activists in Chicago in the 1960s. Thus, while the HOLC maps are a vivid illustration of the redlining era, and HOLC’s institutionalization of race-based neighborhood appraisals did have consequences for other players in the mortgage market, it seems that “HOLC was as much a follower as a leader when it came to neighborhood appraisals.” Hillier, *supra*, at 412; see also Louis Lee Woods, *The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Lending Discrimination, 1921–1950*, 38 J. URB. HIST. 1036, 1038 (2012) (“While the HOLC did not create racial and socioeconomic lending bias, it certainly helped nationalize the practice.”).

Whether HOLC was a leader or a follower in tying real estate values and mortgage availability to the race of neighborhood residents, there is no dispute that *de jure* redlining was a real phenomenon, nor that the redlining era had a profound and lasting effect on the housing stock of the United States, the density of its residential neighborhoods, and the segregation of those neighborhoods on the basis of race. FHA removed neighborhood racial characteristics from its underwriting criteria in 1966, and the use of racial criteria by any public or private residential mortgage lending institution was rendered unlawful by the Fair Housing Act of 1968, but three decades of *de jure* redlining had already reshaped the face of American residential neighborhoods. One recent study

²We will discuss these racially restrictive deed covenants, held unenforceable as unconstitutional by the Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948). In general, they forbade any owner of property subject to such a covenant from selling or leasing their property to anybody who was not White and Christian. Some forbade anyone who was not White and Christian from using the property as a residence, sometimes excepting domestic servants. Such covenants were—until *Shelley* was decided—enforceable in an action by other property owners within the same community for injunctive relief.

found that the Black share of population in areas graded “D” on HOLC maps grew from 1930 to 1970, as it did in areas graded “C” bordering areas graded “B,” despite the fact that both “B” and “C” areas had virtually no Black residents prior to the advent of HOLC and FHA (the authors refer to this phenomenon as “yellow-lining” in reference to the yellow color-coding of “C”-graded areas on HOLC maps). Daniel Aaronson et al., *The Effects of the 1930s HOLC “Redlining” Maps* (Fed. Rsrv. Bank of Chi. Working Paper Series, No. WP 2017-12, Feb. 2019), <http://hdl.handle.net/10419/200568>. That same study showed that less favorable HOLC rankings were correlated with falling homeownership rates, falling home values, and rising vacancy rates during the same period, which the authors argue reflects housing disinvestment in redlined and even “yellow-lined” neighborhoods. *Id.*

21.2 Lasting Impact

During the redlining era, neighborhoods where substantial numbers of non-white people lived were often deemed categorically ineligible for FHA-insured loans. And because federal insurance allowed lenders to offer credit more cheaply, this meant that residents of predominantly White neighborhoods were able to borrow more easily and cheaply to buy or improve their homes, while residents of racially mixed or majority-minority neighborhoods either paid more for mortgage credit or were not able to access the mortgage market at all. In the latter case, those who wanted to buy homes in redlined neighborhoods had to purchase under (often usurious) installment contracts that carried high risks of default and forfeiture. This systematic deprivation of access to mortgage credit and housing wealth over the course of decades has had long-term consequences, both for individuals and, importantly, for neighborhoods.

Half a century after the FHA disavowed redlining, American residential communities are still marked by substantial racial segregation. The degree of segregation across HOLC boundaries does seem to have diminished somewhat in some areas since the advent of the Fair Housing Act. See *id.* But that does not mean there has been broad racial residential integration. In many locations the neighborhood lines set down by HOLC in the late 1930s bear striking resemblances to boundaries of residential racial segregation in the 21st century. One recent study found that in the aggregate, over 85% of neighborhoods graded “A” in HOLC maps from the late 1930s were majority-White neighborhoods in 2016, while approximately 64% of neighborhoods graded “D” in those maps

were majority-minority in 2016. See BRUCE MITCHELL & JUAN FRANCO, NAT'L CMTY. REINVESTMENT COAL., HOLC "REDLINING" MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY (Mar. 20, 2018), <https://perma.cc/Z2V5-2R39>.

To visualize this persistence of residential racial segregation, consider the following comparison of HOLC maps from the 1930s with Racial Dot Maps—maps that represent individual residents with dots color-coded by census racial classification—of the same areas in 2010:

Legends

RESIDENTIAL SECURITY MAP

— L E G E N D —

- [Green] A - FIRST GRADE
- [Blue] B - SECOND GRADE
- [Yellow] C - THIRD GRADE
- [Red] D - FOURTH GRADE
- [Diagonal lines] SPARSELY SETTLED (Color Indicates Grade)
- [Cross-hatch] INDUSTRIAL & COMMERCIAL

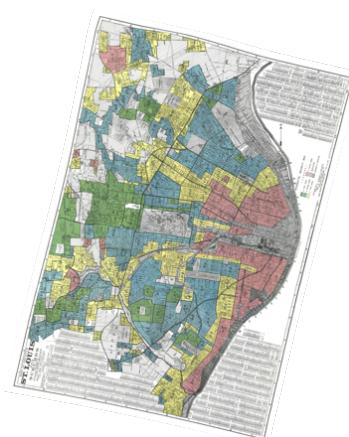
PREPARED BY
DIVISION OF RESEARCH & STATISTICS
WITH THE CO-OPERATION OF THE APPRAISAL DEPARTMENT
HOME OWNERS' LOAN CORPORATION
NOVEMBER 5, 1937

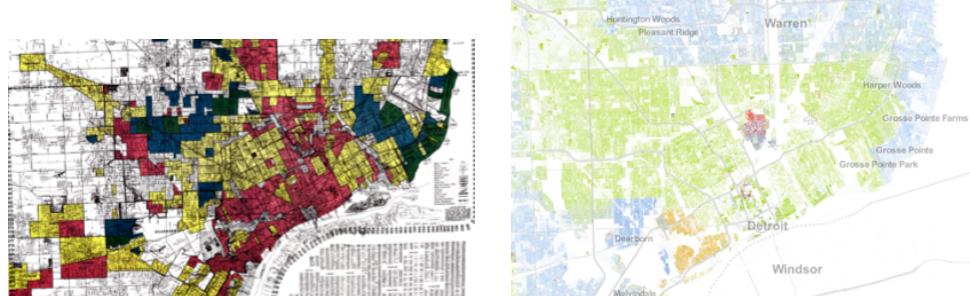
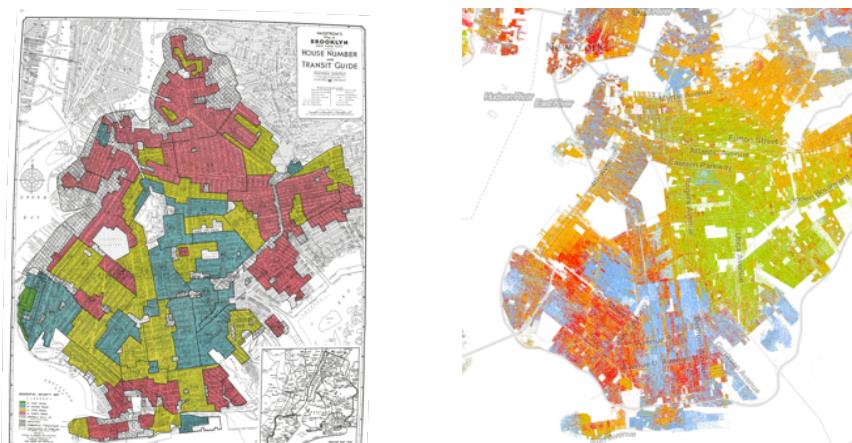
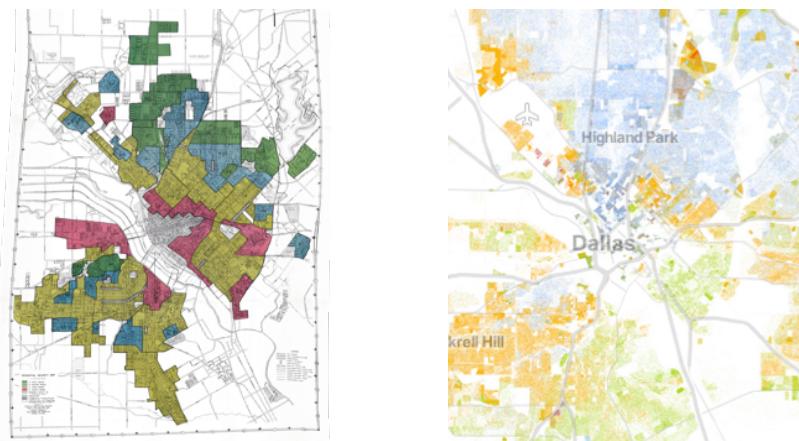
2010 Census Block Data

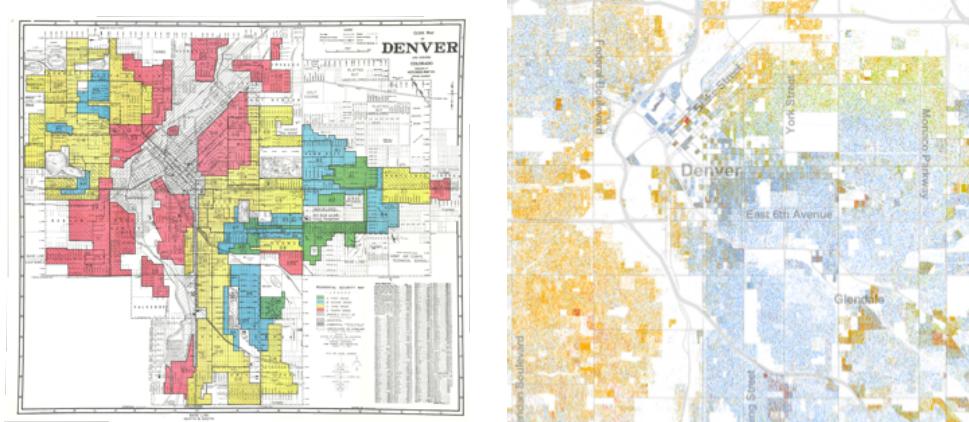
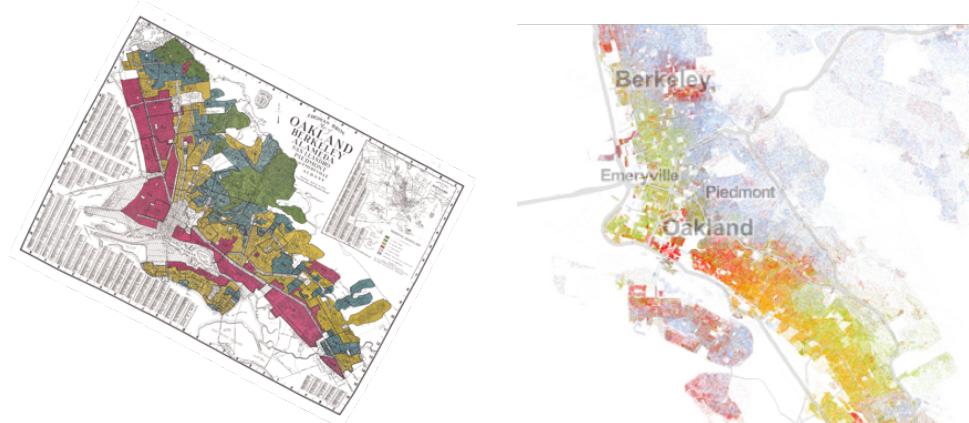
1 Dot = 1 Person

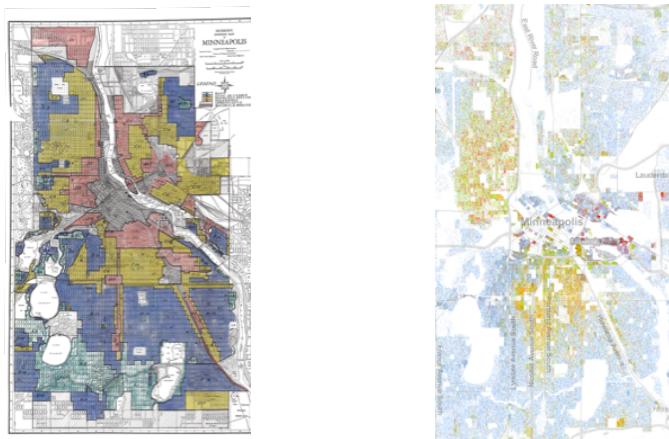
- White
- Black
- Asian
- Hispanic
- Other Race / Native American / Multi-racial

St. Louis, Mo.



Detroit, Mich.**Brooklyn, N.Y.****Dallas, Tex.**

Denver, Colo.**Oakland, Berkeley, and Alameda, Cal.**

Minneapolis, Minn.

Sources:

- Nelson, Winling, Marciano & Connolly et al., *supra*. CC-BY-NC 2.5.
- *Racial Dot Maps*, WELDON COOPER CTR. FOR PUB. SERV. (2010), <http://racialdotmap.demographics.coopercenter.org/>. Images Copyright, 2013, Weldon Cooper Center for Public Service, Rector and Visitors of the University of Virginia (Dustin A. Cable, creator). Map data by OpenStreetMap, under CC-BY-SA.

If the era of *de jure* redlining ostensibly ended no later than the passage of the federal Fair Housing Act of 1968, why are residential communities largely segregated even now, half a century later? Scholars have tended to coalesce around three overlapping explanations. See generally Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 2 ANN. REV. SOC. 167 (2003).

21.1. Racial Wealth Gaps and “Lock-In.” One explanation may arise from the observation that decades of *de jure* discrimination and segregation rendered Black home buyers *as a group* less wealthy than White home buyers *as a group*, and resulted in systematic disparities in the value of housing stock in neighborhoods where mainly nonwhite people lived relative to housing stock in predominantly White neighborhoods. Since housing is a durable but depreciating asset, over time the unequal allocation of credit and capital investment generated a disparity of home values that correlated with neighborhood

racial demographics: predominantly white neighborhoods came to be comprised of more valuable homes and wealthier homeowners than racially mixed or majority-minority neighborhoods. See generally DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDER-CLASS* (1993).

Even when *de jure* discrimination ostensibly ended, these consequences of its history remained, and they would be difficult to change even if one were to assume the absence of overt racial bias (by no means a safe assumption). Because (1) wealthier people can afford and tend to prefer more expensive homes, (2) wealth correlates with race, and (3) the value of homes correlates with the racial demographics of the neighborhood in which those homes are located, segregation may be, in a sense, “locked in”: Black homebuyers cannot afford to buy into high-value predominantly White neighborhoods, and White homebuyers can afford *not* to live in lower-value racially diverse or majority-minority neighborhoods, so segregation persists. See DARIA ROITHMAYR, *REPRODUCING RACISM* 93-120 (2014).

This explanation, while theoretically sound and grounded in historical experience, does not seem to be the whole story. While racial wealth and income gaps are real, and can be traced in part to policy decisions of the redlining era, empirical analysis suggests that these gaps are only a modest (though real) contributor to the persistence of residential racial segregation. In particular, wealth gaps alone do not explain observed levels of exclusion of Black homeowners from predominantly White neighborhoods. See generally Kyle Crowder et al., *Wealth, Race, and Inter-Neighborhood Migration*, 71 AM. SOC. REV. 72 (2006). Other, overlapping factors must also be playing a role.

21.2. Segregation as an Emergent Phenomenon. In the 1970s, the prominent game theorist Thomas C. Schelling (whose insights about cooperation and conflict had helped defuse the Cuban Missile Crisis and would later lead to his being awarded the Nobel Prize in economics) developed a still-influential mathematical model of segregation. See Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971). This model demonstrated how large systematic discriminatory effects can emerge from the interaction of uncoordinated, individual private choices. Moreover, such systematic effects could arise and persist even where individual decisions are motivated by preferences far milder than what we might consider overt racial animus or hatred. The example Schelling gave was a preference not to live in a neighborhood where

one is part of a small racial minority:

Whites and blacks may not mind each other's presence, may even prefer integration, but may nevertheless wish to avoid minority status. Except for a mixture at exactly 50:50, no mixture will then be self-sustaining because there is none without a minority, and if the minority evacuates, complete segregation occurs. If both blacks and whites can tolerate minority status but there is a limit to how small a minority the members of either color are willing to be—for example, a 25% minority—initial mixtures ranging from 25% to 75% will survive but initial mixtures more extreme than that will lose their minority members and become all of one color. And if those who leave move to where they constitute a majority, they will increase the majority there and may cause the other color to evacuate. Evidently if there are lower limits to the minority status that either color can tolerate, and if complete segregation obtains initially, no individual will move to an area dominated by the other color. Complete segregation is then a stable equilibrium.

Simulations based on Schelling's model demonstrate how segregation can indeed emerge from such uncoordinated choices and entrench itself once established. In particular, they demonstrate that if an environment is already segregated, simply *removing* bias is not enough to desegregate it. You can try such a simulation for yourself at: Vi Hart & Nicky Case, *Parable of the Polygons* (last updated Nov. 7, 2022), <https://ncase.me/polygons/>. (This simulation also suggests that cultivating widespread homeowner preferences *against* racial homogeneity may be one tool to promote desegregation).

21.3. Private Discrimination. Just as widespread invidious racial discrimination in the allocation of housing and mortgage credit existed long before HOLC was created, private discrimination did not magically disappear when the Fair Housing Act was enacted. When the activists of Austin coined the term “redlining,” they were referring to lines drawn on maps at their local, privately owned savings and loan offices, not maps drawn by the federal government (though there was a historical and causal relationship between the two).

Sadly, even though the federal Fair Housing Act, analogous state and local laws, and associated regulations have long forbidden various discriminatory behaviors with respect to housing, such behaviors persist even today. For example, an ambitious three-year investigation conducted by the newspaper

Long Island Newsday from 2016 to 2019 demonstrated that in the New York City suburbs of Long Island, real estate agents regularly discriminated against non-white house hunters compared to White house hunters. Notably, about a quarter of the agents investigated steered White house hunters toward more homogeneously White neighborhoods, while steering comparable nonwhite house hunters toward more mixed or majority-minority neighborhoods. See Ann Choi, Bill Dedman, Keith Herbert, & Olivia Winslow, *Long Island Divided*, NEWSDAY (Arthur Browne ed. Nov. 17, 2019), available at <https://perma.cc/KG54-DLF3>. Such steering is unlawful under the Fair Housing Act and related regulations. See, e.g., 24 C.F.R. § 100.70(c). Nevertheless, it clearly persists and—along with other forms of private discrimination—likely contributes to the continued *de facto* racial segregation of residential neighborhoods.

21.3 Overcoming the Legacy of Redlining

If we believe that racially segregated residential neighborhoods are a problem, what is the solution? Consider the following proposals. Do you think they are likely to be effective? Might they be counterproductive?

21.4. Racial Wealth Gaps and Reparations. If today's racial wealth and income gaps are indeed the product of *past* discrimination, can we count on these gaps to close over time as people in formerly redlined neighborhoods take advantage of economic opportunities now available to them? Is the problem simply that not enough time has passed since the redlining era? Is "lock-in" a phenomenon that might fade away if only we are patient enough?

If private housing discrimination were absent, and intergenerational social mobility (defined as upward changes in income and wealth from one generation to the next) were high, we might expect the passage of time to ameliorate racial wealth gaps and thereby reduce residential racial segregation. But as we have seen, private housing discrimination persists even half a century after being outlawed. And the latest research demonstrates that social mobility in the United States is not only low, it is *negatively correlated with segregation*—people who grow up in segregated neighborhoods are less likely to see generational increases in income or wealth. See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1607-09 (2014) ("[B]oth blacks and whites living in areas with large African American populations have lower rates of upward income

mobility . . . [and m]ore racially segregated areas have less upward mobility.”) If this research is right, and lock-in will not simply fade away, what more should be done?

As we discussed in Chapter 5, historical injustices whose effects are felt in the present can be difficult to resolve through litigation. For this reason, many have proposed broader programs of redistribution to address such injustices, and the legacy of redlining is among the targets of such programs. Indeed, the Ta-Nehisi Coates article in note 5.15 cites redlining as its primary example of systematic racial injustice in the United States that deprived Blacks of opportunities afforded to Whites to build intergenerational wealth, calling out for reparations as a remedy. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), available at <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/>.

21.5. Tackling Demand-Side Discrimination. If Schelling’s model of segregation is correct, real estate professionals like those investigated by *Newsday* might believe they have reasons to perpetuate continued residential segregation even if those professionals privately deplore (or believe they deplore) segregation and racial bias. For example, real estate agents might believe they are faithfully catering to the odious preferences of their house hunting clients when they preferentially direct White clients to homogeneously White neighborhoods, or direct nonwhite clients to racially mixed or majority-minority neighborhoods. That is, they may think that homebuyers generally prefer to live among people who look like them.

This belief may not be wrong! Consistent with the Schelling model, surveys find that White people tend to express preferences to live in an area where Whites are clearly in the majority, while nonwhites are more likely to express preferences to live in areas where races are evenly mixed. See, e.g., W. A. V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991). Some house hunters might even explicitly instruct their brokers about the racial demographics they are seeking in a new neighborhood. But if real estate agents tailor housing searches to such client preferences—even if the agents themselves abhor racial bias—they may be contributing to continued residential racial segregation. Should professional acquiescence to such discriminatory preferences on the part of house hunters be unlawful?

Professor Lee Anne Fennell thinks so. See Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349 (2017). She argues that the law ought to treat such home seekers’ preferences for segregated housing the same way it treats

the proverbial Mrs. Murphy's desire to discriminate in her selection of boarders (you'll remember the "Mrs. Murphy exception" to the Fair Housing Act's prohibitions from Chapter 16.2.5). That is, she would allow home seekers to ultimately decide to purchase a home based on the racial demographics of the neighborhood in which the home is located, but she would forbid them from publishing those preferences or communicating them to real estate professionals, and would prohibit those professionals from soliciting or complying with such client instructions. *Id.* at 395-403.

Professor Fennell's proposal is—by her own admission—in tension with current understandings of fair housing law. In particular, the Court of Appeals for the Seventh Circuit has opined that real estate brokers who follow their house-hunting customers' instructions to limit their search based on the racial composition of neighborhoods would not violate the Fair Housing Act, even if the result is residential racial segregation, because such brokers would not subject *those customers* to disparate treatment on the basis of race. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530-31 (7th Cir. 1990). In the court's view, the Fair Housing Act is designed to protect home buyers from discrimination, not to construct a less segregated society. So long as home buyers are not subjected to disparate treatment, the court said, brokers ought not be held liable. However, the same opinion affirmed that "a person who serves as a conduit for another person's discrimination can, it is true, be guilty of intentional discrimination, or, what is the same thing, of disparate treatment. . . . And it is actionable discrimination, regardless of its effects and notwithstanding the merchant's own freedom from racial animus." *Id.* On this understanding of the law, a *seller* who instructed a broker not to show their home to potential buyers on the basis of race could still be held liable, as could a broker who complied with such instructions, on grounds that the broker would be subjecting *potential buyers* to disparate treatment on the basis of race.

Is the distinction drawn by the *Village of Bellwood* court consistent with the justifications for the Mrs. Murphy exception? Is Professor Fennell's proposal? Do the justifications for the Mrs. Murphy exception apply to a homebuyer's selection of a neighborhood to live in?

21.6. Segregation vs. Gentrification. How might residential neighborhoods change if more homeowners began valuing racial diversity among their neighbors as a more important factor in deciding where to live? Given the persistent racial gaps in wealth and income, and the correlation of housing values with the race of neighborhood residents, how might such an increased preference for diversity manifest itself in homeowner behaviors? Who will be in the

best position to choose to live in a more integrated neighborhood as demand for such neighborhoods increases?

Recall our discussion of the problem of gentrification in Chapter 16.4.5. The same dynamics that arise when wealthy tenants suddenly begin leasing residences in a poorer neighborhood can arise when racially diverse or majority-minority neighborhoods get an influx of new investment in owner-occupied housing from White home buyers. So long as wealth and race are correlated, and housing values tend to drive local costs of living, integration-by-gentrification may perversely have the effect of *driving out* nonwhite residents of diverse neighborhoods who can no longer afford to live there, ultimately simply rearranging the boundary lines of racially segregated neighborhoods.

At least, integration-by-gentrification *could* have that effect. So far, empirical evidence is somewhat mixed. Perhaps because displacement is likely to lag gentrification, and because it is difficult to distinguish displacement (poorer, nonwhite residents being forced out by richer, White newcomers) from succession (poorer, nonwhite residents leaving at a normal rate and being replaced by richer, White newcomers), researchers disagree on whether displacement is happening at all in gentrifying neighborhoods, let alone the extent to which it is a problem. For a literature review, see Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLANNING LIT. 31, 36-39 & tbl. 2 (2018).

Setting aside the potential problem of displacement, are segregation and gentrification our only options? Can you imagine a mechanism for residential racial integration that *doesn't* involve gentrification? If the problem is that race, wealth, and neighborhood home values are correlated, is there any way to create opportunities for poorer homeowners to move into more expensive neighborhoods?

21.7. Creditworthiness and Community Investment. Like real estate agents who believe they are satisfying their clients' preferences, finance professionals looking out for their institutions' balance sheets might make decisions that have the effect of perpetuating residential racial segregation, even if the professionals themselves privately deplore (or believe they deplore) segregation and racial bias. Because, as discussed above, the value of residential real estate in racially diverse or majority-minority neighborhoods tends to be lower than the value of real estate in predominantly White neighborhoods, lending officers might well reason that loans secured by homes in racially diverse or majority-minority neighborhoods are likelier to result in losses for the lender than loans secured by real estate in predominantly White neighborhoods. A

lending officer who sincerely believed this could in good faith tell himself that it would be irresponsible to extend credit secured by property in such neighborhoods. But writing off the credit needs of entire neighborhoods on the basis of such generalizations can be expected to leave many otherwise creditworthy borrowers without access to mortgage financing, based solely on the racial demographics of the neighborhood where they live—exactly the harm caused by *de jure* redlining.

To counteract this tendency, the Community Reinvestment Act of 1977 (“CRA”), 12 U.S.C. § 2901 *et seq.*, was enacted to require financial institutions to extend credit in all communities where they accept deposits—including low- and moderate-income neighborhoods—consistent with the “safe and sound” operation of the institution. 12 U.S.C. § 2903(a)(1). The CRA and its implementing regulations require federally regulated financial institutions to report their lending activities to the federal agency that regulates them. The agencies, in turn, must evaluate whether the reporting institutions are adequately meeting the credit needs of the communities they serve, and publish their evaluation accompanied by a rating of the institutions’ performance. In addition to subjecting financial institutions to public scrutiny, these evaluations are also used by federal regulators to determine whether the regulated institution should be granted permission to expand by acquisition, merger, or the opening of new branches and offices.

Chapter 22

Recording Acts

Famed con artist George C. Parker specialized in selling the Brooklyn Bridge. Parker and other con artists working in New York around the start of the 20th century would convince victims that they stood to make a fortune charging tolls. Unfortunately, the buyers obtained nothing, no matter how fancy the paperwork Parker offered them, because Parker did not own the bridge. **Nemo dat quod non habet** was the Latin motto of the common law: “No man can give what he does not have.” Parker, having no title, could give none to his buyers.

Today, “I’ve got a bridge to sell you” is a punchline: only an incredible rube, we like to believe, could be so gullible as to think that a man in the street with a “Bridge for Sale” sign is actually its owner. But the problem arises even in less dramatic cases. Suppose Dorothy Dupe is scheduled to buy Blackacre on Wednesday from Sadie Scamalot. What if on Tuesday Scamalot sells Blackacre to Charles Clueless first? Then on Wednesday before the “sale,” Scamalot is no longer the owner of Blackacre, and under *nemo dat*, Dupe owns nothing after the “sale.” Sometimes, equity would intervene to protect a second buyer who lacked notice of the prior sale—but such doctrines have serious risks for Clueless, who may have no idea that Scamalot is about to turn around and “sell” Blackacre again.

The heart of the problem here is that Clueless and Dupe don’t know enough about potential conflicting claims to Blackacre. Dupe can’t find Clueless to confirm that she should be dealing with him rather than with Scamalot, and Clueless can’t find Dupe to warn her off from buying something Scamalot no longer owns. Recording systems try to prevent some of these messes by making available better information about who owns what. If Clueless **recorded** his interest in Blackacre by making it a matter of public record, then it becomes reasonable

to treat Dupe as having **constructive notice** of Clueless's claim of ownership: even if she didn't check the records, she should have. Conversely, if Clueless fails to record, there is much less Dupe can do to protect herself, so it becomes reasonable to let Dupe take title free and clear of Clueless's claim. Thus, the system gives Clueless a strong incentive to record and gives Dupe a strong incentive to check the records. As a result, there are good records of people's property claims. Clueless and Dupe never get into this mess in the first place, and Scamalot's scheme fails.

Recording systems are useful even in the absence of fraud; they create the trust and certainty needed to make land transactions common and reliable. Most home sales today happen between people who do not otherwise know each other and don't otherwise expect to transact again. How can the buyer be sure the seller is really the owner? A recording system provides the answer. Perhaps more importantly, a recording system gives *lenders* sufficient assurance that they'll be able to recover something in case of a loan default; with that security, they are willing to loan more and at lower rates.

For this and other reasons, a recording system can be a vital part of a large-scale, modern economy. According to the *New York Times*, for example, the absence of a functioning recording system in Greece "scares off foreign investors; makes it hard for the state to privatize its assets, as it has promised to do in exchange for bailout money; and makes it virtually impossible to collect property taxes." Suzanne Daley, *Who Owns This Land? In Greece, Who Knows?*, NEW YORK TIMES, May 26, 2013. Clear title is often important for access to government services and even water and electricity connections: otherwise it's not clear where the checks and bills should go.

The materials in this section work through real property recording systems from the inside out. First, an excerpt from an article by Carol Rose traces some recurring themes in the history of recording law. Second, *Belmont* considers what it means to "record" a document and under what circumstances it ought to be treated as giving notice. Third, *Hartig* examines the process of searching title records: what must a reasonable buyer do to confirm that there are no conflicting claims? *Argent* then considers the main variations on this scheme under state recording acts, many of which create additional incentives to record quickly by creating a "race" to the recording office. *Hughes* illustrates the kinds of messes that can arise even with a reasonably well-functioning recording system. The Note on Informal Title finishes by considering some of the systemic advantages that have been claimed for well-functioning recording systems, and some of the empirical evidence for and against those claims.

Carol M. Rose, *Crystals And Mud In Property Law**

40 STAN. L. REV. 577 (1988)

. . . In establishing recording systems, legislatures have lent support to private parties' efforts to sharpen the definition of their entitlements. The *raison d'être* of such systems is to clarify and perfectly specify landed property rights for the sake of easy and smooth transfers of land.

But the Anglo-American recording system in fact has been a saga of frustrated efforts to make clear who has what in land transfers. Common law transfers of land required a certain set of formalities between the parties, but thereafter, conflicting claims were settled by the age-old principle, "first in time, first in right." Thus, on Tuesday I might sell my farm to you, and on Wednesday I might wrongfully purport to sell it once again to innocent Farmer Brown. Poor Farmer Brown remains landless even though he knew nothing about the prior sale to you and indeed had no way of knowing about it. This outcome was hardly satisfactory from a property rights perspective. "First in time, first in right" may work well enough in a community where everyone knows all about everyone else's transactions, but outside that context, the doctrine does little to put people on notice of who owns what, and the opportunities for conflicting claims are endless.

But the efforts to remedy this flaw have gone through new cycles of certainty and uncertainty. Henry VIII attempted—without great success—to establish public registration of land claims through the Statute of Enrollments in 1536. Versions of the Statute resurfaced in Massachusetts' 1640 recording act and in other seventeenth and eighteenth century colonial recording acts, all of which were much more widely (though still somewhat irregularly) applied than their Henrician model had been.

Henry's Statute and its original American counterparts reflected an emphatically crystalline view of property. Their literal language suggests that they were versions of what has come to be called a "race" statute: the first purchaser to record (the winner of the "race" to the registry) can hold his title against all other claimants, whether or not he was in fact the first to purchase. In such a system, the official records become an unimpeachable source of information about the status of land ownership; the law counts the record owner, and only the record owner, as the true owner. The purchaser can buy in reliance on the records without fear of divestment by

*Excerpts reprinted by permission.—Eds.

some unknown interloper, and without the need to make some cumbersome extra-record search for such potential interlopers.

This system was too crystalline to last. The characters to muck up this crystalline system [are] ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them. What are we to do, for example, with the silly fellow who buys an interest in property but simply forgets to record? Or with the more conscientious one who does attempt to record his interest, but whose records wind up in the wrong book? Or with the lost soul whose impeccably correct filing is dropped behind the radiator by the neglectful clerk? Some courts take a hard line, perhaps concluding that the first owner was in a better position than our innocent outsider—that is, the next purchaser—to detect and correct the flaws in the records. But our sympathies for the luckless unrecorded owner put pressure on the recording system that would divest him in favor of the later-arriving outsider.

Our sympathies are all the greater when the outsider is not so innocent after all. What shall we do, say, when the unrecorded first buyer is snookered out of his claim by a later purchaser who knows perfectly well that the land had already been sold? Shall we allow this nasty second buyer to perfect a claim simply because he carefully follows the official recording rules? This thought was too much for the courts of equity, and too much for American legislatures as well. By the early nineteenth century, the British equity courts had imported an element of non-record “notice” into what had initially been a “race” system. Under these doctrines, the later purchaser could take free of the prior claims only if he did not *know* about those prior claims, either from the records or from non-record facts that should put him “on notice.” American legislatures followed this move to such a degree that, at present, only a handful of states maintain a race system with any rigor. The other states deny the subsequent claim of the person who had or should have had notice of the earlier claim.

This development means mud: What “should” a purchaser know about, anyway? To be sure, if someone is living on the land, perhaps the potential purchaser should make a few inquiries about the occupant’s status. But what if the “occupant’s” acts are more ambiguous, consisting of, say, shovelling some manure onto the contested land? Well, said one court, a buyer should have asked about the source of all that manure—and since he didn’t, and thus did not find out about the manure shoveller’s prior but unrecorded claim, the later buyer did not count as an innocent; his title

was a nullity.

With the emergence of this judicial outlook, the crystalline idea of the recording system has come full cycle back to mud. To be sure, the recording system can give one a fair guess about the legal status of any given property. But by the end of the last century, as a Massachusetts court put it, "it would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title." Thus, the test of a title's "marketability" became a question of whether the title was subject to "reasonable" doubt—a matter, of course, for the discretion of the court. In the meantime, a whole title insurance industry sprang up to calm the fears of would-be purchasers who wanted to avoid questions about which doubts were reasonable and which were not. It is this industry, in a sense, that once again makes crystals out of the recording system's mud; and according to the reformers, it is this industry that now stands in the way of a more rational method of cleaning up the mess once and for all.

Yet one must wonder whether cleaning up the mess might not just repeat the cycle of mud/crystal/mud. One of the most popular suggestions for reform is the so-called "Torrens" system, named for someone who thought that shipping registry methods could be used beneficially in real estate. In this system, all claims on a given property—sales, liens, easements, etc.—are first registered and then incorporated in a certificate. Torrens registration echoes eerily the colonial "race" statutes: No unregistered claim counts, and the owner's certificate for a given property acts as the complete record of everything that anyone might claim.

Well, perhaps not everything: Government liens, fraudulent transactions, and, according to some courts, even simple errors or neglect in registration can produce unregistered claims that count. Hence this neo-race system provides no complete relief from the recording system's mud. Even after we look at the Torrens certificate, we still have to be on the lookout for the G-men, the forgers, and the ninnies who neglected to register their claims properly. Not a lot of mud, to be sure, but just wait. In some jurisdictions with a long history of Torrens registration, courts have in effect reestablished a "notice" system, defeating the interest of one who registers his claim when he knows about a prior unregistered one—or merely when he *should* have known about the prior claim. This practice, of course, means that the registry and certificate no longer count as the complete source of information about a property's title status.

The most striking aspect of these developments is that first the title recording acts, and later the registration systems, represented deliberate choices to establish crystalline rules for the sake of simplicity and ease of land sales and purchases. People who failed to use the records or registries were supposed to lose their claims, no matter how innocent they might have been, and no matter how nastily their opponents might have behaved. Yet these very crystalline systems have drifted back into mud through the importation of equitable ideas of notice—only to be replaced by new crystalline systems in the form of private contract or public legislation

Let us suppose that we have a system for the clarification of property titles. Might we have a tendency to overuse the system, so that in the end it becomes so hopelessly bogged down in detail that the purpose of clarity is defeated? Certainly our traditional land records have this quality. Some early cases permitted only fee interests to be recorded, but it was the very attractiveness of the system that created pressure to allow the recordation of other interests; liens, for example, or easements. Indeed, some claims may be in the records even though they are not legally recordable. Then too, many claims are recorded and just stay put over time, and sometimes even conflict with other recorded claims. The layers of these recorded but unextinguished claims can grow so thick that it hardly seems worth the time to go back and check them all. So, in a sense, we treat our clarifying systems—in this case the recording mechanisms—as a kind of “commons.” The resulting system overload, in turn, creates a certain disgust with the lush proliferation of records. In fact, one of our current recording reforms would simply extinguish claims that have not been asserted during a given period.

Thus, the very attractiveness of making clear one’s claims by recording them defeats the purpose of the system, that is, to clarify all claims against a given property. One sees the same pattern in the excessively long contracts that attempt to specify all possible contingencies and that no one actually reads; however comforting it might be to “have it in writing,” it really isn’t worth the effort to nail down everything, and the overly precise contract may wind up being just as opaque as—and perhaps even more arbitrary than—the one that leaves adjustments to the contingencies of future relations.

The trouble, then, is that an attractively simple legal device draws in too many users, or too complex a set of uses. And that, of course, is where

the simple rule becomes a booby trap. It is this booby trap aspect of what seems to be clear, simple rules—that scenario of disproportionate loss by some party—that seems to drive us to muddy up crystal rules with the exceptions and the post hoc discretionary judgments.

National Packing Corp. v. Belmont

547 N.E.2d 373 (Ohio Ct. App. 1988)

DOAN, J.

In the instant appeal, we must determine whether to apply the venerable doctrine of *idem sonans* to the facts and circumstances set forth in the record. . . .

The record reveals that the plaintiff, National Packaging Corporation (“NPC”), sued Michael Bolan, d.b.a. Trade Packaging, in the Franklin County Court of Common Pleas. On November 25, 1983, NPC obtained a judgment for \$3,331.76 plus interest; and, at a later time, it certified the judgment in Hamilton County, with Bolan’s name incorrectly spelled “B-O-L-E-N” in the docket book. At the time the judgment was certified, Michael Bolan owned property in Hamilton County at 8107 Camargo Road and 815 Indian Hill Road.

Bolan’s ex-wife, Elaine (now Elaine Belmont), brought a foreclosure action against the property located at 815 Indian Hill Road to collect overdue child-support payments. The property was sold in a sheriff’s sale to L. Michael and Elaine Belmont (Bolan’s ex-wife and her new husband). Because NPC’s judgment was filed under an incorrect spelling of Bolan’s name, NPC did not receive notice of the sheriff’s sale and was unable to protect its interest in the property.

The Belmonts subsequently sold the Indian Hill Road property to Richard E. and Vera DeCamp. It was only after this second conveyance that NPC brought its own foreclosure action, asserting the certified judgment from Franklin County against both the Indian Hill Road property and the Camargo Road property.

The Belmonts moved to dismiss NPC’s complaint in a filing that the trial court treated as a motion for summary judgment. The DeCamps then moved for summary judgment against NPC and the Belmonts. NPC responded with its own motion for summary judgment against the Belmonts and the DeCamps. On April 30, 1987, the trial court overruled NPC’s mo-

tion for summary judgment, entered summary judgment for the DeCamps and the Belmonts against NPC and held that the DeCamps' motion for summary judgment against the Belmonts was moot. The court dismissed all other claims existing among these three parties, adding a Civ. R. 54(B) certification in a *nunc pro [tunc]* entry dated July 6, 1987, and this appeal followed.

In its single assignment of error, NPC asserts that the trial court erred to its prejudice by overruling its motion for summary judgment. Relying upon the doctrine of *idem sonans*,¹ it argues that the certified judgment filed under a similar sounding but incorrect spelling of the debtor Bolan's name, retaining the same initial letters as the correctly spelled name, should have been held to give rise to a valid lien for the benefit of NPC and to provide the appropriate constructive notice to title searchers.

The doctrine of *idem sonans* was adopted by the Ohio Supreme Court in *Lessee of Pillsbury v. Dugan's Administrator* (1839), 9 Ohio 117. There the court held that Mrs. Pillsbury was on sufficient notice that her one-eighth interest in certain real estate was being adjudicated, even though the petition for partition listed her as "Pillsby." Its reasoning was expressed in these terms:

In adjudicating upon transactions occurring in the early settlement of our state, we must never forget the absence of precedents and system, the different usages introduced by people emigrating from every part of the country, the want of knowledge or neglect of technical learning, and the risk of loss of evidence from the lapse of time. Hence errors of form have

¹The doctrine of *idem sonans* is defined in 70 OHIO JURISPRUDENCE 3d (1986) 21-22, *Names*, Section 18, as follows:

"The arbitrary orthography and pronunciation given to proper names, and the variant spelling resulting from ignorance have led the courts to formulate the doctrine of 'idem sonans,' which means 'sounding the same.' Under this doctrine a mistake in spelling the name of a party is immaterial if both modes of spelling have the same sound. The grounds for applying the doctrine to slight variations in spelling is that of de minimis non curat lex – the principle that the law is not concerned with trifles. The general rule in Ohio seems to be that a change in the spelling of a word which does not alter its meaning, or in the spelling of a name where the *idem sonans* is preserved, is not a material variance. Thus, it is not every mistake in names which will invalidate an instrument or proceeding. To have this effect, the mistake must be such that a person cannot be identified, or that the error describes another. Since words are intended to be spoken, bad spelling will not vitiate their intended effect where the sound is substantially preserved."

always been overlooked, where the acts of a court are manifest, and its jurisdiction established.

It is not every mistake in names which will invalidate an instrument or proceeding. *This effect will follow where the person can not be identified*, or where the error is such as to describe another. But words are intended to be spoken; and where the sound is substantially preserved, bad spelling will not vitiate. . . .

Id. at 119-120 (emphasis added).

The petition in *Pillsbury* otherwise identified Mrs. Pillsbury by reference to her father, who died seized of the subject real estate, and to her apparent siblings and in-laws. Further, the petition correctly identified the real estate. Thus, she could be identified in spite of her misspelled name. . . .

The Ohio Supreme Court next mentioned the doctrine of *idem sonans* in *Buchanan v. Roy's Lessee* (1853), 2 Ohio St. 251, a quiet-title action initiated by Nicholas Longworth. The court, in dicta, mused that the misspelling of Sarah Roy's name as Sarah Ray, in a notice by publication, standing alone might be fatal to the action. Without squarely deciding the question, however, the court went on to note that Sarah Roy could otherwise be identified in the published notice. Thus the "otherwise identified" standard was carried forward from *Pillsbury* to *Buchanan*.

In 1869, the Ohio Supreme Court again dealt with *idem sonans*, this time in a criminal matter. In *Turpin v. State* (1869), 19 Ohio St. 540, a case involving an allegedly forged signature, there was a variance between the spelling of the name as it appeared on the state's exhibit ("R-e-n-n-i-c-k" or "R-u-n-i-c-k"), and the spelling of the name as it appeared in an indictment ("R-e-n-i-c-k"). The court, however, found no fatal flaw in the variance. . . .

NPC cites *Rauch v. Immel* (1936), 55 Ohio App. 71, 23 Ohio Law Abs. 629, 8 O.O. 354, 8 N.E.2d 569, and *Horton v. Matheny* (1943), 72 Ohio App. 187, 27 O.O. 69, 51 N.E.2d 41, as the basis for validation of its claimed error. We note, however, that in *Rauch* the doctrine was applied to a misnomer in a notice of a lawsuit, and in *Horton* it was applied to a misspelling in a deed description. In these two cases, as in *Pillsbury*, *Buchanan*, and *Turpin*, the error did not involve misspellings in a name index.

The case of *Gleich v. Earnest* (1930), 36 Ohio App. 326, 173 N.E. 212, is NPC's best authority because it is factually analogous to the instant mat-

ter. In *Gleich*, the court held that *idem sonans* validated the assertion of a mechanic's lien against the purchaser of the property at a foreclosure sale, even though the foreclosure suit did not name the lienholder. The lienholder had filed its lien against "C. C. Ernest," when in fact the property was held in the name of "Chester C. Earnest." The court's decision upholding the lienholder's position rested upon the testimony of two abstractors who testified that they would have searched the records under both "Ernest" and "Earnest."

In the matter *sub judice*, three experts have given affidavits stating that the doctrine of *idem sonans* should not be applied today as a standard for determining the marketable title of real estate on the basis of irregularities in last names or surnames, and that by custom it is not applied by abstractors in southwestern Ohio.

We hold that the doctrine of *idem sonans* is inapplicable to names that are misspelled in judgment-lien name indexes. We are not a frontier society of pioneers with little education or an absence of precedent and system. Since the Supreme Court issued its opinion in *Pillsbury* in 1839, we have experienced a tremendous growth in the population and the economy, and those developments have spawned countless real estate sales and a volume of litigation resulting in an abundance of indexed judgment liens. In modern society we cannot overlook matters of form by continuing to indulge the outmoded premises of our societal infancy. To impose rigidly the doctrine of *idem sonans* to name indexes now maintained for judgment liens would tax all land abstractors beyond reasonable limits and require them to be poets, phonetic linguists, or multilingual specialists. The additional time necessary to examine name indexes under such a stringent doctrine would make the examinations financially prohibitive.

The appellees, in their brief, demonstrate the difficulty in applying the doctrine of *idem sonans* to the range of spellings implicated in the instant case: Bolan, Bolen, Bolin, Bowlin, Bowlan, Bowlen, Bolun; the addition of double "l," "ein," and "ien" spellings does not even exhaust all conceivable spelling possibilities. The impossibility of the task created by the doctrine of *idem sonans* is further illustrated by the fact that we, as a society and state, are no longer a small homogeneous population primarily of European abstraction. Since our infancy, we have added Asian, African, South American, Oriental and Arabic surnames. The spelling, sound, and pronunciation of our population's surnames create an insurmountable burden for an abstractor to face in appreciating all the possible variations. Un-

der all the circumstances, a strict application of the doctrine today would leave a real estate purchaser with a lingering fear that misspelled lienholders, either negligently or deliberately, might be lurking under the *idem sonans* doctrine in the judgment-debtor indexes.

We further conclude that the misspelling of Bolan as “B-o-l-e-n,” does not rise to being “otherwise identifiable.” Unlike many states that statutorily require land descriptions with lien filings, Ohio’s indexes merely require a name.

Finally, with the exception of *Gleich*, the courts have not strictly applied *idem sonans*. We find instead a conditional application, which includes as a factor whether the individual is otherwise identified, and in only one case has the doctrine been applied to listings in a judgment-lien name index. We cannot, in sum, find any authority mandating strict application of the *idem sonans* doctrine. . . .

Notes and Questions

22.1. True or false: the result in *Belmont* follows from the principle of *nemo dat*? True or false: the result in *Belmont* follows from the principle that a good faith purchaser for value takes free of conflicting transfers of which she had no notice? What work, if any, are these principles doing in the case?

22.2. What result if a deed as delivered to the clerk reads “Bolan” but the clerk enters it in the indexes under “Bolen?” Under “Nolan?” What if the clerk neglects to index it at all? What if the clerk drops the deed behind the radiator and forgets about it?

22.3. Elaine Bolan changed her name to Elaine Belmont when she remarried. If during her first marriage, she co-signed a mortgage with her now ex-husband Michael Bolan, will a title searcher find it in a search under “Belmont?” Whose problem is that? What if her new name is Elaine Bolan-Belmont?

22.4. Problems also arise in determining what a recorded deed actually gives notice of. In *Luthi v. Evans*, 576 P.2d 1064 (Kan. 1978), Grace Owens executed a deed in 1971 granting International Tours “all interest of whatsoever nature in all working interests and overriding royalty interest in all Oil and Gas Leases in Coffey County, Kansas, owned by [Owens].” The deed, which was properly recorded, listed seven leases in Coffey County, but Owens also owned an eighth, the Kufahl lease. Who owns the Kufahl lease? Four years later, Owens gave a deed to the Kufahl lease to J.R. Burris, who had no actual knowledge of the deed to International Tours. Who owns the Kufahl lease now? Would the re-

sult be the same if the deed to International Tours had referred instead to “all Oil and Gas Leases described in the attached Schedule A,” and Schedule A had listed all eight leases, but the deed had been recorded without Schedule A?

22.5. Land records are increasingly maintained using computer databases rather than paper records. Does this cut for or against applying the doctrine of *idem sonans*? Are there ways to improve the quality of the recording system by using computers, so that mistakes like this (and others) are less likely?

22.6. In 2008, the *New York Daily News* “stole” the Empire State Building by recoding a phony deed to it in New York City’s recording system. The deed purported to transfer ownership of the building to “Nelotis Properties L.L.C.”; it bore a fake notary stamp and purported to be “witnessed” by Fay Wray, the actress who starred in *King Kong*. Clerks made no attempt to verify any of the information on the deed, which was duly recorded. Should they have?

22.7. Tax protesters – people who challenge the authority of government to collect taxes – sometimes record multi-million-dollar “liens” against the houses of local tax officials and government lawyers. Unlike the lien in *Belmont*, which resulted from a judgment of an Ohio state court, these “liens” arise from the actions of “common law courts” established by the protesters themselves. What effect does recording one of these “liens” have? What can the victims do about it? How might a state government deal with the general problem of fraudulent recording?

Hartig v. Stratman

729 N.E.2d 237 (2000)

SHARPNACK, Chief Judge:

Melvin and Louise Stratman are the owners of real property located at 2208 E. Walnut St. in Evansville, Indiana. The property next door, at 2210 E. Walnut St., is owned by [Timothy] Hartig. The instant dispute centers around a shared driveway that is located on both parcels of property, with the majority of the driveway being on Hartig’s property.

The record of title to Hartig’s property discloses that Hartig purchased the property from Sean Holmes on September 28, 1995. Holmes in turn purchased the property from John Connell on May 31, 1994. On the same day that Connell sold the property to Holmes, Connell entered into a written easement agreement with the Stratmans regarding the shared driveway. The agreement gave the Stratmans a perpetual easement over the

portion of the driveway that is located upon the parcel at 2210 E. Walnut St. and gave the property owners at 2210 E. Walnut St. a perpetual easement over the portion of the driveway that is located upon the Stratman parcel. The Stratman-Connell easement agreement was recorded in the Vanderburgh County Recorder's Office on June 8, 1994, at 2:25 p.m. The deed transferring the property at 2210 E. Walnut Street from Connell to Holmes was also recorded on June 8, 1994, but it was recorded one minute earlier, at 2:24 p.m. It is undisputed that when Holmes sold the property to Hartig, he did not inform Hartig about the existence of the driveway easement agreement.

Thereafter, on February 13, 1998, the Stratmans filed a complaint alleging that Hartig was blocking the driveway and refusing to allow them to use it. [The Stratmans claimed a prescriptive easement to use the driveway; the court dismissed their complaint.] Then, on August 26, 1998, the Stratmans filed a "Second Paragraph of Amended Complaint," asserting the right to use the driveway by virtue of the Connell-Stratman easement agreement. Thereafter, Hartig filed a motion for summary judgment, which the trial court denied on June 29, 1999. . . .

B.

Hartig next contends that he is entitled to summary judgment because the Connell-Stratman driveway easement agreement was recorded outside his chain of title and therefore not binding on him. Indiana's recording statute provides:

Every conveyance or mortgage of lands or of any interest therein . . . shall be recorded in the recorder's office . . . ; and every conveyance [or] mortgage . . . shall take priority according to the time of the filing thereof, and such conveyance [or] mortgage . . . shall be fraudulent and void as against any subsequent purchaser, . . . or mortgagee in good faith and for a valuable consideration, having his deed [or] mortgage . . . first recorded.

Ind. Code § 32-1-2-16. The purpose of this statute is to provide protection to subsequent purchasers and mortgagees. This protection is derived from the fact that a landowner will not be deemed to have constructive notice of adverse claims that appear outside the chain of title.

To determine the chain of title, the prospective purchaser must go to the recorder's office and search through the grantor index, beginning with the person who received the grant of land from the United States and continuing until the conveyance of the tract in question. The particular grantor's name is not searched thereafter.

Here, when Hartig conducted a title search of the property at 2210 E. Walnut St., he would have discovered the conveyance to Connell. Next, Hartig would have discovered the conveyance from Connell to Holmes that was recorded on June 8, 1994, at 2:24 p.m. Hartig would not have discovered the Connell-Stratford [Ed: presumably "Connell-Stratman"] easement agreement that was recorded one minute later, however, because Connell's name would not have been searched after the conveyance to Holmes was discovered. Therefore, the easement agreement is not within Hartig's chain of title and he cannot be deemed to have constructive notice of its existence. Accordingly, we hold that the trial court erred in denying Hartig's motion for summary judgment with respect to the issue of the driveway easement agreement.

Notes and Questions

22.8. Would it have been easier or harder for Hartig to have discovered the Connell-Stratman easement agreement than it would have been for the De-Camps to have discovered NPC's judgment in *Belmont*?

22.9. *Morse v. Curtis*, 2 N.E. 929 (Mass. 1885), explained,

If [a title examiner] can start with an owner who is known to have a good title . . . he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the index of grantors the name of every person who at any time, through, perhaps, a long chain of title, was the owner of the estate.

Does this policy persuasively justify *Hartig*?

22.10. Suppose the Stratmans reason as follows: Hartig bought without notice, so we lost to him, but we can fix the notice problem going forward. We'll

put up a big sign on our front yard at 2208 E. Walnut St. reading, “We own a driveway easement across 2210 E. Walnut St.” True or false: if the Stratmans do this, anyone who buys the house from Hartig takes with notice of the easement and is therefore bound by it. Would it make a difference if *Hartig v. Stratman* had never been litigated and reduced to judgment?

22.11. In *Hartig*, the Connell-Stratford deed was outside Hartig’s chain of title because it was recorded too late: after Connell was no longer the record owner. Deeds can also be recorded too early: before the grantor is the record owner. How could that happen? Suppose that the Bluth Corporation is building a subdivision on land in Sudden Valley that it is purchasing from the federal government. Although the contract of sale with the government has been signed, the delivery of the actual deed to Bluth has been delayed for complex bureaucratic reasons. You represent the Devon Bank, which is financing the development with a loan to Bluth, which will be secured with a mortgage on the land. The bank’s manager proposes that the bank go through with the loan and protect its interest by recording the mortgage immediately and ensuring that Bluth records the deed from the government as soon as it issues. Is this a good idea?

22.12. Who is a “purchaser . . . for a valuable consideration” entitled to the protection of a recording act? In *Hood v. Webster*, 2 N.E.2d 43 (N.Y. 1936), Florence Hood executed a deed to a farm to her brother-in-law William Hood in 1913; the deed was escrowed and was to be delivered to William at Florence’s death. In 1928, Florence executed and delivered another deed to the same farm, this time to her nephew, Howard Webster. Howard’s deed recited that it was given for “One Dollar and other good and valuable consideration.” Florence died in 1933. Held: the “recital was not enough to put [Howard] into the position of purchaser[] for a valuable consideration.” Is this right? What if the deed had recited that it was given for “Ten Billion Dollars and other good and valuable consideration?” What if Howard had testified that the farm was worth \$20,000 and he had given Florence \$1,000 in cash? The dissent argued that the record showed that William had reneged on a promise to pay Florence \$200 a month for life, and that Howard had “come to live with [Florence] and help her on the farm” when she executed the deed to him. Do these facts affect your view of the case?

Argent Mortgage Co. v. Wachovia Bank N.A.

52 So. 3d 796 (Dist. Ct. App. 2010)

GRiffin, J.

Argent Mortgage Company, LLC [“Argent”] appeals the trial court’s entry of judgment in favor of Wachovia Bank National Association, as Trustee Under Pooling and Servicing Agreement Dated as of November 1, 2004, Asset Backed Pass-Through Certificates Series 2004-WWF1 [“Wachovia”]. Argent argues that the trial court erred by finding that the mortgage now owned by Wachovia has priority over Argent’s mortgage. We reverse.

On August 31, 2004, Gene M. Burkes and Ann Burkes [“the Burkes”] as borrower/mortgagor and Olympus Mortgage Company as lender/mortgagee executed a mortgage [“the Olympus Mortgage”] on real property as security for a \$90,000.00 loan. The Olympus Mortgage was recorded on January 5, 2005. Subsequently, the Olympus Mortgage was assigned to Wachovia. As a result of default, Wachovia filed a complaint to foreclose the Olympus Mortgage and to enforce lost loan documents. Wachovia joined Argent as a defendant, alleging that Argent might claim some interest in or lien upon the subject property by virtue of a recorded mortgage.

On December 10, 2004, the Burkes as borrower/mortgagor and Argent as lender/mortgagee executed a mortgage [“the Argent Mortgage”] as security for a \$65,000.00 loan on the same real property that is the subject of the Olympus Mortgage. The Argent Mortgage was recorded on January 31, 2005. Subsequently, Wells Fargo Bank became the owner of the Argent Mortgage. An action to foreclose the Argent Mortgage was initiated as a result of default.

[Argent and Wachovia filed cross motions for summary judgment.] Ultimately, the trial court deemed “the Florida statutes on recordation,” namely sections 695.01 and 695.11, Florida Statutes, “to be of the race-notice variety,” found that the Olympus Mortgage should have priority over the Argent Mortgage, and entered a partial final judgment in favor of Wachovia.

On appeal, . . . Argent asserts that section 695.01, Florida Statutes, alone determines which mortgage has priority, that section 695.01 is, and, for over a century, has been recognized to be a “notice” statute, not a “race-notice” statute and that, under section 695.01, the Argent Mortgage has priority over the Olympus Mortgage.

Wachovia acknowledges that section 695.01, Florida Statutes, is a “notice” type of recording statute. However, Wachovia contends that amendments made to section 695.11, Florida Statutes, have converted Florida into a “race-notice” state.

As an initial matter, it bears explaining that recording statutes are classified into three categories: race, notice, and race-notice. These can generally be described as follows:

- Under a *race* recording statute, a subsequent mortgagee of real property will prevail against a prior mortgagee of the said real property if the subsequent mortgage is recorded before the prior mortgage.
- Under a *notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee.
- Under a *race-notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee if the subsequent mortgage is recorded before the prior mortgage.

Importantly, under either a notice or a race-notice recording statute, the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage.

Application of each type of recording statute to the undisputed facts here yields the following results:

- Wachovia prevails under a race recording statute because the Olympus Mortgage was recorded before the Argent Mortgage;
- Argent prevails under a notice recording statute because it is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage; and
- Wachovia prevails under a race-notice recording statute because, although Argent is a subsequent mortgagee for value and did not have

notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Olympus Mortgage was recorded before the Argent Mortgage.

Commentators appear uniformly to categorize section 695.01 as a “notice” type of recording statute. *See* 2–26 RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §26.02 (Matthew Bender & Co., Inc. 2010) (“Florida has a notice type recording statute, the primary function of which is to protect subsequent purchasers (which for purposes of this discussion includes mortgagees and creditors who are within the statute’s protection) against claims arising from prior unrecorded instruments . . .”).

Florida courts over time have described and applied Florida’s recording statute in a manner that is consistent with a “notice” type of recording statute. [citing cases] Florida’s approach to the problem was succinctly described by the Florida Supreme Court in *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 100 Fla. 438, 129 So. 892, 895 (1930):

[I]t is generally held, in states having recording statutes similar to ours, that if A conveys lands to B, a bona fide purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second bona fide purchaser for value without notice of B’s interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal with the property and part with his consideration without knowledge of B’s interest. So B is estopped and the equities are with C.

Section 695.01, notwithstanding, the trial court accepted Wachovia’s argument that a 1967 amendment to a different statute, section 695.11, Florida Statutes, entitled, “Instruments deemed to be recorded from time of filing” converted Florida from a “notice” to a “race-notice” jurisdiction.*

*Section 695.11 reads, “All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, . . . and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers . . . and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument

The earliest version of section 695.11 dates back to 1885. Examination of the language of the 1906, 1920, and 1935 iterations of section 695.11, make clear that this statute was intended to provide a mechanism for determining the time at which an instrument was deemed to be recorded. Nothing in the case law suggests that section 695.11 modifies section 695.01. . . .³

Wachovia relies on an earlier opinion of this Court, *Rice v. Greene*, 941 So.2d 1230 (Fla. 5th DCA 2006), in support of its contention that Florida has a race-notice type of recording statute. In *Rice*, this Court . . . found:

In other words, an unrecorded deed is not good or effectual in law or equity against creditors or subsequent purchasers for valuable consideration who are without notice of the transaction. Therefore, *because Mr. Greene had no notice of the earlier warranty deed between Mr. Rice and Mrs. Schwartz and paid valuable consideration for the property, Mr. Greene's recording of his warranty deed before Mr. Rice gives Mr. Greene priority to the property.*

Id. at 1232 (emphasis added). According to Wachovia, this language proves that priority in recording is key. Notably, however, *Rice* does not mention section 695.11 and recording was not an issue. The subsequent purchaser in *Rice* (Mr. Greene) had priority to the property under a notice type of recording statute because he paid value for the property and did not have notice (actual or constructive) of the earlier warranty deed at the time of the conveyance. The fact that Mr. Greene's deed was recorded before Mr. Rice's does not affect the outcome under a notice type of recording statute. Although a portion of the sentence in *Rice*, on which Wachovia relies, mentions recording, in that case, it was superfluous.

We conclude that Florida is, and remains, a “notice” jurisdiction, and notice controls the issue of priority. Since Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the

bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.” —Eds.

³Case law confirms that the purpose of section 695.11 is to determine the time at which an instrument is deemed to be recorded and to serve as notice. [citing cases] Section 695.11 has an important purpose to determine the priority between judgment liens. [citing cases] Because a certified copy of a judgment must be recorded in order to create a lien on real property, a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority.

time of execution of the Argent Mortgage, the Argent Mortgage has priority over the Olympus Mortgage. As such, the trial court erred by entering partial summary final judgment in favor of Wachovia on the issue of priority.

Recordation Statutes

Fla. Stat. § 695.01

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law

N.C. Stat. §47-18

No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies

Alaska Stat. §40.17.080

. . . A conveyance of real property in the state, other than a lease for a term of less than one year, is void as against a subsequent innocent purchaser in good faith for valuable consideration of the property or a part of the property whose conveyance is first recorded. . . .

Notes and Questions

22.13. What kind of recording acts are the three state statutes listed above? Explain how the categorization—**race**, **notice**, or **race-notice**—follows from the text of the statute.

22.14. Who would have won in *Argent* if Argent had recorded on January 3 instead of on January 31? What about in a race jurisdiction? In a race-notice jurisdiction?

22.15. Who would have won in *Argent* if the Burkes had disclosed the existence of the Olympus Mortgage to Argent on December 6? On December 16?

What about in a race jurisdiction? In a race-notice jurisdiction?

Board of Education of Minneapolis v. Hughes
136 N.W. 1095 (Minn. 1912)

BUNN, J.

Action to determine adverse claims to a lot in Minneapolis. . . . The trial resulted in a decision in favor of plaintiff, and defendants appealed from an order denying a new trial.

The facts are not in controversy and are as follows: On May 16, 1906, Carrie B. Hoerger, a resident of Faribault, owned the lot in question, which was vacant and subject to unpaid delinquent taxes. Defendant L. A. Hughes offered to pay \$25 for this lot. His offer was accepted, and he sent his check for the purchase price of this and two other lots bought at the same time to Ed. Hoerger, husband of the owner, together with a deed to be executed and returned. The name of the grantee in the deed was not inserted; the space for the same being left blank. It was executed and acknowledged by Carrie B. Hoerger and her husband on May 17, 1900 [Ed: presumably 1906], and delivered to defendant Hughes by mail. The check was retained and cashed. Hughes filled in the name of the grantee, but not until shortly prior to the date when the deed was recorded, which was December 11, 1910. On April 27, 1909, Duryea & Wilson, real estate dealers, paid Mrs. Hoerger \$25 for a quitclaim deed to the lot, which was executed and delivered to them, but which was not recorded until December 21, 1910. On November 19, 1909, Duryea & Wilson executed and delivered to plaintiff a warranty deed to the lot, which deed was filed for record January 27, 1910. It thus appears that the deed to Hughes was recorded before the deed to Duryea & Wilson, though the deed from them to plaintiff was recorded before the deed to defendant.

The questions for our consideration may be thus stated: (1) Did the deed from Hoerger to Hughes ever become operative? (2) If so, is he a subsequent purchaser whose deed was first duly recorded, within the language of the recording act?

The decision of the first question involves a consideration of the effect of the delivery of a deed by the grantor to the grantee with the name of the latter omitted from the space provided for it, without express authority to the grantee to insert his own or another name in the blank space. It

is settled that a deed that does not name a grantee is a nullity, and wholly inoperative as a conveyance, until the name of the grantee is legally inserted. . . . [T]he deed to defendant Hughes was not operative as a conveyance until his name was inserted as grantee. [But] Hughes had implied authority from the grantor to fill the blank with his own name as grantee, and . . . when he did so the deed became operative.

When the Hughes deed was recorded, there was of record a deed to the lot from Duryea & Wilson to plaintiff, but no record showing that Duryea & Wilson had any title to convey. The deed to them from the common grantor had not been recorded. We hold that this record of a deed from an apparent stranger to the title was not notice to Hughes of the prior unrecorded conveyance by his grantor. He was a subsequent purchaser in good faith for a valuable consideration, whose conveyance was first duly recorded; that is, Hughes' conveyance dates from the time when he filled the blank space, which was after the deed from his grantor to Duryea & Wilson. He was, therefore, a "subsequent purchaser," and is protected by the recording of his deed before the prior deed was recorded. The statute cannot be construed so as to give priority to a deed recorded before, which shows no conveyance from a record owner. It was necessary, not only that the deed to plaintiff should be recorded before the deed to Hughes, but also that the deed to plaintiff's grantor should be first recorded.

Our conclusion is that the learned trial court should have held on the evidence that defendant L. A. Hughes was the owner of the lot.

Notes and Questions

22.16. The deed from Duryea & Wilson to the plaintiff is called a "wild deed." Why? Draw a diagram of the conveyances in *Hughes*, noting which of them were recorded. What would someone searching the title to the property have found? Put another way, what went wrong here? Whose fault was it? What can or should a recording system do about it?

22.17. What kind of recording act does Minnesota have, according to *Hughes*? How can you tell? Would the result have been different under either of the other types of recording acts?

22.18. What result if Hughes had filled in his name on the blank deed when he received it from Hoerger in 1906 rather than when he recorded it in 1910?

Note on Recording Systems and Informal Title

Up to a billion people worldwide are squatters, living on land they have no legal right to occupy, usually on the outskirts of cities. They're vulnerable to eviction or at least extortion from officials who take advantage of their lack of legal rights. Moreover, the influential economist Hernando De Soto has argued that record title would help poor people enter the formal economy by giving them clear ownership of assets. Poor people are often highly entrepreneurial, but face great barriers entering the formal economy – and thus their efforts may lead to fines and jail rather than to wealth. As owners, they'd have better incentives to invest in improving their land; they could also pledge their land to lenders in order to raise capital to start legitimate businesses; and they might even be able to get insurance in case of disaster. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000). In the U.S., about 70% of new business credit comes from using title to other assets, such as homes, as collateral. The likelihood of being able to recover from these identifiable assets is the foundation of much willingness to lend. De Soto argues that: "Property is much more than a body of norms. It is also a huge information system that processes raw data until it is transformed into facts that can be tested for truth, and thereby destroys the main catalysts of recessions and panics – ambiguity and opacity." Hernando de Soto, *Toxic Assets Were Hidden Assets*, WALL ST. J., Mar. 25, 2009. Legal title and a robust recording system provides reliable information.

De Soto's views have been highly influential, but also controversial. Record title might help for specific situations, but the government first has to decide to give the title to the people who are living on the land, and that generally requires formally dispossessing someone else – often someone wealthy who will fight back. De Soto favors squatters' rights, and his argument depends in many ways on the same foundation as adverse possession. However, if the "legal" owners' title was unjustly acquired – which is often the case – then squatters' rights can also be founded on theories of labor or first in time.

Does formalizing title work? The evidence is mixed. De Soto's ideas were adopted as part of land title reform in Peru. In a six-year period, more than 1.2 million households, containing 6.3 million people, received title to the properties they were living on. Using similar areas that weren't subject to reform as controls, Erica Field determined that labor force participation increased and child labor decreased. Apparently, many squatter families try to run a small business out of their house so they can safeguard the homestead at the same

time; with legal title, that's no longer necessary. However, there was not much evidence of increased access to credit, contrary to de Soto's predictions. See Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122 Q.J. ECON. 1561 (2007). By contrast, in Thailand, the size of loans obtained from banks by farmers with formalized property was more than 50% larger than loans to farmers without record title. Results from around the world are ambiguous; formal title sometimes seems to spur investment, and sometimes it doesn't. See CLAUDIA R. WILLIAMSON, **THE TWO SIDES OF DE SOTO: PROPERTY RIGHTS, LAND TITLING, AND DEVELOPMENT**, ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS 95 (2011).

Moreover, it's important not to make the overgeneralized claim that "strong" or "clear" property rights are necessary for economic development. It should already be clear to you that Western property rights vary a lot and can be subject to lots of their own uncertainties, from the acts required to possess a previously unowned resource to the boundaries of an intellectual property right. England industrialized while its property law was highly unclear. What's needed is sufficient certainty to go forward, not perfect certainty – and that certainty can come from various sources, including but not limited to formal law.

The first Chinese law focusing specifically on property rights did not become effective until 2007. China's unprecedented real estate development during the prior two decades thus occurred without any published law of real estate; investors committed hundreds of billions of dollars without assurance of what they would own even if all went well. See GREGORY M. STEIN, **MODERN CHINESE REAL ESTATE LAW** (2012). In Shenzhen, an economic powerhouse of a city with over 10 million residents, half of the buildings have no legal titles. Instead, professionals have developed practices and networks, including government officials (with a bit of bribery thrown in), that facilitate transactions even among strangers. See Shitong Qiao, *Planting Houses in Shenzhen: A Real Estate Market without Legal Titles*, 29 CAN. J.L. & SOC. 253 (2013). Qiao quotes an official at the Shenzhen Real Estate Ownership Registration Center: "Nobody cares whether they have legal titles or not. You say they are illegal: dare you void the contracts? . . . There is a huge amount of transactions – you say farmers cannot sell, it is illegal [because the Chinese government owns all rural land], but they do it privately with little ado. Are you to tell them whether it is legal or illegal?" Another quote from a senior official: "[I]t is a war against the people that cannot be won." Facts on the ground matter. On the other hand, China has also repeatedly suffered from conflicts, sometimes violent, between developers who claim government sanction and squatters who assert that their actual possession should

be respected.

At a minimum, record title can be useless without an overall well-functioning legal system. If corruption is a nation's problem, title won't solve that by itself. In addition, expropriation by the wealthy or well-connected is an enduring problem. Without careful implementation of a titling system, it's the already-powerful who end up with legal title – either initially, or when the formal system's property taxes start to kick in. A De Soto-type titling program in Cambodia led to fires and forced evictions of slum dwellers, followed by transfers of newly valuable inner-city land to wealthy developers. See John Gravois, *The de Soto Delusion*, SLATE, Jan. 29, 2005. Older programs to provide title to members of Indian tribes, supposedly to help them integrate into the broader U.S. economy, suffered from similar problems. See Ezra Rosser, *Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling*, in HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010).

If De Soto is right, the U.S. may have turned its back on his insights by inflicting serious damage on our land recording system and investing too much in financial instruments for which no centralized records are available. Even without the mortgage crisis, in the U.S., not everyone has record title, especially in low-income communities where property often transfers by intestate inheritance. In Louisiana, for example, an estimated 15% of the homeowners who applied for federal housing assistance after Hurricane Katrina – approximately 20,000 homeowners – lacked clear record title. This problem affected many homeowners concentrated in the low-income neighborhoods of New Orleans Parish and is one reason they received smaller amounts of help than many other, better-off neighborhoods. In Texas, about one out of five low-income households applying for hurricane recovery assistance had at least one title issue impeding their ability to access assistance. See Heather Way, *Informal Homeownership in the United States and the Law*, 29 ST. L. U. PUB. L. REV. 113 (2009); see also Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002) (discussing large-scale squatter communities in Texas); Zoe Loftus-Farren, *Tent Cities: An Interim Solution to Homelessness and Affordable Housing Shortages in the United States*, 99 CALIF. L. REV. 1037 (2011). Should the U.S. consider schemes for titling people or communities presently without record title?

Problems

22.19. Peter and Nathan Petrelli are the record owners of land in Disturbia. They hold the land as joint tenants. Peter conveys his interest to Angela Petrelli, who pays fair market value for it. Angela gives her interest to her granddaughter Claire Bennet, who records. Peter and Nathan then sell the land to Matt Parkman, who doesn't know anything about Peter's earlier conveyance to Angela. Matt records. Disturbia's recording statute reads in relevant part as follows: "Every conveyance is void as against any subsequent purchaser of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Who owns what, and why?

22.20. Peter Bishop and Olivia Dunham are the record owners of Fringeacre as joint tenants with right of survivorship. Bishop and Dunham grant Bishop's father, Walter Bishop, an easement to pasture his cows on Fringeacre. Walter does not record the easement. Later, Dunham gives her interest in Fringeacre as a gift to Astrid Farnsworth, who does not know about Walter Bishop's easement, and who records. When Dunham subsequently dies, Peter Bishop sells Fringeacre to Philip Broyles, who had seen Walter's cows grazing on the property; when Broyles asked Peter about the cows, Peter said, "Yeah, I let my dad do that." Broyles records. The relevant recording statute is: "No conveyance or mortgage of an interest in land is valid against any subsequent purchaser for value without notice thereof, unless it is recorded." Who owns what, and why? How, if at all, would the answer change if the recording statute read, "Every unrecorded conveyance of an interest in land shall be void as against any subsequent purchaser in good faith and for a valuable consideration whose conveyance shall be first duly recorded"?

22.21. Damon Salvatore conveys Blackacre to Bonnie Bennet. Salvatore subsequently conveys Blackacre to Caroline Forbes for valuable consideration. Forbes lacks knowledge of the deed to Bennet. Bennet records, then Forbes records. Thereafter, Forbes sells the western half of Blackacre to Jeremy Gilbert, and the eastern half back to Salvatore. Who owns Blackacre and why? Answer with respect to each of the following laws (Hint: first identify what type of statute this is):

1. "No conveyance or mortgage of an interest in land is valid against any subsequent purchaser for value without notice thereof, whose conveyance is first recorded."
2. "No conveyance or mortgage of an interest in land is valid against any sub-

sequent purchaser for value without notice thereof, unless it is recorded.”

3. “No conveyance or mortgage of an interest in land is valid against any subsequent purchaser whose conveyance is first recorded.”

Chapter 23

Takings

We now address a final method of resolving incompatible property uses. **Eminent domain** is the inherent power of the state to transfer title of private property into state hands. In the United States, when the government **takes** land in this manner, it must pay the owner **just compensation**. This is a constitutional requirement, as the Fifth Amendment provides, “nor shall private property be taken for public use, without just compensation.” This brief constitutional provision encompasses three distinct issues that we will deal with in this chapter (though not in this order): (1) has there been a “taking” of private property? (2) Is the taking for **public use**? And (3) has “just compensation” been provided?

Precedent under the Takings Clause regulates the manner in which the state directly exercises its eminent domain power. As we will see, however, the clause also limits the ability of the state to regulate. Property owners sometimes challenge property regulations as being so onerous that it is as if the state has appropriated property and compensation is therefore due. Much of the Supreme Court’s takings caselaw concerns these so-called “regulatory takings.”

23.1 Rationales

The power to take property is recognized (but not granted) by the Constitution and long historical practice, but what justifies it? Simply calling it an attribute of sovereignty does not provide a reason for its use. Property ownership usually encompasses the right to say no. If I want to ship a mobile home across your field, but we don’t agree on a price, it’s my duty to stay out. I cannot declare your property mine in exchange for a judicially determined measure of

“just compensation.” What makes the state different?

One traditional explanation concerns the transaction costs of government enterprises. In a normal market, buyers can choose from among competing sellers. If houses in town A are too expensive, you can look for one in town B, and if you are priced out of the market, so be it. The state is often more constrained. Imagine a planned road that will connect two cities. Building the road requires assembling multiple, connected parcels. The number of plausible routes is finite, and increasingly constrained as plans progress. Owners along the planned route therefore may hold out for higher sale values, knowing the state has few alternatives. The absence of a functioning market depletes the social surplus of the road and may kill the project altogether. Eminent domain enables the government to engage in projects like these without the risk that a single property owner might exercise a veto.¹ Of course private entities sometimes undertake large projects. Why might they succeed despite lacking the eminent domain power? For one argument, see Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 5 (2006) (“[T]akings for the benefit of private parties are generally unnecessary—even if a private project potentially also has a public benefit—because private parties can avoid the holdout problem using secret buying agents. These undisclosed agents overcome the holdout problem by purchasing property without revealing the identity of the assembler or the nature of the assembly project to existing owners.”).

A second question concerns the requirement of compensation. Why do you think it is required? Fairness? Perhaps, but life is unfair. Moreover, we have insurance to protect against life’s calamities. Why couldn’t we insure against government takings? Might the answer have something to do with the nature of government action? Unlike forces of nature, it is susceptible to outside influence. Can you think of other rationales? For a discussion, see Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451 (2003). If the government did not have a duty to compensate, how would its behavior

¹And courts sometimes do require property owners to take the money and bear an intrusion. For example, private condemnation statutes allow landlocked owners to obtain access to public roads so long as they pay compensation. Likewise, we will see in *Boomer v. Atlantic Cement Co.* that courts can require nuisance plaintiffs to accept a de facto servitude on their land upon payment of permanent damages by the defendant. Both situations may be described as involving high transaction costs either in the form of bilateral monopoly or problems of coordinating numerous parties.

change?

23.2 “Public Use”

The Fifth Amendment declares that if private property is taken “for public use” compensation is required. What function does the term “public use” play in the clause? One could read the phrase as descriptive, i.e., as describing situations in which the government takes property via eminent domain (as opposed to taking it via the exercise of other powers, like taxation or punishment for a criminal offense). Under that reading, the only limit to the state’s taking authority is its willingness to pay (and the operation of other Constitutional requirements, like Equal Protection, Due Process, or the like). The Supreme Court takes a different view. Its precedent treats the term “for public use” as a *substantive* limitation to the takings power, albeit not a strong one.

Kelo v. City of New London

545 U.S. 469 (2005)

Justice STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” In assembling the land needed for this project, the city’s development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city’s proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a “distressed municipality.” In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort

Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. . . . Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide

land for office and retail space, parking, and water-dependent commercial uses.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to “build momentum for the revitalization of downtown New London,” the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City’s name. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the “public use” restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City’s

proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." Next, relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use and, second, whether the takings were for "reasonably foreseeable needs." The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass.

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on

a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. . . .

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” [Midkiff, 467 U.S.] at 244. Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. . . . Thus, in a case upholding a mining company’s use of an aerial bucket line to transport ore over property it did not own, Justice Holmes’ opinion for the Court stressed “the inadequacy of use by the general public as a universal test.” *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906). We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area’s 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and ar-

guing that the creation of a “better balanced, more attractive community” was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful. The Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.” The public use underlying the taking was unequivocally affirmed:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit’s view that it was “a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B’s private use and benefit.” Reaffirming *Berman*’s deferential approach to legislative judgments in this field, we concluded that the State’s purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. “[I]t is only the taking’s purpose, and not its mechanics,” we explained, that matters in determining public use. . . .

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have

evolved over time in response to changed circumstances. . . . For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis

for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. . . . The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. . . . The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Just as we decline to second-guess the City's considered judgments

about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. . . .

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek. . . .

Justice KENNEDY, concurring.

. . . This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental

or pretextual public justifications. . . .

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. [Justice Kennedy went on to observe that the trial court made findings that supported the conclusion "that benefiting Pfizer was not 'the primary motivation or effect of this development plan'".] . . . This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause. . . .

. . . There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development. . . .

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

. . . Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent. . . .

. . . Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things

that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. But “public ownership” and “use-by-the-public” are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). . . .

. . . We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. It had become burdened with “overcrowding of dwellings,” “lack of adequate streets and alleys,” and “lack of light and air.” Congress had determined that the neighborhood had become “injurious to the public health, safety, morals, and welfare” and that it was necessary to “eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose,” including eminent domain. Mr. Berman’s department store was not itself blighted. Having approved of Congress’ decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot.

In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State’s land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State’s most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature had concluded that the oligopoly in land ownership was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,” and therefore enacted a condemnation scheme for redistributing title. . . .

In moving away from our decisions sanctioning the condemnation of

harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power. . . .

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that “the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.” 1 *Commentaries on the Laws of England* 134–135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for “public necessity,” but instead for “public use.” Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a “[P]ublic [P]urpose” Clause (or perhaps the “Diverse and Always Evolving Needs of Society” Clause (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is “legitimate” and the means “not irrational.” This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a “public use.”

I cannot agree. If such “economic development” takings are for a “public use,” any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O’CONNOR powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court’s error runs deeper than this. Today’s decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government’s eminent domain power. Our cases have strayed from the Clause’s original meaning, and I would reconsider them. . . .

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. . . .

. . . In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, *Downtown, Inc. How America Rebuilds Cities* 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, *Poletown: Community Betrayed* 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects. . . .

Notes and Questions

23.1. If the state pays compensation and bears the political costs, what is wrong with taking from A and giving to B? Suppose the state wants land to be used for a particular purpose. Is it sensible to require the state to conduct oper-

ations or might turning them over to private actors enhance efficiency? Or is a “public use” requirement more about policing local political processes, deterring corruption or special interest capture? If so, is this an efficient mechanism?

23.2. *Kelo* provoked a strong public reaction and a flurry of state legislative activity designed to control abuses of eminent domain. By 2009, 43 states had enacted eminent domain restrictions. Does this mean that democracy works? Are there advantages to the Supreme Court’s setting limits on eminent domain? Compare Alberto B. Lopez, *Revisiting Kelo and Eminent Domain’s “Summer of Scrutiny,”* 59 ALA. L. REV. 561, 565 (2008) (“[P]ost-*Kelo* legislation symbolizes the government’s effort to remedy the breach of the public’s trust caused by *Kelo* regardless of one’s substantive view of those legislative measures. Furthermore, the robust post-*Kelo* legislative response is a testament to the strength of one of the core principles of our government—federalism.”), with Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2105 (2009) (“Only seven states that had recently engaged in significant numbers of economic development and blight condemnations have enacted post-*Kelo* legislative reforms with any real teeth.”). Can one’s answer be independent of one’s prior views on the legitimate uses of eminent domain?

23.3. As Justice Thomas’s dissent notes, one criticism of the eminent domain power has been that it has been used in either a discriminatory or racially disproportionate manner. Which way does this consideration cut in *Kelo*? After all, the practice of labeling of minority communities as “blighted” is a matter of historical record. Might the Court’s approval of eminent domain’s use on *Kelo*’s facts improve the politics of eminent domain law by making clear that anyone could be on the receiving end of a condemnation? And to the extent the problem with eminent domain is discriminatory application, why isn’t the Constitution’s Equal Protection Clause a preferable safeguard? Or does the history cited by Justice Thomas answer that question?

23.4. Most of the affected homeowners in New London negotiated a purchase price with the New London Development Corporation (NLDC). For her part, *Kelo* reportedly turned down a purchase offer that would have netted her a \$22,000 profit on her home. The decision to litigate, while not letting her keep her property, did lead to a higher purchase price. The public outcry in the wake of the *Kelo* ruling led to favorable settlements for the holdout landowners. For example,

Kelo agreed in June 2006 to sell for \$442,000 (\$392,000 plus a payoff of her \$50,000 mortgage); not too bad for a place she had

purchased in August 1997 for \$53,500, and NLDC had appraised for condemnation at \$123,000 in November 2000. She only sold the lot. Avner Gregory, the same preservationist who had refurbished the house after moving it from its original location to the site where Kelo found it, relocated the house a second time to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as “The Kelo House.”

George Lefcoe, *Jeff Benedict’s Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 954-55 (2010) (footnotes omitted). In 2009 Pfizer announced it would leave New London to cut costs, taking its jobs to its facility in Groton, Connecticut. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, November 13, 2009, at A1, <http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>.

23.3 Eminent Domain Operations

Local governments carry out condemnations in a variety of ways. There is no standard eminent domain regime. Some states require some sort of pre-condemnation activity (e.g., formal findings that a condemnation is necessary or efforts to negotiate with the landowner); others do not. Some jurisdictions require the condemning authority to initiate a judicial action; others allow an administrative procedure, giving the landowner the right to challenge the taking in court. Some states provide for expedited procedures, “quick take” provisions, either as an independent cause of action or by motion within an ongoing proceeding. 13 POWELL ON REAL PROPERTY § 79F.06.

In Illinois, for example, the condemning authority files an eminent domain action in the circuit court for the county of the property. The complaint details: “(i) the complainant’s authority in the premises, (ii) the purpose for which the property is sought to be taken or damaged, (iii) a description of the property, and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known.” 735 ILL. COMP. STAT. ANN. § 30/10-5-10. Either the condemning authority or the property owner may request a jury trial. Expedited procedures (called a “quick take” procedure) are also available upon motion. *Id.* § 30/20-5-5.

23.4 Just Compensation

What is just compensation? The standard approach is fair market value. See, e.g., 735 ILL. COMP. STAT. ANN. § 30/10-5-60 (“[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale.”). This amount may include costs directly attributable to the condemnation. See *id.* § 735 ILL. COMP. STAT. ANN. § 30/10-5-62 (providing for compensation of reasonable relocation costs).

Evidentiary difficulties aside, the fair market value metric potentially understates the value of the home from the perspective of the property owner in at least three ways. First, fair market value ignores subjective values. A property owner often values it more than the market (as reflected by the fact that it has not yet been sold for the market price). If the property is a home, it may have high sentimental value (e.g., if it is where one raised children) or offer idiosyncratic amenities that cannot be easily duplicated but are not reflected in market price (e.g., proximity to friends, work, etc.). Second, eminent domain is a forced transaction. The landowner may experience the transaction as a violation of personal autonomy. Third, to the extent the project produces a surplus, the displaced landowner does not get a share. In other words, suppose five lots are each individually worth \$10,000, but they can be assembled into a park that confers \$100,000 of benefits on the surrounding area. The owners of the condemned lots do not share in the surplus, they still receive only \$10,000. See, e.g., 735 ILL. COMP. STAT. ANN. § 30/10-5-60 (“In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and any depreciation in value proximately caused by the improvement”).

What happens when only part of a parcel is taken? The general approach is to allow compensation for the effect of the severance on the land retained by the condemnee. Imagine O owns Blackacre and Whiteacre as one parcel with a combined value of \$100,000. If Blackacre is taken for a fair market value of \$50,000, and the severance leaves Whiteacre worth only \$40,000, O is entitled to compensation for the lost \$10,000. Note, however, that if O owned *only* Whiteacre, and its value was reduced by \$10,000 due to the next-door condemnation of Blackacre, O would receive nothing. 13 POWELL ON REAL PROPERTY § 79F.04.

What if a partial taking *enhances* the value of the remainder? See, e.g., 735

ILL. COMP. STAT. ANN. § 30/10-5-55 (“In assessing damages or compensation for any taking or property acquisition under this Act, due consideration shall be given to any special benefit that will result to the property owner from any public improvement to be erected on the property.”); *Illinois State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chicago*, 642 N.E.2d 1249, 1255 (Ill. 1994) (“[S]pecial benefits are any benefits to the property that enhance its market value and are not conjectural or speculative.”).

This mix of rules leads to results that may strike you as unfair. Imagine a government project to build a subway station, and three affected landowners, Alice, Bob, and Charles. Alice’s parcel is condemned in its entirety; half of Bob’s land is condemned; and Charles’s land is untouched. Suppose further that the transit station leads to a doubling in the property values of the surrounding land. On these facts, Alice receives the pre-project value of her land. Bob receives nothing (assuming the appreciation of his retained half matches the pre-project value of the condemned portion); and Charles receives a windfall. Is there any way to avoid these difficulties?

Holders of future interests are also entitled to compensation. See generally 2 NICHOLS ON EMINENT DOMAIN § 5.02; see, e.g., CAL. CODE CIV. PROC. § 1265.420 (“Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following: (a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman; (b) The compensation to be used to purchase comparable property to be held subject to the life tenancy; (c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy; (d) Such other arrangement as will be equitable under the circumstances.”).

23.5 Physical Occupations

Loretto v. Teleprompter Manhattan CATV Corp.
458 U.S. 419 (1982)

Justice MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner’s property authorized by government consti-

tutes a “taking” of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. In this case, the cable installation occupied portions of appellant’s roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing cable television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

“On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street.”

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter’s roof cables did not service appellant’s building. They were part of what could be described as a cable “highway” circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called “crossovers”—cable lines extending from one building to another in order to reach a new group of tenants. Two years after appellant purchased the building, Teleprompter connected a “noncrossover” line—*i.e.*, one that provided CATV service to

appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable." The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time \$1 payment is the normal fee to which a landlord is entitled. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking."

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief. Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. The Appellate Division affirmed without opinion.

On appeal, the Court of Appeals, over dissent, upheld the statute. . . . The court . . . ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community

benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the \$1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the \$1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction.

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co. v. New York City* the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." But the inquiry is not standardless. The economic impact of the

regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, e.g., *Pumpelly, supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot."

Since these early cases, this Court has consistently distinguished be-

tween flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

In *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. . . .

Similarly, in *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. . . .

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause. . . .

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not sim-

ply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As Part II-A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the

area permanently occupied. Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.¹⁷ . . .

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently

¹⁷It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . .

affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).¹⁹

¹⁹If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental"; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. Appellant, who resides in her building, further testified that the cable installation is "ugly." Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.²⁰ . . .

Justice BLACKMUN, with whom Justice BRENNAN and Justice WHITE join, dissenting.

. . . In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." Sax, Takings and the Police Power, 74 Yale L.J. 36, 37 1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. . . .

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred. . . .

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, and jurisprudentially sound. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases

burden.

²⁰In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights."

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. . . .

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "permanent physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly-created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing

conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.” Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship. If § 828 authorizes a “permanent” occupation, and thus works a taking “without regard to the public interests that it may serve,” then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.

The Court denies that its theory invalidates these statutes, because they “do not require the landlord to suffer the physical occupation of a portion of his building by a third party.” But surely this factor cannot be determinative, since the Court simultaneously recognizes that temporary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court’s test, the “third party” problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court’s formula—a “physical touching” by a stranger—was satisfied and that § 828 therefore worked a taking. Literally read, the Court’s test opens the door to endless metaphysical struggles over whether or not an individual’s property has been “physically” touched. . . .

Third, the Court’s talismanic distinction between a continuous “occupation” and a transient “invasion” finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting “temporary” physical invasions of considerable economic magnitude. Moreover, precedents record numerous other “temporary” officially authorized in-

vasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula."

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to . . . provide utility

connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building.” Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. A landlord’s dispositional rights are affected no more adversely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

The Court also suggests that § 828 unconstitutionally alters appellant’s right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants’ use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter’s cable occupies on appellant’s building. If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another’s expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner’s use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State’s interference is so severe as to constitute a compensable taking in light of the owner’s alternative uses for the property. Appellant freely admitted that she would have had no other use for the cable-occupied space, were Teleprompter’s equipment not on her building.

The Court’s third and final argument is that § 828 has deprived appellant of her “power to exclude the occupier from possession and use of the space” occupied by the cable. This argument has two flaws. First, it unjustifiably assumes that appellant’s tenants have no countervailing property interest in permitting Teleprompter to use that space. Second, it suggests that the New York Legislature may not exercise its police power to affect appellant’s common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner’s common-law rights, without compensation, if the legislative ac-

tion serves sufficiently important public interests. . . .

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination. Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States v. Causby*, 328 U.S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

Notes and Questions

23.5. Remember Michael Gruen of *Gruen v. Gruen* fame? He became a lawyer and argued the case for Loretto.

23.6. Loretto's victory at the Supreme Court amounted to little. The Commission on Cable Television decided that \$1 sufficed as compensation because cable television access enhances property values, and the Court of Appeals held it was permissible for the compensation to be set by the commission, subject to later judicial review, rather than a court. *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 434 (N.Y. 1983).

23.7. **Categorical Rules.** One debate between the majority and the dissent concerns the merits of rules versus standards. As we will discuss in greater detail, the Court had developed a balancing test for determining whether government regulation goes "too far" and becomes a taking. The question thus arose whether that balancing test applies to *all* takings inquiries. Even if *Loretto* had gone the dissent's way, it still would be the case that physical invasions would generally be takings. The dispute was over whether courts have the discretion to treat certain minor intrusions sufficiently *de minimis* as not to require compensation. The Court rejected this approach, clarifying that any permanent physical occupation by or authorized by the government is a taking as a categorical, *per se*, matter.

23.8. A consequence of the rule is that certain minor intrusions merit compensation, while more costly regulations may pass muster under the balancing test. That problem aside, Justice Blackmun claims that the *per se* occupations rule lacks the compensating benefit of ease of application, pointing to the difficulty of distinguishing permanent from temporary occupations. Do you agree?

23.9. Another point of contention between the majority and dissent is whether it is sensible to allow the state to require by regulation the installation of cable (or other) facilities, but prohibit it from directly authorizing their installation. At some point, might regulation become so extensive that it constitutes a *de facto* occupation? *Yee v. City of Escondido*, 503 U.S. 519 (1992), rejects the argument that rent control laws fall under *Loretto*'s categorical rule, concluding that the decision of the landlord to lease the premises negates the claim of any forced physical occupation.

23.10. **Personal property.** How does *Loretto* apply to personal property? *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), addressed a challenge to a Department of Agriculture program intended to promote stability in the raisin market. The program issued marketing orders that required raisin farmers to set aside a certain percentage of their annual crop. The government took title to the reserved raisins and disposed of them in a variety of ways, including sales in non-competitive markets, returning any net profits to the growers. The Court held this to be a taking under *Loretto*.

Raisin growers subject to the reserve requirement thus lose the entire “bundle” of property rights in the appropriated raisins—“the rights to possess, use and dispose of” them, *Loretto*, 458 U.S., at 435 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government’s “actual taking of possession and control” of the reserve raisins gives rise to a taking as clearly “as if the Government held full title and ownership,” id., at 431 (internal quotation marks omitted), as it essentially does. The Government’s formal demand that the [farmers] turn over a percentage of their raisin crop without charge, for the Government’s control and use, is “of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.” Id., at 432.

576 U.S. at 361-62. As in *Loretto*, the Court rejected the argument that the reserve requirement was permissible given that the government could achieve the same end by simply prohibiting the farmers from selling a portion of their crop.

[T]hat distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends.

Id. The Court likewise determined that the farmers' retention of a contingent monetary interest in the sale of the reserved raisins did not negate the physical taking. Dissenting, Justice Sotomayor argued that *Loretto's* *per se* rule applies only when *all* property rights have been taken, and the farmers' contingent interest negates use of the *per se* rule.

23.11. **Cedar Point and “rights of access”—expanding the *per se* rule.**

Loretto draws a distinction between “permanent” and “temporary” occupations. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (“[T]his Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within, on the other. A taking has always been found *only* in the former situation.” (emphases added)). In so doing, the Court cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which upheld California law requiring a shopping center to allow visitors to exercise free speech and petition rights on its property. *Id.* at 434. On this logic, permanent occupations receive *per se* treatment, while temporary occupations are evaluated under the balancing test—discussed in the next section—to determine whether they rise to the level of a taking.

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court greatly expanded the class of cases subject to a *per se* rule. A California regulation required agricultural employers to permit union organizers to come onto their property. The Court held that this regulation was a *per se* taking.

The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their

own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

141 S. Ct. at 2072. *Cedar Point* raises a host of significant questions, not only about the scope of the *per se* rule, but also about the state's ability to issue regulations that depend on the ability of non-owners to access property (e.g., the conduct of health inspections). It is difficult to discuss *Cedar Point*'s treatment of these issues without first exploring the Court's jurisprudence on regulatory takings and exactions, both of which are covered below. We therefore hold off on a full treatment of *Cedar Point* until after those units.

23.6 Regulatory Takings

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a

human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land-a very valuable estate-and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of

the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 Atl. 820. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to the left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the

United States.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go-and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree-and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. . . .

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

Mr. Justice BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . . subsidence of . . . any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious-as it may because of further change in local or social conditions-the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch v. Swasey*, 214 U. S. 91. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 668, 669; *Powell v. Pennsylvania*, 127 U. S. 678, 682. See also *Hadacheck v. Los Angeles*, 239 U. S. 394; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power. If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why

may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending *ab orco usque ad coelum*. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the state's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. But even if the particular facts are to govern, the statute should, in my opinion be upheld in this case. For the defendant has failed to adduce any evidence from which it appears that to restrict its mining operations was an unreasonable exercise of the police power. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the Legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided

for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. . . . Nor can existing contracts between private individuals preclude exercise of the police power. . . . The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

- (a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.
- (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.
- (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of

the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects; or upon adjoining owners, as by party wall. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Notes and Questions

23.12. **Nuisances.** Justice Brandeis's dissent objects that the Kohler Act simply prohibits a "noxious use." A number of prior precedents, Brandeis argues, established that the state may enjoin such uses even if doing so "deprives the owner of the only use to which the property can then be profitably put." In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), for example, the Court found no taking where an ordinance prohibiting brickyards largely destroyed the value of an existing facility. The land was alleged to be worth \$800,000 as a brickyard and \$60,000 otherwise. Nonetheless, the Court deemed it within the state's police power to declare previously lawful activities to be nuisances and enjoin them. *Id.* at 410 ("[T]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community."). The principle, that regulating nuisances is never a taking, has been referred to as a second categorical rule in takings law. As we will see below (in our discussion of the *Lucas* case), the actual doctrine is not so simple.

23.13. **Diminution of value.** How far is too far depends on how one defines the property interest at stake. For Holmes, the Kohler Act "purports to abolish . . . an estate in land," by preventing the exercise of the mining company's bargained-for rights. On this logic, the diminution of value is total. Brandeis, by contrast, objected that "[t]he rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole." An-

alyzing the takings question by looking at the property as a composition of discrete “estates,” rather than as an integrated whole has been called “**conceptual severance**.” Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (“[T]his strategy hypothetically or conceptually ‘severs’ from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.”).

The issue is also sometimes referred to as the “**denominator problem**. ” Suppose I have a parcel of land that I could sell for \$200,000, but I could also sell the mining rights alone for \$100,000. Suppose further that the state enacts a ban on mining, which reduces the market value of the land to \$100,000. How do we evaluate the diminution of value? Is it 50% ($\$100,000/\$200,000$)? Or is the denominator the mining rights alone, making the diminution 100% ($\$100,000/\$100,000$)? If we were to permit conceptual severance, how should the relevant estates be identified? In *Pennsylvania Coal*, Holmes noted that the mining interest at issue was an established one under state law. Is that a satisfactory basis? Can state law define federal rights in this way? What if an anti-regulatory state legislature took advantage of its time in power to create broad new “estates” (e.g., one for oil drilling, one for factory smoke, etc.)?

23.14. **Support estates revisited.** On this question, note that the Court revisited the takings implications of Pennsylvania statutes designed to protect surface structures from mining. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), upheld a statute whose implementing regulations required coal companies to leave approximately 50% of coal in the ground beneath protected buildings. The Court did so notwithstanding Pennsylvania law’s “unique” approach of treating the “support estate” as a discrete interest in land. By a 5-4 vote, the Court concluded that the interest is part and parcel of other mining interests (thus expanding the denominator at issue in considering diminution of value). “Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.” *Id.* at 501.

This result may seem at odds with *Pennsylvania Coal*. The dissent certainly thought so. The majority read *Pennsylvania Coal* narrowly as reaching only a specific application of the Kohler Act to bargained-for rights to mine under a particular house. The rest, pertaining to the general applicability of the

Kohler Act was described as an “uncharacteristically” advisory opinion on Justice Holmes’s part. *Id.* at 484. In any case, the majority viewed the Subsidence Act as different than the earlier law in two key respects. First, the Court read the history of the statute as disclosing a public purpose. “None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes’ opinion are present here.” *Id.* at 486. That some private parties *did* benefit was seen as incidental. Second, as noted above, the Court viewed the challengers as retaining valuable mining rights. Unlike “the Kohler Act[, which] made mining of ‘certain coal’ commercially impracticable,” the Subsidence Act was not shown to have worked a similar harm, at least for purposes of a facial challenge.

23.15. **Baseline Games.** Is Justice Brandeis’s distinction between “confer[ring] benefits on property owners” and “protect[ing] the public from detriment and danger” persuasive? What Justice Brandeis views as prevention of a harm—preventing the collapse of surface structures overlying coal formations owned by mining interests—Justice Holmes views as conferral of an unbargained-for benefit—a support estate that was willingly bargained away. Is one of them wrong? What is the baseline against which the economic effects of a regulation ought to be evaluated?

23.16. **“Reciprocity of advantage.”** Reciprocity of advantage refers to a sort of implicit compensation of regulation. Suppose you own land in a part of town zoned for residential use. You may not build a factory on your property, but neither can your neighbors. Your property’s residential value is enhanced accordingly. “Under our system of government, one of the State’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.” *Keystone Bituminous Coal Ass’n*, 480 U.S. at 491. The principle is often invoked to argue that regulations should not “single out” anyone for disproportionate burdens. That does not mean that everything comes out even. “The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.” *Id.* at 491 n.21.

Penn Cent. Transp. Co. v. City of New York
438 U.S. 104 (1978)

Mr. Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a “taking” requiring the payment of “just compensation.” Specifically, we must decide whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. “[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.”

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act, adopted its Landmarks Preservation Law in 1965. See N.Y.C. Admin. Code, ch. 8-A, § 205-1.0 *et seq.* (1976). The city acted from the conviction that “the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government” would be threatened if legislation were not enacted to protect

historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205-1.0(a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e.g.*, fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attractions to tourists and visitors”; “support[ing] and stimul [ating] business and industry”; “strengthen[ing] the economy of the city”; and promoting “the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.” § 205-1.0(b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,⁶ but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a “reasonable return” on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have “a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.” If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance’s criteria, it will designate a building to be a “landmark,” situated on a particular “landmark site,” or will designate an area to be a “historic district.” After the Commission makes a designation, New York

⁶The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 Law & Contemp. Prob. 329, 330–331, 339–340 (1971).

City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair. Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return,"—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, to ensure that designation does not cause economic hardship.

Although the designation of a landmark and landmark site restricts

the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building [, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74-79 (emphasis deleted). In addition, the 1969 amendment permits, in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel.

B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed. The Terminal itself is an eight-story structure which Penn Central uses as

a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. . . . At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the "city tax block" it occupies a "landmark site." The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central \$1 million annually during construction and at least \$3 million annually thereafter. The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Breuer I, which would have preserved the

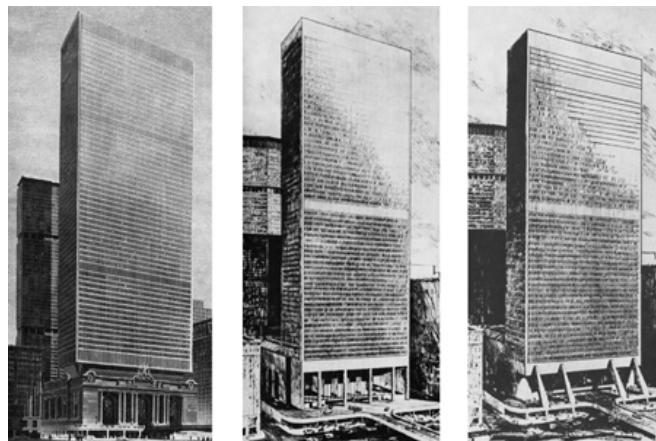


Figure 23.1: Reproductions of the proposals. From <http://www.architakes.com/?p=13036>.

existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan Am Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The “addition” would be four times as high as the ex-

isting structure and would reduce the Landmark itself to the status of a curiosity.

Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.

Appellants did not seek judicial review of the denial of either certificate. . . . Further, appellants did not avail themselves of the opportunity to develop and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking." [The New York Supreme Court, Appellate Division, reversed, and this ruling was affirmed by the state Court of Appeals.]

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute "just com-

pensation” within the meaning of the Fifth Amendment. We need only address the question whether a “taking” has occurred.

A

... The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed “taking” challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant

to constitute “property” for Fifth Amendment purposes. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorrieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but “taking” challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene*, 276 U.S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make “a choice between the preservation of one class of property and that of the other” and since the apple industry was important in the State involved, concluded that the State had not exceeded “its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public.”

Again, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that

the legislature had reasonably concluded that the presence of the brick-yard was inconsistent with neighboring uses. . . .

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Court held that the statute was invalid as effecting a “taking” without just compensation.

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute “takings.” *United States v. Causby*, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant’s land, that destroyed the present use of the land as a chicken farm, constituted a “taking,” *Causby* emphasized that Government had not “merely destroyed property [but was] using a part of it for the flight of its planes.” *Id.*, 328 U.S., at 262–263, n. 7.

B

. . . Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable devel-

opment rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U.S. 603 development of particular parcels.²⁷ "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede

²⁷These cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2 % diminution in value), and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. . . . [B]ut appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions

concerning the Terminal were in any sense arbitrary or unprincipled. But, in any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.³⁰ Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more

³⁰Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual." Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 50 (1964). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's.

severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, or a safety regulation prohibiting excavations below a certain level.

C

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property

interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

. . . [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material and character with [the Terminal]." Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Al-

though appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

Affirmed.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE and Mr. Justice STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the

benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, there is “an average reciprocity of advantage.”

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property as a landmark at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of “zoning” has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the “Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). . . .

I

The Fifth Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its “air rights” over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, how-

ever, the constitutionality of appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause—"property," "taken," and "just compensation."

A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U.S. 373 (1945). . . .

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state. The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.

B

. . . [A]n examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use. . . .

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson*, 222 U.S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner's property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others' land without compensating him. . . .

Appellees are not prohibiting a nuisance. The record is clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety require-

ments. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux-arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States v. Causby*, 328 U.S. 256, 262 (1946), and must compensate the owner for his loss. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

2

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. . . .

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, “the question at bottom” in an eminent domain case “is upon whom the loss of the changes desired should fall.” The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner to make some “reasonable” use of his property. . . .

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, the property owner may theoretically “transfer” his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system “Transfer Development Rights,” or TDR’s.

Of all the terms used in the Taking Clause, “just compensation” has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires “a full and perfect equivalent for the property taken.” *Monongahela Navigation Co. v. United States*, 148 U.S., at 326. . . .

Appellees contend that, even if they have “taken” appellants’ property, TDR’s constitute “just compensation.” Appellants, of course, argue that TDR’s are highly imperfect compensation. Because the lower courts held that there was no “taking,” they did not have to reach the question of

whether or not just compensation has already been awarded. . . .

Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken."

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416. The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

Notes and Questions

23.17. The *Penn Central* test. The *Penn Central* factors are generally listed as an inquiry into "[1] the regulation's economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The first factor concerns diminution of value, an issue raised by *Pennsylvania Coal*. As you see, the Court resisted the conceptual severance claim, rejecting the notion that "air rights" were something to be evaluated independently of the property as a whole.

23.18. Distinct Investment-Backed Expectations. The meaning of the second factor as something distinct from the first is a matter of debate. Unhelpfully, the Court later described the question as being one of "reasonable" investment-backed expectations in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The idea is frequently credited to an article by Frank Michelman, who argued that the principle more accurately captures what may rise to the level of a taking than simple diminution of value:

The customary labels—magnitude of the harm test, or

diminution of value test—obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

The nature and relevance of this inquiry may emerge more clearly if we notice one other familiar line of doctrine . . . when a new zoning scheme is instituted, for "established" uses which would be violations were the scheme applied with full retrospective vigor. The standard practice of granting dispensations for such "nonconforming uses" seems to imply an understanding that simply to ban them without payment of compensation, thus seriously reducing the property's market value, would be wrong and perhaps unconstitutional. But a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1232-34 (1967) (footnotes omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) ("A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'") (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). As the excerpted text notes, the principle

of nonconforming uses in zoning law reflects the importance of property owner expectations in uses that preexist the arrival of new zoning rules.

Michelman's argument, and some precedent, suggests that investment-backed expectations are less likely to be found where the property in question is purchased against a backdrop of regulation. Does that mean that takings challenges are doomed whenever the property is acquired after the offending regulations are in place? In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held in the negative. Ever straining for eloquence, Justice Kennedy concluded that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle. . . . Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.” *Id.* at 627.

23.19. **Character of the Governmental Action.** Here, too, the Court is less than clear, as its example of how this factor might be weighed in the property owner’s favor, a permanent physical invasion, was later held to be a taking as a categorical matter in *Loretto*. That sort of invasion is juxtaposed against an interference “from some public program adjusting the benefits and burdens of economic life to promote the common good,” suggesting room for judgment when a program falls short (e.g., when someone is unfairly singled out for the burdens, whether there is a reciprocity of advantage, etc.). See, e.g., Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 664 (2012) (“Several lower courts have picked up on the idea that the character factor is designed to measure the distributional impact of the challenged governmental action. These courts favor broad-based laws that offer reciprocity of advantage and find suspect laws that single out particular owners for severe burdens while conferring benefits on others.”).

23.20. **Takings and Due Process inquiries distinguished.** The question whether a regulation amounts to a taking is distinct from the issue of whether it violates a liberty or property interest under the Due Process Clause. The latter asks whether the government may impose the challenged regulation at all. The former identifies a subset of cases in which the government regulation is such an intrusion as to require compensation.

In takings cases, you may encounter citations to *Agins v. City of Tiburon* for the proposition that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legiti-

mate state interests.” 447 U.S. 255, 260 (1980). Does this mean that compensation must be paid if the state cannot meet a higher burden than the one required for regulation under the Due Process Clause? No. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-42 (2005), the Court observed the phrase was “regrettably imprecise” and clarified that “it has no proper place in our takings jurisprudence.”

23.21. Several articles report that the government generally prevails under the Penn Central test in the lower courts. F. Patrick Hubbard et al., *Do Owners Have A Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL’Y F. 121 (2003); Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000). One such study argues that calling the factors a balancing test misstates what is actually going on.

The analysis reveals that the Courts of Appeals for the First, Ninth, and Federal Circuits, and the trial courts within the Ninth Circuit, all decided *Penn Central* cases utilizing fewer than three factors in a majority of the cases reaching the merits: on average, the circuit courts of appeals utilized three factors only slightly more than one-third of the time (37.8%). Complementing these findings is data on how often the courts actually applied *Penn Central* as a balancing test. The data shows that applying *Penn Central* as a balancing test is statistically rare. Averaging the cases that reached the merits of a takings claim, the courts applied *Penn* as a balancing test less than 7% of the time. As an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), courts applied it as a balancing test less than 14% of the time. Together this data indicates that the predominant practice of the federal courts is not to use *Penn Central* as a balancing test.

Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 FED. CIR. B.J. 677, 704 (2013). Pomeroy argues that regulatory takings claims prevail only when the court concludes that the regulation looks like an act that is normally a taking as a categorical matter. *Id.* at 696 (“It seems that instead of balancing factual situations, the courts of appeals have found regulatory takings under *Penn Central* only when a claim falls barely short being a taking under one of the categorical rules.”). We have already discussed

one such categorical rule in *Loretto*. We now turn to the second.

23.7 “Wipeouts”

Lucas v. South Carolina Coastal Council
505 U.S. 1003 (1992)

Justice SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C.Code Ann. § 48-39-250 *et seq.* (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas’s parcels “valueless.” App. to Pet. for Cert. 37. This case requires us to decide whether the Act’s dramatic effect on the economic value of Lucas’s lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of “just compensation.” U.S. Const., Amdt. 5.

I

A

South Carolina’s expressed interest in intensively managing development activities in the so-called “coastal zone” dates from 1977 when, in the aftermath of Congress’s passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S.C.Code Ann. § 48-39-10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a “critical area” (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a “use other than the use the critical area was devoted to on [September 28, 1977].” § 48-39-130(A).

In the late 1970’s, Lucas and others began extensive residential devel-

opment of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as “Beachwood East,” Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a “critical area” under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas’s plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a “baseline” connecting the landward-most “point[s] of erosion . . . during the past forty years” in the region of the Isle of Palms that includes Lucas’s lots. S.C.Code Ann. § 48–39–280(A)(2) (Supp. 1988). In action not challenged here, the Council fixed this baseline landward of Lucas’s parcels. That was significant, for under the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48–39–290(A). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act’s construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina’s police power, but contended that the Act’s complete extinguishment of his property’s value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that “at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.” The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas’s lots were concerned, and that this prohibition “deprive[d] Lucas

of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless.” The court thus concluded that Lucas’s properties had been “taken” by operation of the Act, and it ordered respondent to pay “just compensation” in the amount of \$1,232,387.50.

[The Supreme Court of South Carolina reversed, concluding that regulation “to prevent serious public harm” is not a taking regardless no matter the effect on property values.]

III

A

Prior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a “direct appropriation” of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a “practical ouster of [the owner’s] possession,” *Transportation Co. v. Chicago*, 99 U.S. 635 (1879). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, “the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].” These considerations gave birth in that case to the oft-cited maxim that, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going “too far” for purposes of the Fifth Amendment. In 70-odd years of succeeding “regulatory takings” jurisprudence, we have generally eschewed any “set formula” for determining how far is too far, preferring to “engag[e] in . . . essentially ad hoc, factual inquiries.” *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer

a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York’s law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking even though the facilities occupied at most only 1 ½ cubic feet of the landlords’ property.

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*” *Agins, supra*, 447 U.S., at 260 (citations omitted) (emphasis added).⁷

⁷Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333–334, 366 N.E.2d 1271, 1276–1277 (1977), aff’d, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel’s value produced by a municipal ordinance in light of total value of the takings claimant’s other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497–502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515–520 (REHNQUIST, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S.Cal.L.Rev. 561, 566–569 (1984). The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—*i.e.*, whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas’s beachfront lots without economic value.

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S., at 652 (dissenting opinion). “[F]or what is the land but the profits thereof[?]” 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” *Penn Central Transportation Co.*, 438 U.S., at 124, in a manner that secures an “average reciprocity of advantage” to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,” *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. . . .

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.⁸

⁸Justice STEVENS criticizes the “deprivation of all economically beneficial use” rule as “wholly arbitrary,” in that “[the] landowner whose property is diminished in value 95% recovers nothing,” while the landowner who suffers a complete elimination of value “recovers the land’s full value.” This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, “[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.⁹ Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. . . . [and] within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause,

expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations. . . .

⁹This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits that the finding was erroneous.

affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. . . .

The transition from our early focus on control of “noxious” uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from “harming” South Carolina's ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve. Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. A given restraint will be seen as mitigating “harm” to the adjacent parcels or securing a “benefit” for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. Whether Lucas's construction of single-family residences on his parcels should be described as bringing “harm” to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.¹²

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings”—which require compensation—from regulatory deprivations that do not require

¹²In Justice BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title. We believe similar treatment must be accorded confiscatory regulations, *i.e.*,

regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see,

e.g., *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.*, § 827, Comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . ." Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing. . . .

Justice KENNEDY, concurring in the judgment.

. . . In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal prop-

erty may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. . . .

Justice BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. . . .

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage. . . .

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of “protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner.” The General Assembly also found that “development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property.”

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court’s prior cases, the Act is constitutional. “Long ago it was recognized that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491–492 (1987) (internal quotation marks omitted). The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. . . .

The Court creates its new takings jurisprudence based on the trial court’s finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house. . . .

Clearly, the Court was eager to decide this case. . . .

The Court does not reject the South Carolina Supreme Court’s decision simply on the basis of its disbelief and distrust of the legislature’s findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle.

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced" if all economic value has been lost. If one fact about the Court's takings jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S., at 261. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). . . .

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use. Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. . . .

Ultimately even the Court cannot embrace the full implications of its *per se* rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."¹⁵

¹⁵Although it refers to state nuisance and property law, the Court apparently does not

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance. The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. . . .

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation. The Court, however, fails to explain how its proposed common-law alternative escapes the same trap.

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction" is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. . . .

The Court's decision in *Keystone Bituminous Coal* illustrates this principle perfectly. In *Keystone*, the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 U.S., at 501. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. The dissent, however, characterized the support estate as a distinct property interest that was wholly destroyed. The Court could agree on no "value-free

mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, *The Boundaries of Nuisance*, 65 L.Q.Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, *Private Action for Public Nuisance*, 52 Va.L.Rev. 997, 999–1000 (1966); J. Stephen, *A General View of the Criminal Law of England* 105–107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

basis” to resolve this dispute.

Even more perplexing, however, is the Court’s reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly “objective” or “value free.” Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the “long recognized” “understandings of our citizens.” These “understandings” permit such regulation only if the use is a nuisance under the common law. Any other course is “inconsistent with the historical compact recorded in the Takings Clause.” It is not clear from the Court’s opinion where our “historical compact” or “citizens’ understanding” comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution. . . .

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners. . . .

Nor does history indicate any common-law limit on the State’s power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Takings Clause indicates that the Clause was limited by the common-law nuisance doctrine. . . .

In short, I find no clear and accepted “historical compact” or “under-

standing of our citizens" justifying the Court's new takings doctrine. Instead, the Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. . . .

I dissent.

Justice STEVENS, dissenting.

. . . In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow. . . .

Although in dicta we have sometimes recited that a law "effects a taking if [it] . . . denies an owner economically viable use of his land," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), our rulings have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. . . .

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S.C. Acts 634, § 3. Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in *Mugler*, the brickyard in *Hadacheck*, and the gravel pit in *Goldblatt* all could be put to "other uses" and that, therefore, those cases did

not involve total regulatory takings.³

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest "valueless." In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not greatly hinder important governmental functions—but this is true of *any* small class of

³Of course, the same could easily be said in this case: Lucas may put his land to "other uses"—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "economically beneficial or productive use" (emphasis added) of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are developmental uses.

regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some form of public service." . . . I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: A regulation may single out a property owner without depriving him of all of his property; and it may deprive him of all of his property without singling him out. What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U.S. Reports. No sooner does the Court state that "total regulatory takings must be compensated," than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." The Court thus rejects the basic holding in *Mugler v. Kansas*, 123 U.S. 623 (1887). There we held that a state-wide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. . . .

Under our reasoning in *Mugler*, a State's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be pre-

pared to pay for the adverse economic consequences of its decision. One must wonder if government will be able to “go on” effectively if it must risk compensation “for every such change in the general law.” *Mahon*, 260 U.S., at 413.

The Court’s holding today effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.” *Munn v. Illinois*, 94 U.S. 113 (1877). . . .

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined “property.” On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. . . .

The Court’s categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed \$1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law. . . .

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. . . .

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. . . . Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, and what is equally significant, from repairing erosion control devices, such as seawalls. . . . In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike. This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind. . . .

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property. . . .

Statement of Justice SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that . . . the trial court's conclusion is highly questionable. While the respondent now

wishes to contest the point the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us. . . .

Notes and Questions

23.22. For some before-and-after photos of the Lucas lot, visit <http://www.dartmouth.edu/~wfischel/lucasupdate.html>. Writing about *Lucas*, Carol Rose observes that much of what made the case seem unfair to the reviewing courts—the “singling out” of Lucas’s lot—was a byproduct of an effort to limit political opposition to the state’s coastal preservation program by curtailing its regulatory reach. It also limited the ability of the regulations to combat the problems of development. Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea* at 24, in ENVIRONMENTAL STORIES (Richard J. Lazarus & Oliver A. Houck, eds., Foundation Press, 2005), <http://ssrn.com/abstract=706637>. Bad optics notwithstanding, Rose notes that the impacts of development do not accumulate in a linear manner. It may very well make sense to impose restrictions after a period of unchecked growth.

... Environmental resources typically have some threshold below which use is not harmful, but beyond which marginal costs rise not just additively but exponentially. Bodies of water, for example, can tolerate some organic materials, but over a threshold, each increment of additional waste is not just additively but exponentially more damaging to wildlife, vegetation, and water quality. The smoke from an old-fashioned house furnace or two will dissipate without damage, but if you burn enough, you run the risk of a killer fog. Beachfront management is another clear example of this pattern of exponentially rising costs. A single revetment or seawall would have had little impact on South Carolina’s beaches or their ability to replenish themselves; what threatened to become devastating was the accumulation of ever more armored structures. . . .

That is why a conventional notion of equality is inadequate with respect to environmental uses, including land uses. If early uses are relatively harmless, it would be pointless and overly intrusive to try to regulate them. But something has to be done

when later uses slice far enough out on the salami. At that later point, it can be an invitation to environmental disaster to look around at pre-existing uses, and to say that new users should all receive the same old lax treatment, as Scalia suggested in Lucas.

Id. at 38.

23.23. What if someone “comes to” the regulation by purchasing a property *after* the objected-to regulation has been imposed. Does that preclude a takings challenge? As noted previously, the Court held that takings claims remain available lest the state “put an expiration date on the Takings Clause.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

23.24. **Can judges take?** On the question of nuisance definition, what if the state actor declaring/redefining property interests is a court? In *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot.*, a four-Justice plurality opinion would have recognized judicial takings as a viable claim (though in the case at hand it would have found no taking). 560 U.S. 702, 715 (2010) (plurality) (“[T]he Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.”). But don’t judges adjust the contours of property law all the time? How could this basic function of the courts continue if challengeable as a taking? Some of these issues were taken up in the concurrences in *Stop the Beach* and the academic commentary that followed.

23.25. **“Inverse condemnation” procedures.** In regulatory takings cases, the government typically denies that a taking has occurred, so there is no condemnation proceeding. Instead, the property owner brings suit seeking relief. The Tucker Act provides an avenue for federal claimants. The statute waives United States sovereign immunity for claims founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. 28 U.S.C. § 1491(a)(1). The “Little Tucker Act,” § 1346(a)(2), establishes concurrent jurisdiction in the district courts for claims of less than \$10,000. If a state government is the offending regulator, the property owner may look to available state remedies, but may also proceed under the federal civil rights statute. 42 U.S.C. § 1983. A litigant pursuing a § 1983 action need not pursue state remedies first. *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180 (2019) (“[A] government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time. . . . Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. But because the violation

is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action.”).

23.26. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), held that compensation is required for temporary takings. This opened the door to the argument that regulations temporarily suspending certain land uses are takings under the *Lucas* categorical rule. The Court addressed the claim in the following case.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
535 U.S. 302 (2002)

Justice STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81-5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83-21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA’s jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32-month period, a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is “uniquely beautiful,” 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999), that President Clinton was right to call it a “‘national treasure that must be protected and preserved,’ ” *ibid.*, and that Mark Twain aptly described the clarity of

its waters as “‘not *merely* transparent, but dazzlingly, brilliantly so,’” *ibid.* (emphasis added) (quoting M. Twain, *Roughing It* 174–175 (1872)).

Lake Tahoe’s exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake’s pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the “noble sheet of blue water” beloved by Twain and countless others. As the District Court found, “[d]ramatic decreases in clarity first began to be noted in the late 1950’s/early 1960’s, shortly after development at the lake began in earnest.” The lake’s unsurpassed beauty, it seems, is the wellspring of its undoing.

The upsurge of development in the area has caused “increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development.” . . .

Given this trend, the District Court predicted that “unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity.”

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered “high hazard” lands. Moreover, certain areas near streams or wetlands known as “Stream Environment Zones” (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because “[t]he most obvious response to this problem . . . is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff,” conservation efforts have focused on controlling growth in these high hazard areas.

In the 1960’s, when the problems associated with the burgeoning development began to receive significant attention, jurisdiction over the Basin, which occupies 501 square miles, was shared by the States of California and Nevada, five counties, several municipalities, and the Forest Service of the Federal Government. In 1968, the legislatures of the two States adopted the Tahoe Regional Planning Compact. The compact set goals for the protection and preservation of the lake and created TRPA

The 1980 Tahoe Regional Planning Compact (Compact) redefined the structure, functions, and voting procedures of TRPA and directed it to develop regional “environmental threshold carrying capacities”—a term that embraced “standards for air quality, water quality, soil conservation, veg-

etation preservation and noise.” . . . The Compact also contained a finding by the legislatures of California and Nevada “that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.” Accordingly, for the period prior to the adoption of the final plan (“or until May 1, 1983, whichever is earlier”), the Compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also prohibited each city and county in the Basin from granting any more permits in 1981, 1982, or 1983 than had been granted in 1978.

During this period TRPA was also working on the development of a regional water quality plan to comply with the Clean Water Act, 33 U.S.C. § 1288 (1994 ed.). [Because it could not meet the Compact’s timetables,] [o]n June 25, 1981, it therefore enacted Ordinance 81-5 imposing the first of the two moratoria on development that petitioners challenge in this proceeding. The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact.

The District Court made a detailed analysis of the ordinance, noting that it might even prohibit hiking or picnicking on SEZ lands, but construed it as essentially banning any construction or other activity that involved the removal of vegetation or the creation of land coverage on all SEZ lands, as well as on class 1, 2, and 3 lands in California. Some permits could be obtained for such construction in Nevada if certain findings were made. It is undisputed, however, that Ordinance 81-5 prohibited the construction of any new residences on SEZ lands in either State and on class 1, 2, and 3 lands in California. . . .

[TRPA later] adopted Resolution 83-21, “which completely suspended all project reviews and approvals, including the acceptance of new proposals,” and which remained in effect until a new regional plan was adopted on April 26, 1984. Thus, Resolution 83-21 imposed an 8-month moratorium prohibiting all construction on high hazard lands in either State. In combination, Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case. . . .

II

Approximately two months after the adoption of the 1984 plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe-Sierra Preservation Council, Inc., a nonprofit membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of the 1980 Compact primarily for the purpose of constructing “at a time of their choosing” a single-family home “to serve as a permanent, retirement or vacation residence.” When they made those purchases, they did so with the understanding that such construction was authorized provided that “they complied with all reasonable requirements for building.”

Petitioners’ complaints gave rise to protracted litigation that has produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions. For present purposes, however, we need only describe those courts’ disposition of the claim that three actions taken by TRPA—Ordinance 81-5, Resolution 83-21, and the 1984 regional plan—constituted takings of petitioners’ property without just compensation. Indeed, the challenge to the 1984 plan is not before us Thus, we limit our discussion to the lower courts’ disposition of the claims based on the 2-year moratorium (Ordinance 81-5) and the ensuing 8-month moratorium (Resolution 83-21).

The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner’s use of her property that it produces “nearly the same result as a direct appropriation.” The court noted that all of the claims in this case “are of the ‘regulatory takings’ variety.” . . . [The District Court concluded that there was no taking under the *Penn Central* factors.]

The District Court had more difficulty with the “total taking” issue. Although it was satisfied that petitioners’ property did retain some value during the moratoria, it found that they had been temporarily deprived of “all economically viable use of their land.” The court concluded that those ac-

tions therefore constituted “categorical” takings under our decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). It rejected TRPA’s response that Ordinance 81–5 and Resolution 83–21 were “reasonable temporary planning moratoria” that should be excluded from *Lucas*’ categorical approach. The court thought it “fairly clear” that such interim actions would not have been viewed as takings prior to our decisions in *Lucas* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) After expressing uncertainty as to whether those cases required a holding that moratoria on development automatically effect takings, the court concluded that TRPA’s actions did so, partly because neither the ordinance nor the resolution, even though intended to be temporary from the beginning, contained an express termination date. Accordingly, it ordered TRPA to pay damages to most petitioners for the 32-month period from August 24, 1981, to April 25, 1984, and to those owning class 1, 2, or 3 property in Nevada for the 8-month period from August 27, 1983, to April 25, 1984.

Both parties appealed. TRPA successfully challenged the District Court’s takings determination Petitioners did not, however, challenge the District Court’s findings or conclusions concerning its application of *Penn Central*. . . . Accordingly, the only question before the court was “whether the rule set forth in *Lucas* applies—that is, whether a categorical taking occurred because Ordinance 81–5 and Resolution 83–21 denied the plaintiffs ‘all economically beneficial or productive use of land.’” Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking.

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners’ fee interest in the properties, no categorical taking had occurred. . . .

III

Petitioners make only a facial attack on Ordinance 81–5 and Resolution 83–21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they “face an uphill battle,” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987), that is made especially steep by their desire for a cat-

egorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

We shall first explain why our cases do not support their proposed categorical rule—indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. . . .

IV

. . . When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. . . . But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, *Block v. Hirsh*, 256 U.S. 135 (1921); that bans certain private uses of a portion of an owner's property, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); or that forbids the private use of certain airspace, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. Escondido*, 503 U.S. 519, 523 (1992).

This longstanding distinction between acquisitions of property for

public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,” and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. “This case does not present the ‘classi[c] taking’ in which the government directly appropriates private property for its own use,” *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998); instead the interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good,” *Penn Central*, 438 U.S., at 124.

Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here. . . .

As we noted in *Lucas*, it was Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that gave birth to our regulatory takings jurisprudence. In subsequent opinions we have repeatedly and consistently endorsed Holmes’ observation that “if regulation goes too far it will be recognized as a taking.” . . .

In the decades following that decision, we have “generally eschewed” any set formula for determining how far is too far, choosing instead to engage in “‘essentially ad hoc, factual inquiries.’” *Lucas*, 505 U.S., at 1015 (quoting *Penn Central*, 438 U.S., at 124). Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine “a number of factors” rather than a simple “mathematically precise” formula. Justice Brennan’s opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must

focus on “the parcel as a whole”:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

This requirement that “the aggregate must be viewed in its entirety” explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U.S. 51 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox*, 274 U.S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S., at 498, were not considered regulatory takings. In each of these cases, we affirmed that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.” *Andrus*, 444 U.S., at 65–66.

While the foregoing cases considered whether particular regulations had “gone too far” and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 636 (1981), Justice Brennan identified that question and explained how he would answer it:

“The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.”

Justice Brennan’s proposed rule was subsequently endorsed by the Court in *First English*, 482 U.S., at 315, 318, 321. *First English* was certainly

a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In *First English*, the Court unambiguously and repeatedly characterized the issue to be decided as a “compensation question” or a “remedial question.” And the Court’s statement of its holding was equally unambiguous: “We merely hold that where the government’s activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” (emphasis added). In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged. . . .

Similarly, our decision in *Lucas* is not dispositive of the question presented. Although *Lucas* endorsed and applied a categorical rule, it was not the one that petitioners propose. *Lucas* purchased two residential lots in 1988 for \$975,000. These lots were rendered “valueless” by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of \$1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that “was unconditional and permanent.” . . .

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of “*all* economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.” The emphasis on the word “*no*” in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a “complete elimination of value,” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in *Penn Central*.

Certainly, our holding that the permanent “obliteration of the value” of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively

sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question. Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7–9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. . . .

V

Considerations of "fairness and justice" arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of seven different theories. First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" which were put to one side in our opinion in *First English*. Third, we could

adopt a rule like the one suggested by an *amicus* supporting petitioners that would “allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements” would “kick in.” Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a “series of rolling moratoria” that were the functional equivalent of a permanent taking. Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Sixth, apart from the District Court’s finding that TRPA’s actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

As the case comes to us, however, none of the last four theories is available. The “rolling moratoria” theory was presented in the petition for certiorari, but our order granting review did not encompass that issue; the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2-year period and the other for an 8-month period. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court’s unchallenged findings of fact. Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court’s conclusion that the evidence would not support it. Nonetheless, each of the three *per se* theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of “fairness and justice” that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners’ broad submission would apply to numerous “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,” [*First English*,] 482 U.S., at

321, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication. . . .

In rejecting petitioners’ *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. . . . [M]oratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. . . .

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. . . .

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim We conclude, therefore, that the interest in “fairness and justice” will

be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

[The dissenting opinions of Chief Justice Rehnquist (joined by Justice Scalia and Justice Thomas) and of Justice Thomas (joined by Justice Scalia) are omitted.]

Notes and Questions

23.27. Oral argument for the planning agency was handled by John Roberts, the current Chief Justice, while in private practice.

23.28. How do you reconcile *Tahoe* with the fact that holders of future interests and leaseholders may be entitled to compensation when land is condemned? 2-5 NICHOLS ON EMINENT DOMAIN § 5.02.

23.8 Defining the Parcel

Tahoe's rejection of conceptual severance still left an important question. Even if a court focuses on the “parcel as a whole,” it must still define the parcel. What if the claimant owns multiple lots? Do we measure regulatory effects on individual lots or the property owner’s aggregate holdings? See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (focusing on the extent to which the owner treated distinct parcels as “a single economic unit”). The Supreme Court turned to the issue in its 2016 term.

Murr v. Wisconsin

582 U.S. 383 (2017)

Justice KENNEDY delivered the opinion of the Court.

[Petitioners, the Murrs, owned two adjacent lots, Lot E and Lot F, that were subject to state and local regulations that limited development of lots with less than one acre of suitable land. Neither lot met the size requirement individually. The regulations contained a grandfather clause allowing development of preexisting undersized lots, but a merger provision prohibited undersized adjacent lots under common ownership from sale or development as separate lots. Lots E and F came under the common

ownership of the Murrs in 1995, making them subject to the merger provision. The regulations thus interfered with the Murrs' plan to move a cabin on Lot F and sell Lot E to pay the costs of doing so. They filed a regulatory takings claim. In rejecting it, the Wisconsin Court of Appeals concluded that the relevant parcel for takings analysis was the combination of Lots E and F, refusing to consider the regulations' effect on Lot E individually.]

....

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, “[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)).

As commentators have noted, the answer to this question may be outcome determinative. This Court, too, has explained that the question is important to the regulatory takings inquiry. “To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.” *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644 (1993). . . .

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central*, for example, the Court rejected a challenge to the denial of a permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against the “air rights” above the terminal

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state-court de-

cision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates non-adjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment

of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law. . . .

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.

Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course, unquestionable that the law must recognize those legitimate expectations in order to give proper

weight to the rights of owners and the right of the State to pass reasonable laws and regulations. . . .

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. . . .

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. . . .

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances.

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today.

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of

regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only \$40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' re-

tained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at \$698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at \$373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at \$40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel. . . .

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. They can use the property for residential purposes, including an enhanced, larger residential improvement. The property has not lost all economic value, as its value has decreased by less than 10 percent.

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land. . . .

Justice GORSUCH took no part in the consideration or decision of this case.

Chief Justice ROBERTS, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Murr family owns two adjacent lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of buildable land. Wis. Admin. Code § NR 118.08(4)(a)(2) (2017). The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the “private property” at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) “the physical characteristics of the land,” (2) “the prospective value of the regulated land,” (3) the “reasonable expectations” of the owner, and (4) “background customs and the whole of our legal tradition.” Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority’s new, malleable definition of “private property”—adopted solely “for purposes of th[e] takings inquiry”—undermines that protection.

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the “private property” at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent. . . .

Because a regulation amounts to a taking if it completely destroys a property’s productive use, there is an incentive for owners to define the relevant “private property” narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar “bundle” analogy, each “strand” in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant “private property” at issue as the specific “strand” that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co. v. New York City*, we held that property owners may not “establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest.” In that case, the owner of Grand Central Terminal in New York City argued that a restriction on the owner’s ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the “property” at issue, concluding that the correct unit of analysis was the owner’s “rights in the parcel as a whole.” . . .

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. States may define those plots differently—some using metes and bounds, others using government surveys, recorded plats, or subdivision maps. But the definition of property draws the basic line between, as P.G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.

Following state property lines is also entirely consistent with *Penn Central*. Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*—and claim a complete taking based on that strand alone. That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates . . . property" to avoid a successful takings claim. But such obvious attempts to alter the legal land-

scape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of “private property.”

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a “taking,” courts should focus on the effect of the regulation on the “private property” at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner’s possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. . . .

In sum, the “parcel as a whole” requirement prevents a property owner from identifying a single “strand” in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining “private property” would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning those parcels. Those established bundles of rights should define the “private property” in regulatory takings cases. While ownership of contiguous properties may bear on whether a person’s plot has been “taken,” *Penn Central* provides no basis for disregarding state property lines when identifying the “parcel as a whole.”

II

The lesson that the majority draws from *Penn Central* is that defining “the proper parcel in regulatory takings cases cannot be solved by any simple test.” Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property “would be treated as one parcel, or, instead, as separate tracts.” Those factors, says the majority, show that Lots E and F of the Murrs’ property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking.

In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a “taking.” Cramming them into

the definition of “private property” undermines the effectiveness of the Takings Clause as a check on the government’s power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving “essentially ad hoc, factual inquiries,” we have conducted those wide-ranging investigations when assessing “the question of what constitutes a ‘taking’” under *Penn Central*. *Ruckelshaus*, 467 U.S., at 1004 (emphasis added). And even then, we reach that “ad hoc” *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. Both of these inquiries presuppose that the relevant “private property” has already been identified. There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of “property” designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one “parcel,” solely for purposes of resisting a particular claim. And under the majority’s test, identifying the “parcel as a whole” in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government’s regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause “prevents the public from loading upon one individual more than his just share of the burdens of government,” *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893), by considering the effect of a regulation on specific property rights as they are established at state law. But the

majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—based on all the circumstances and the nature of the regulation—Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property . . . should not necessarily preordain the outcome in *every* case." (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the

majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" for another. This is just another opportunity to gerrymander the definition of "private property" to defeat a takings claim. . . .

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. The Murrs argued that the ordinance amounted to a taking of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel." . . .

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. These facts speak to "the economic impact of the regulation," in-

terference with “investment-backed expectations,” and the “character of the governmental action”—all things we traditionally consider in the *Penn Central* analysis.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, “the security of Property” is one of the “great object[s] of government.” 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Takings Clause was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a “taking” of one of those property rights is, properly enough, a fact-intensive task that relies “as much on the exercise of judgment as on the application of logic.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986) (alterations and internal quotation marks omitted). But basing the definition of “property” on a judgment call, too, allows the government’s interests to warp the private rights that the Takings Clause is supposed to secure.

I respectfully dissent.

Justice THOMAS, dissenting.

I join THE CHIEF JUSTICE’s dissent because it correctly applies this Court’s regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court announced a “general rule” that “if regulation goes too far it will be recognized as a taking.” But we have since observed that, prior to *Mahon*, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a ‘practical ouster of [the owner’s] possession,’ *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879).” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. See generally Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008) (describing the debate among scholars over those questions).

Notes and Questions

23.29. How confident are you in your ability to apply the majority's test? Is it a fair objection that the analysis inappropriately smuggles considerations applicable to substantive takings analysis into the distinct preliminary issue of defining the private property in question? Or are preexisting lot lines too arbitrary?

23.30. If the dissent had prevailed, would property owners have an incentive to break their parcels up into smaller lots to increase the likelihood of prevailing in a takings case? Chief Justice Roberts asserts that such efforts would be easy to "detect and disarm." But what would be the mechanism for doing so? And what if a piece of property had been owned and transferred as an undifferentiated whole for decades, but nevertheless encompassed portions that had once been sold as individual, smaller lots? Should they be treated separately in a regulatory takings case?

23.31. What incentives would states have if the dissent carried the day? Might they make it harder to multiply parcels (e.g., by enacting barriers to subdividing land)? For a blog exchange on this point, see Rick Hills, *A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in Murr v. Wisconsin*, PRAWFSBLAWG (June 23, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/a-half-hearted-two-cheers-for-the-victory-of-federalism-over-property-rights-in-murr-v-wisconsin.html>; Ilya Somin, *More on Murr—a Response to Rick Hills*, WASH. POST (June 24, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/more-on-murr-a-response-to-rick-hills/>.

23.32. What do you make of Justice Thomas's dissent? Is he suggesting that the whole of regulatory takings jurisprudence is without a constitutional basis? The Rappaport article he cites argues that even if Takings Clause of the Fifth Amendment does not support regulatory takings jurisprudence, "there are strong reasons, based on history, structure, and purpose, to conclude that the Takings Clause had a different meaning under the Fourteenth Amendment." 45 SAN DIEGO L. REV. at 731.

23.9 Intellectual Property

Property rights may reach intangible things, and the Takings Clause may apply to these rights. See generally 2-5 NICHOLS ON EMINENT DOMAIN § 5.03 (listing

examples). What about “intellectual property”? In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court ruled that to the extent state law recognized a property right in trade secrets, they were protected by the Takings Clause.

Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment’s Taking Clause. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman’s lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602, (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.

Id. at 1003 (1984). The *Monsanto* plaintiff claimed that disclosure requirements of the Federal Insecticide, Fungicide, and Rodenticide Act would destroy its trade secrets. The Court held that the absence of reasonable investment-backed expectations precluded some of these claims, concluding that the plaintiff had submitted its data under a regulatory scheme that required eventual disclosure. *Id.* at 1007 (“Thus, as long as Monsanto is aware of the conditions under which the data are submitted . . . a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”).

Trade secrets exist under state law, to which courts may look in determining whether a property interest exists. What about federal IP rights? The issue is a debated. Compare, e.g., Davida H. Isaacs, *Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007), with Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 689 (2007); see generally Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529 (1998). (“[T]he law of takings with regard to intellectual property can only be characterized as a muddle within the muddle.”).

Should intellectual property receive takings protection? On the one hand, the underlying statutes give them the attributes of property. 35 U.S.C. § 261

(“Subject to the provisions of this title, patents shall have the attributes of personal property.”). On the other, IP rights lack many of the traditional attributes of property. Not only are they intangible, but they constitute a government delegation to private parties of regulatory power over the actions of others. To the extent the government wishes to curtail these rights—or otherwise adjust the governing regime, introducing takings doctrine may upset its ability to adjust a regulatory regime to changing circumstances.

Moreover, the malleability of the concept of “property” complicates matters, for the question whether an intangible interest is property may arise in a context independent of any takings issues. Once the property switch is flipped, however, the complexities of takings analysis kick in. Recall, for example, the issue covered earlier as to whether domain names are property for purposes of state law. *Kremen v. Cohen*’s answer in the affirmative afforded a remedy for a wronged party in a conversion action, but the classification could ripple through other bodies of law. For example, the Anticybersquatting Consumer Protection Act (ACPA) allows trademark holders to claim domain names containing the marks from those who registered them with a “bad faith intent to profit.” 15 U.S.C. § 1125(d). But if a domain name is property—one that one acquires by registering it—how is ACPA’s operation not a taking without just compensation? Worse, how is it not taking from A and giving to B as prohibited by the “Public Use” Clause? To date, courts have not been receptive to this argument, *DaimlerChrysler v. The Net Inc.*, 388 F.3d 201 (6th Cir. 2004), but it suggests the difficulties with casually applying the label of property to interests that exist outside the common law property tradition.

23.10 Exactions

The state has broad powers to regulate land use. What if a state regulator agrees to limit regulation in return for a strip of land? The transaction is voluntary, but had the state just taken the land, it would have had to pay just compensation. Since the government isn’t obligated to allow the project, doesn’t the offer leave the landowner better off? Or is this a form of extortion?

These types of conditional grants of permits or other dispensations under land use regulations are called **exactions**. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court opened the door to closer scrutiny of these exchanges, declaring that permit conditions must serve the same purpose as the reason to withhold permission in the first place. Absent an “essen-

tial nexus" between the condition and the reason for the restriction, the demand is a taking. *Id.* at 837.

Nollan involved a permit request to tear down and rebuild a beachfront house. Because the project would reduce views of the ocean, the California Coastal Commission conditioned the permit on the Nollans' granting a public easement on their property to access the beach. The Court ruled this condition lacked the requisite nexus. To the extent that the project would impair sightlines to the beach, the state could condition permit approval on ameliorative steps, like size restrictions, limits on fencing, or provision of a platform to improve the public's view of the beach. But the majority found it "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

The outcome of *Nollan* rested on the majority's conclusion that there was no logical relationship between the condition demanded by the Coastal Commission and the harm it claimed to be regulating: a right to cross the Nollan's land wouldn't improve the public's view of the beach from behind their house. What if there is some logical relationship, but it is (at least arguably) somewhat attenuated?

Dolan v. City of Tigard
512 U.S. 374 (1994)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. . . . Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the

area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. . . .

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. . . .

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

Thus, the Commission required that petitioner dedicate the portion

of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted. . . . The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." Based on this anticipated increased storm water flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." The Tigard City Council approved the Commission's final order, subject to one minor modification; the city council reassigned the re-

sponsibility for surveying and marking the floodplain area from petitioner to the city's engineering department.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

[The Oregon Court of Appeals and the Oregon Supreme Court both affirmed.]

II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). . . .

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, *supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. . . .

III

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan*, 483 U.S., at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

A

We addressed the essential nexus question in *Nollan*. . . . The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. . . .

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. . . . We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. . . . The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. . . .

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary." In addition, the city demanded that the retail store be designed so as

not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site."

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961). Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." *Id.*, at 381, 176 N.E.2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical

is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980), where that court stated:

The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted." *Id.*, at 248, 292 N.W.2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]."

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. . . .

. . . We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the CDC already required that petitioner leave 15% of it

as open space and the undeveloped floodplain would have nearly satisfied that requirement. But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request. . . .

If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of

the traffic demand.” 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city’s goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal*, 260 U.S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[The dissenting opinions of Justices Stevens (joined by Justices Blackmun and Ginsburg) and of Justice Souter are omitted.]

Koontz v. St. Johns River Water Management Dist.

570 U.S. 595 (2013)

Justice ALITO delivered the opinion of the Court.

Our decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a “nexus” and “rough proportionality” between the government’s demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. The District did not approve his application on the condition that he surrender an interest in

his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

[Florida law regulates construction that affect state waters. Landowners with construction plans that might affect state waters must obtain a Management and Storage of Surface Water (MSSW) permit, which may impose conditions to protect local water resources. In addition, state law prohibits dredging or filling surface waters without a Wetlands Resource Management (WRM) permit, which is to be granted only if the construction is not against the public interest. To that end, the St. Johns River Water Management District, which regulated Koontz's land, required construction in the wetlands to be offset by activities that benefitted wetlands in

other locations.]

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it “would also favorably consider” alternatives to its suggested offsite mitigation projects if petitioner proposed something “equivalent.”

Believing the District’s demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he

was entitled to relief under Fla. Stat. § 373.617(2), which allows owners to recover “monetary damages” if a state agency’s action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”

B

. . . [T]he State Circuit Court held a 2-day bench trial. After considering testimony from several experts who examined petitioner’s property, the trial court found that the property’s northern section had already been “seriously degraded” by extensive construction on the surrounding parcels. In light of this finding and petitioner’s offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. It accordingly held the District’s actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, but the State Supreme Court reversed. A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan*, the District did not approve petitioner’s application on the condition that he accede to the District’s demands; instead, the District denied his application because he refused to make concessions. Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. . . .

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari and now reverse.

II

[The Court held that “[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.”]

III

We turn to the Florida Supreme Court’s alternative holding that petitioner’s claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional

conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. Respondent and the dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim.

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. . . .

A

In *Eastern Enterprises*, *supra*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. Although Justice KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.*, at 540 (opinion concurring in judgment and dissenting in part); see *id.*, at 554–556 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here

did “operate upon . . . an identified property interest” by directing the owner of a particular piece of property to make a monetary payment. In this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner’s ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. The fulcrum this case turns on is the direct link between the government’s demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*’s “essentially ad hoc, factual inquir[y],” 438 U.S., at 124, at all, much less extend that “already difficult and uncertain rule” to the “vast category of cases” in which someone believes that a regulation is too costly. Instead, petitioner’s claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a “*per se* [takings] approach” is the proper mode of analysis under the Court’s precedent. *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003). . . .

B

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that “[t]axes and user fees . . . are not ‘takings.’” *Brown, supra*, at 243, n. 2 (SCALIA, J., dissenting). . . . This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens

on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown, supra*, at 232, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips v. Washington Legal Foundation, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by the legislature, not the courts.

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deed-ing to the public a conservation easement on a larger parcel of undeveloped land.

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a “tax” becomes “so arbitrary . . . that it was not the exertion of taxation but a confiscation of property.” *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 24–25 (1916). . . .

C

Finally, we disagree with the dissent’s forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation’s most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. Yet the “significant practical harm” the dissent predicts has not come to pass. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees. . . .

We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner’s claim that respondent’s actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court’s judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion. . . .

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

In the paradigmatic case triggering review under *Nollan* [and] *Dolan* . . . , the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money? This case also raises other, more fact-specific issues I will address: whether the government here imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent). . . . So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision. . . .

I

. . . [T]he *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. . . . Even the majority acknowledges this basic point about *Nollan* and *Dolan*: It too notes that those cases rest on the premise that “if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking.” Only if that is true could the government’s demand for the property force a landowner to relinquish his constitutional right to just compensation.

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. I assume for now that the District made that demand (although I think it did not, see *infra*) The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan-Dolan* test apply.

But we have already answered that question no. [Discussion of *Eastern Enterprises v. Apfel* omitted]. . . .

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously “difficult” and “perplexing” standards, into the very heart of local land-use regulation and service delivery. 524 U.S., at 541. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse because the majority's distinction between monetary “exactions” and taxes is so hard to apply. The majority acknowledges, as it must, that taxes are not takings. But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible “exaction,” how is anyone to tell the two apart? The question, as Justice BREYER's opinion in *Apfel* noted, “bristles with conceptual difficulties.” And practical ones, too: How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must confront the same question, as they enforce restrictions on localities' taxing power. And their decisions—contrary to the majority's blithe assertion—struggle to draw a coherent boundary. . . . Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are

imposed ad hoc, and not to fees that are generally applicable. . . . Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evoke the limitations" on exaction of real property interests that those decisions impose. But that is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[] too far." *Mahon*, 260 U.S., at 415.³

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the Takings Clause would otherwise prevent—*i.e.*, take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process, because under *Apfel* such an action does not otherwise trigger the Takings Clause's protections. By extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and ser-

³Our *Penn Central* test protects against regulations that unduly burden an owner's use of his property: Unlike the *Nollan-Dolan* standard, that framework fits to a T a complaint (like *Koontz*) that a permitting condition makes it inordinately expensive to develop land. And the Due Process Clause provides an additional backstop against excessive permitting fees My argument is that our prior caselaw struck the right balance: heightened scrutiny when the government uses the permitting process to demand property that the Takings Clause protects, and lesser scrutiny, but a continuing safeguard against abuse, when the government's demand is for something falling outside that Clause's scope.

vice delivery, at a bare minimum depriving state and local governments of “necessary predictability.” *Apfel*, 524 U.S., at 542 (opinion of KENNEDY, J.). That decision is unwarranted—and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit. And second, because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

A

Nollan and *Dolan* apply only when the government makes a “demand[]” that a landowner turn over property in exchange for a permit. *Lingle*, 544 U.S., at 546. I understand the majority to agree with that proposition

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides’ advantage. But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer. Hence the need to reserve *Nollan* and *Dolan*, as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State’s rapidly diminishing wetlands, Florida law prevents

landowners from filling or draining any such property without two permits. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. At that point, the District could simply have denied the applications; had it done so, the *Penn Central* test—not *Nollan* and *Dolan*—would have governed any takings claim Koontz might have brought.

Rather than reject the applications, however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. Alternatively, the District raised several options for “off-site mitigation” that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, “[n]ot in any great detail.” And the District made clear that it welcomed additional proposals from Koontz to mitigate his project’s damage to wetlands. Even at the final hearing on his applications, the District asked Koontz if he would “be willing to go back with the staff over the next month and renegotiate this thing and try to come up with” a solution. But Koontz refused, saying (through his lawyer) that the proposal he submitted was “as good as it can get.” The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition—not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District’s only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria. Koontz’s failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means*. *Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those decisions require a condition; and here, there was none.

Indeed, this case well illustrates the danger of extending *Nollan* and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance. . . . Nothing in the Takings Clause requires that folly. I would therefore hold that the District did not impose an unconstitutional condition—because it did not impose a condition at all.

B

And finally, a third difficulty: Even if (1) money counted as “specific and identified propert[y]” under *Apfel* (though it doesn’t), and (2) the District made a demand for it (though it didn’t), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the Takings Clause. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts. . . .

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend

money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

Notes and Questions

23.33. Why aren't taxes takings? Does it make a difference whether there is an individualized determination about a particular use, and which way should an individualized determination cut? That is, suppose in order to deal with global warming, the Miami legislature imposes a new tax of 10% of the assessed value of a parcel every time a new building permit for that parcel is granted. The money will go into a fund to help the city become more flood-resistant. Is this an unconstitutional exaction? If your answer is yes, what about a new tax of 10% of the assessed value of every parcel, regardless of whether there's new building on it or not?

23.34. What if the condition isn't monetary? Suppose the zoning authority says "you may build your building, but only if you comply with building codes that specify a minimum number of exits, minimum width of doors, and multiple other details." Is that an exaction? If not, why not?

23.35. **Categorical Exclusions.** Just as some government acts are takings as a categorical matter; others are categorically excluded. Koontz mentions that taxes and user fees are never takings. Why not? One possibility is the idea that the private property protected by the Takings Clause only protects discrete re-

sources, and does not apply to legally obligated acts like the payment of money. That was the logic of five Justices in *Eastern Enterprises v. Apfel*, which was discussed and distinguished in *Koontz*. *E. Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting with three other Justices).

But can we do more than provide a definitional exclusion? Eduardo Peñalver observes:

As Richard Epstein—one of the few scholars to focus substantial effort on the issue—has noted, “[t]he taxing power is placed in one compartment; the takings power in another,” and scholarly discussion of the conflict between the two never really gets off the ground. In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state’s power to tax. Specifically, Epstein argued that the Takings Clause required the government to adopt a system of proportional taxation, also known as a “flat tax.” This argument flew in the face of settled constitutional orthodoxy, which since the founding era has understood the state’s power to tax as being virtually plenary. . . .

This cool response to Epstein’s proposal is unsurprising. The constitutional doctrine defining the state’s power to tax is so entrenched that it is nearly axiomatic. In contrast, Takings Clause jurisprudence is characterized by nothing if not the confusion and intense disagreement it generates. . . .

Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185-86 (2004) (footnotes omitted). Peñalver draws an opposite conclusion from Epstein’s, noting that the seeming conflict between the two powers stems not from the reach of the taxing power, but from the fact that courts have applied the Takings Clause beyond its original understanding as a simple requirement of compensation when the power of eminent domain is exercised. If the clause were read more narrowly, the apparent tension would disappear. On this view, “Takings are the state’s direct appropriation of parcels of property from individuals through the power of eminent domain, and taxes are generally applicable measures, enacted under the state’s power to tax, requiring individuals to make payments to the state. Each corresponds to different and nonoverlapping governmental powers.” *Id.* at 2188.

There are also government actions that do affect specific pieces of prop-

erty that are nonetheless excluded from operation of the Takings Clause. We have already seen one example in the rule—discussed in the opinions in *Lucas*—that regulation of a common law nuisance is never a taking. Other examples include government forfeitures, federal control of navigable waterways, and the state's right to destroy property to contain the spread of fire. See generally DAVID A. DANA & THOMAS W. MERRILL, TAKINGS 110-120 (Foundation Press 2002); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (“Property seized and retained pursuant to the police power is not taken for a ‘public use’ in the context of the Takings Clause.”). What explains these exceptions? Perhaps they, too, may be understood as simply categorically different government powers (i.e., if the Takings Clause is read as simply applying to eminent domain, the existence of regulatory takings notwithstanding). Dana and Merrill suggest that we might understand these exceptions similarly to the nuisance exclusion—the powers are within traditional conceptions of the state’s police powers, and they have a long historical pedigree, long enough that property owners may be said to be on imputed notice that they may be exercised.

23.11 *Cedar Point* and a Broadened Per Se Rule

Many property regulations burden the right to exclude without causing a permanent occupation or otherwise taking a discrete interest in the land (like an easement). When might regulations of this sort be takings?

In *Loretto*, the Supreme Court indicated that this question should be evaluated under the *Penn Central* test and not the physical occupation *per se* rule. The opinion distinguishes government activities resulting in a *permanent* occupation from those producing a *temporary* one. In enunciating the distinction, the Court explicitly identified government rules that might require a landowner to allow unwanted third parties onto the property as *not* being covered by the *Loretto* categorical rule, at least in cases where the land was otherwise open to the general public.

Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they

had already invited the general public. The Court emphasized that the State Constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.

Loretto, 458 U.S. at 434. Notably, in *PruneYard*, the Court applied the *Penn Central* factors. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court returned to the question of regulations limiting the exercise of the right to exclude. California law required agricultural employers to allow union organizers onto their land to contact workers. In *Loretto*, the Court appeared to categorize regulations of this sort as being outside its categorical rule, distinguishing earlier cases that discussed such rules:

Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, *see, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), is similarly misplaced. As we recently explained:

"[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, *supra*, at 545.

Loretto, 458 U.S. at 434 n.11 (1982). *Cedar Point* revisits those precedents and a good deal more.

Cedar Point Nursery v. Hassid
594 U.S. 139 (2021)

Chief Justice ROBERTS delivered the opinion of the Court.

A California regulation grants labor organizations a “right to take access” to an agricultural employer’s property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

I

The California Agricultural Labor Relations Act of 1975 gives agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right. The state Agricultural Labor Relations Board has promulgated a regulation providing, in its current form, that the self-organization rights of employees include “the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.” Under the regulation, a labor organization may “take access” to an agricultural employer’s property for up to four 30-day periods in one calendar year. In order to take access, a labor organization must file a written notice with the Board and serve a copy on the employer. Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer’s property for up to one hour before work, one hour during the lunch break, and one hour after work. Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish. Interference with organizers’ right of access may constitute an unfair labor practice, which can result in sanctions against the employer.

Cedar Point Nursery is a strawberry grower in northern California. It employs over 400 seasonal workers and around 100 full-time workers, none of whom live on the property. According to the complaint, in October 2015, at five o’clock one morning, members of the United Farm Workers entered Cedar Point’s property without prior notice. The organizers moved to the nursery’s trim shed, where hundreds of workers were preparing strawberry plants. Calling through bullhorns, the organizers disturbed operations, causing some workers to join the organizers in a protest and

others to leave the worksite altogether. Cedar Point filed a charge against the union for taking access without giving notice. The union responded with a charge of its own, alleging that Cedar Point had committed an unfair labor practice. [The case also involved the Fowler Packing Company, "a Fresno-based grower and shipper of table grapes and citrus."]

Believing that the union would likely attempt to enter their property again in the near future, the growers filed suit in Federal District Court against several Board members in their official capacity. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. They requested declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them. . . .

[The District Court ruled in favor of the Board, concluding that the regulation was not a *per se* taking and that any takings claim would have to be made under the *Penn Central* balancing test. A divided Court of Appeals panel affirmed. *En banc* rehearing was denied over a dissent joined by seven other judges.]

II

A

. . . When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. . . . The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the “clearest sort of taking,” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner’s ability to use his own property, a different standard applies. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited

to physical appropriations of property. In *Pennsylvania Coal Co. v. Mahon*, however, the Court established the proposition that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” . . . To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Our cases have often described use restrictions that go “too far” as “regulatory takings.” But that label can mislead. Government action that physically appropriates property is no less a physical taking because it arises from a regulation. That explains why we held that an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *Horne*, 576 U.S. at 361. The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

B

The access regulation appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers’ land for three hours per day, 120 days per year. Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude.

The right to exclude is “one of the most treasured” rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). According to Blackstone, the very idea of property entails “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 W. Blackstone, *Commentaries on the Laws of England* 2 (1766). In less exuberant terms, we have stated that the right to exclude is “universally held to be a fundamental element of the property

right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979).

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

For example, in *United States v. Causby* we held that the invasion of private property by overflights effected a taking. 328 U.S. 256 (1946). The government frequently flew military aircraft low over the Causby farm, grazing the treetops and terrorizing the poultry. The Court observed that ownership of the land extended to airspace that low, and that "invasions of it are in the same category as invasions of the surface." Because the damages suffered by the Causbys "were the product of a direct invasion of [their] domain," we held that "a servitude has been imposed upon the land."

We similarly held that the appropriation of an easement effected a taking in *Kaiser Aetna v. United States*. A real-estate developer dredged a pond, converted it into a marina, and connected it to a nearby bay and the ocean. The government asserted that the developer could not exclude the public from the marina because the pond had become a navigable water. We held that the right to exclude "falls within [the] category of interests that the Government cannot take without compensation." . . .

In *Loretto v. Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss. New York adopted a law requiring landlords to allow cable companies to install equipment on their properties. Loretto alleged that the installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on her roof caused a taking. We agreed, stating that where government action results in a "permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along

the beach. As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, “we have no doubt there would have been a taking.”

More recently, in *Horne v. Department of Agriculture*, we observed that “people still do not expect their property, real or personal, to be actually occupied or taken away.” The physical appropriation by the government of the raisins in that case was a *per se* taking, even if a regulatory limit with the same economic impact would not have been. “The Constitution,” we explained, “is concerned with means as well as ends.”

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers’ property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers’ property—to literally “take access,” as the regulation provides. It is therefore a *per se* physical taking under our precedents. Accordingly, the growers’ complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

C

... The dissent... concludes that the regulation cannot amount to a *per se* taking because it allows “access short of 365 days a year.” That position is insupportable as a matter of precedent and common sense. There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.

To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. . . . The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation. . . .

To be sure, *Loretto* emphasized the heightened concerns associated with “[t]he permanence and absolute exclusivity of a physical occupation” in contrast to “temporary limitations on the right to exclude,” and stated that “[n]ot every physical *invasion* is a taking.” The latter point is well taken, as we will explain. But *Nollan* clarified that appropriation of a right to physically invade property may constitute a taking “even though no particular individual is permitted to station himself permanently upon the

premises."

Next, we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous. *Causby* held that overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport. And while *Nollan* happened to involve a legally continuous right of access, we have no doubt that the Court would have reached the same conclusion if the easement demanded by the Commission had lasted for only 364 days per year. . . . [W]hen the government physically takes an interest in property, it must pay for the right to do so. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.

. . . [The Board contends that the access regulation] fails to qualify as a *per se* taking because it "authorizes only limited and intermittent access for a narrow purpose." That position is little more defensible than the Ninth Circuit's. The fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction. Saying that appropriation of a three hour per day, 120 day per year right to invade the growers' premises "does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831 (citation and internal quotation marks omitted).

The Board also takes issue with the growers' premise that the access regulation appropriates an easement. In the Board's estimation, the regulation does not exact a true easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded. This, the Board says, reinforces its conclusion that the regulation does not take a constitutionally protected property interest from the growers. The dissent agrees, suggesting that the access right cannot effect a *per se* taking because it does not require the growers to grant the union organizers an easement as defined by state property law.

These arguments misconstrue our physical takings doctrine. As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. And no one disputes that

the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. . . .

The Board and the dissent further contend that our decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), establishes that the access regulation cannot qualify as a *per se* taking. There the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. The shopping center argued that the decision had taken without just compensation its right to exclude. Applying the *Penn Central* factors, we held that no compensable taking had occurred. cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (rejecting claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking).

The Board and the dissent argue that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. We disagree. Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public. See *Horne*, 576 U.S. at 364 (distinguishing *PruneYard* as involving "an already publicly accessible" business).

The Board also relies on our decision in *NLRB v. Babcock & Wilcox Co.* But that reliance is misplaced. In *Babcock*, the National Labor Relations Board found that several employers had committed unfair labor practices under the National Labor Relations Act by preventing union organizers from distributing literature on company property. We held that the statute did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise "beyond the reach of reasonable union efforts to communicate with them." The Board contends that *Babcock*'s approach of balancing property and organizational rights should guide our analysis here. But *Babcock* did not involve a takings claim. Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents.

D

In its thoughtful opinion, the dissent advances a distinctive view of property rights. The dissent encourages readers to consider the issue “through the lens of ordinary English,” and contends that, so viewed, the “regulation does not *appropriate* anything.” Rather, the access regulation merely “*regulates . . . the owners’ right to exclude*,” so it must be assessed “under *Penn Central’s* fact-intensive test.” “A right to enter my woods only on certain occasions,” the dissent elaborates, “is a taking only if the regulation allowing it goes ‘too far.’” . . . According to the dissent, this kind of latitude toward temporary invasions is a practical necessity for governing in our complex modern world.

With respect, our own understanding of the role of property rights in our constitutional order is markedly different. In “ordinary English” “appropriation” means “*taking as one’s own*,” 1 Oxford English Dictionary 587 (2d ed. 1989) (emphasis added), and the regulation expressly grants to labor organizers the “right to *take* access,” Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (emphasis added). We cannot agree that the right to exclude is an empty formality, subject to modification at the government’s pleasure. On the contrary, it is a “fundamental element of the property right,” *Kaiser Aetna*, 444 U.S. at 179–180, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*: “[W]hen [government] planes use private airspace to approach a government airport, [the government] is required to pay for that share no matter how small.” *Tahoe-Sierra*, 535 U.S. at 322 (citing *Causby*). And while *Kaiser Aetna* may have referred to the test from *Penn Central*, the Court concluded categorically that the government must pay just compensation for physical invasions. With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained. . . .

III

The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. That fear is unfounded.

First, our holding does nothing to efface the distinction between tres-

pass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent. See *Portsmouth*, 260 U.S. at 329–330 (“[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence.”) . . .

The distinction between trespass and takings accounts for our treatment of temporary government-induced flooding in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012). There we held, “simply and only,” that such flooding “gains no automatic exemption from Takings Clause inspection.” Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. Applying those factors on remand, the Federal Circuit concluded that the government had effected a taking in the form of a temporary flowage easement. . . .

Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. As we explained in *Lucas v. South Carolina Coastal Council*, the government does not take a property interest when it merely asserts a “pre-existing limitation upon the land owner’s title.” For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.

These background limitations also encompass traditional common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity. See Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster); § 197 (entry to avert serious harm to a person, land, or chattels); cf. *Lucas*, 505 U.S. at 1029, n. 16. The common law also recognized a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances. Restatement (Second) of Torts §§ 204–205. Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners. See generally *Camara v. Municipal Court of City*

and County of San Francisco, 387 U.S. 523, 538 (1967).

Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. In *Nollan*, we held that “a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.” The inquiry, we later explained, is whether the permit condition bears an “essential nexus” and “rough proportionality” to the impact of the proposed use of the property.

Under this framework, government health and safety inspection regimes will generally not constitute takings. When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy. See, e.g., 7 U.S.C. § 136g(a)(1)(A) (pesticide inspections); 16 U.S.C. § 823b(a) (hydroelectric project investigations); 21 U.S.C. § 374(a)(1) (pharmaceutical inspections); 42 U.S.C. § 2201(o) (nuclear material inspections).

None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers’ land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. See *Horne*, 576 U.S. at 366 (“basic and familiar uses of property” are not a special benefit that “the Government may hold hostage, to be ransomed by the waiver of constitutional protection”). The access regulation amounts to simple appropriation of private property. . . .

Justice KAVANAUGH, concurring.

I join the Court’s opinion, which carefully adheres to constitutional text, history, and precedent. I write separately to explain that, in my view, the Court’s precedent in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), also strongly supports today’s decision.

In *Babcock*, the National Labor Relations Board argued that the National Labor Relations Act afforded union organizers a right to enter com-

pany property to communicate with employees. Several employers responded that the Board's reading of the Act would infringe their Fifth Amendment property rights. The employers contended that Congress, "even if it could constitutionally do so, has at no time shown any intention of destroying property rights secured by the *Fifth Amendment*, in protecting employees' rights of collective bargaining under the Act. Until Congress should evidence such intention by specific legislative language, our courts should not construe the Act on such dangerous constitutional grounds." Brief for Respondent in *NLRB v. Babcock & Wilcox Co.*, O. T. 1955, No. 250, pp. 18-19.

This Court agreed with the employers' argument that the Act should be interpreted to avoid unconstitutionality. The Court reasoned that "the National Government" via the Constitution "preserves property rights," including "the right to exclude from property." Against the backdrop of the Constitution's strong protection of property rights, the Court interpreted the Act to afford access to union organizers only when "needed"—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees. As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a "necessity" exception similar to that noted by the Court today.

Babcock strongly supports the growers' position in today's case because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows. . . .

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

A California regulation provides that representatives of a labor organization may enter an agricultural employer's property for purposes of union organizing. They may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work. The question before us is how to characterize this regulation for purposes of the Constitution's Takings Clause.

Does the regulation *physically appropriate* the employers' property? If so, there is no need to look further; the Government must pay the employers "just compensation." U. S. Const., Amdt. 5. Or does the regulation simply *regulate* the employers' property rights? If so, then there is every need to look further; the government need pay the employers "just compensa-

tion” only if the regulation “goes too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (HOLMES, J., for the Court); see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (determining whether a regulation is a taking by examining the regulation’s “economic impact,” the extent of interference with “investment-backed expectations,” and the “character of the governmental action”).

The Court holds that the provision’s “access to organizers” requirement amounts to a physical appropriation of property. In its view, virtually every government-authorized invasion is an “appropriation.” But this regulation does not “appropriate” anything; it regulates the employers’ right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner’s property and that this kind of temporary invasion amounts to a taking only if it goes “too far.” See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). In my view, the majority’s conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. And though the majority attempts to create exceptions to narrow its rule, the law’s need for feasibility suggests that the majority’s framework is wrong. With respect, I dissent from the majority’s conclusion that the regulation is a *per se* taking.

I

“In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.” *Arkansas Game and Fish Comm’n*, 568 U.S. at 31. Instead, most government action affecting property rights is analyzed case by case under *Penn Central*’s fact-intensive test. Petitioners do not argue that the provision at issue is a “regulatory taking” under that test.

Instead, the question before us is whether the access regulation falls within one of two narrow categories of government conduct that are *per se* takings. The first is when “the government directly appropriates private property for its own use.” *Horne v. Department of Agriculture*, 576 U.S. 350, 357 (2015). The second is when the government causes a permanent physical occupation of private property. It does not.

A

Initially it may help to look at the legal problem—a problem of

characterization—through the lens of ordinary English. The word “regulation” rather than “appropriation” fits this provision in both label and substance. It is contained in Title 8 of the California Code of Regulations. It was adopted by a state regulatory board, namely, the California Agricultural Labor Relations Board, in 1975. It is embedded in a set of related detailed regulations that describe and limit the access at issue. In addition to the hours of access just mentioned, it provides that union representatives can enter the property only “for the purpose of meeting and talking with employees and soliciting their support”; they have access only to “areas in which employees congregate before and after working” or “at such location or locations as the employees eat their lunch”; and they cannot engage in “conduct disruptive of the employer’s property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses.” §§ 20900(e), (e)(3), (e)(4)(C) (2021). From the employers’ perspective, it restricts when and where they can exclude others from their property.

At the same time, the provision only awkwardly fits the terms “physical taking” and “physical appropriation.” The “access” that it grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (e.g., a fee simple, fee tail, or life estate); any concurrent estate (e.g., a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (e.g., a term of years, periodic tenancy, or tenancy at will). Nor (as all now agree) does it provide the organizers with a formal easement or access resembling an easement, as the employers once argued, since it does not burden any particular parcel of property.

The majority concludes that the regulation nonetheless amounts to a physical taking of property because, the majority says, it “appropriates” a “right to invade” or a “right to exclude” others. It thereby likens this case to cases in which we have held that appropriation of property rights amounts to a physical *per se* taking.

It is important to understand, however, that, technically speaking, the majority is wrong. The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners’ land. It thereby limits the landowners’ right to ex-

clude certain others. The regulation *regulates* (but does not *appropriate*) the owners' right to exclude.

Why is it important to understand this technical point? Because only then can we understand the issue before us. That issue is whether a regulation that *temporarily* limits an owner's right to exclude others from property *automatically* amounts to a Fifth Amendment taking. Under our cases, it does not.

B

Our cases draw a distinction between regulations that provide permanent rights of access and regulations that provide nonpermanent rights of access. They either state or hold that the first type of regulation is a taking *per se*, but the second kind is a taking only if it goes "too far." And they make this distinction for good reason.

Consider the Court's reasoning in an important case in which the Court found a *per se* taking. In *Loretto*, the Court considered the status of a New York law that required landlords to permit cable television companies to install cable facilities on their property. We held that the installation amounted to a permanent physical occupation of the property and hence to a *per se* taking. In reaching this holding we specifically said that "[n]ot every physical invasion is a taking." We explained that the "permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." And we provided an example of a federal statute that did *not* effect a *per se* taking—an example almost identical to the regulation before us. That statute provided "'access . . . limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity.'" (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)).

We also explained why permanent physical occupations are distinct from temporary limitations on the right to exclude. We said that, when the government permanently occupies property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," "effectively destroy[ing]" "the rights 'to possess, use and dispose of it.'" *Loretto*, 458 U.S. at 435. . . . Thus, we concluded, a permanent physical occupation "is perhaps the most serious form of invasion of an owner's property interests."

Now consider *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). We there considered the status of a state constitutional requirement that a

privately owned shopping center permit other individuals to enter upon, and to use, the property to exercise their rights to free speech and petition. We held that this requirement was not a *per se* taking in part because (even though the individuals may have “physically invaded” the owner’s property) “[t]here [wa]s nothing to suggest that preventing [the owner] from prohibiting this sort of activity w[ould] unreasonably impair the value or use of th[e] property as a shopping center,” and the owner could “adop[t] time, place, and manner regulations that w[ould] minimize any interference with its commercial functions.”

In *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), we held that the State’s taking of an easement across a landowner’s property did constitute a *per se* taking. But consider the Court’s reason: “[I]ndividuals are given a *permanent and continuous* right to pass to and fro.” (emphasis added). We clarified that by “permanent” and “continuous” we meant that the “real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”

In *Arkansas Game and Fish Comm’n*, 568 U.S. 23 we again said that permanent physical occupations are *per se* takings, but temporary invasions are not. Rather, they “are subject to a more complex balancing process to determine whether they are a taking.”

As these cases have used the terms, the regulation here at issue provides access that is “temporary,” not “permanent.” Unlike the regulation in *Loretto*, it does not place a “fixed structure on land or real property.” The employers are not “forever denie[d]” “any power to control the use” of any particular portion of their property. And it does not totally reduce the value of any section of the property. Unlike in *Nollan*, the public cannot walk over the land whenever it wishes; rather a subset of the public may enter a portion of the land three hours per day for four months per year (about 4% of the time). At bottom, the regulation here, unlike the regulations in *Loretto* and *Nollan*, is not “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle*, 544 U.S. at 539.

At the same time, *PruneYard*’s holding that the taking was “temporary” (and hence not a *per se* taking) fits this case almost perfectly. There the regulation gave nonowners the right to enter privately owned property for the purpose of speaking generally to others, about matters of their choice, subject to reasonable time, place, and manner restrictions. The regulation before us grants a far smaller group of people the right to enter

landowners' property for far more limited times in order to speak about a specific subject. Employers have more power to control entry by setting work hours, lunch hours, and places of gathering. On the other hand, as the majority notes, the shopping center in *PruneYard* was open to the public generally. All these factors, however, are the stuff of which regulatory-balancing, not absolute *per se*, rules are made. . . .

The majority refers to other cases. But those cases do not help its cause. That is because the Court in those cases . . . did not apply a "*per se takings*" approach. In *United States v. Causby*, 328 U.S. 256, 259 (1946), for example, the question was whether government flights over a piece of land constituted a taking. The flights amounted to 4% of the takeoffs, and 7% of the landings, at a nearby airport. But the planes flew "in considerable numbers and rather close together." And the flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." Taken together, those flights "destr[oyed] the use of the property as a commercial chicken farm." Based in part on that economic damage, the Court found that the rule allowing these overflights went "too far." See *id.*, at 266 ("[I]t is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking" (emphasis added)). . . .

If there is ambiguity in these cases, it concerns whether the Court considered the occupation at issue to be *temporary* (requiring *Penn Central's* "too far" analysis) or *permanent* (automatically requiring compensation). Nothing in them suggests the majority's view, namely, that compensation is automatically required for a *temporary* right of access. Nor does anything in them support the distinction that the majority gleans between "trespass" and "takings."

The majority also refers to *Nollan* as support for its claim that the "fact that a right to take access is exercised only from time to time does not make it any less a physical taking." True. Here, however, unlike in *Nollan*, the right taken is not a right to have access to the property at any time (which access different persons "exercis[e] . . . from time to time"). Rather here we have a right that does not allow access at any time. It allows access only from "time to time." And that makes all the difference. A right to enter my woods whenever you wish is a right to use that property permanently, even if you exercise that right only on occasion. A right to enter my woods only on certain occasions is not a right to use the woods permanently. In the first case one might reasonably use the term *per se* taking. It is as if

my woods are yours. In the second case it is a taking only if the regulation allowing it goes “too far,” considering the factors we have laid out in *Penn Central*. That is what our cases say.

Finally, the majority says that *Nollan* would have come out the same way had it involved, similar to the regulation here, access short of 365 days a year. Perhaps so. But, if so, that likely would be because the Court would have viewed the access as an “easement,” and therefore an appropriation. Or, perhaps, the Court would have viewed the regulation as going “too far.” I can assume, purely for argument’s sake, that that is so. But the law is clear: A regulation that provides *temporary*, not *permanent*, access to a landowner’s property, and that does not amount to a taking of a traditional property interest, is not a *per se* taking. That is, it does not automatically require compensation. Rather, a court must consider whether it goes “too far.”

C

The persistence of the permanent/temporary distinction that I have described is not surprising. That distinction serves an important purpose. We live together in communities. (Approximately 80% of Americans live in urban areas.) Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go “too far.” And it is impractical to compensate every property owner for any brief use of their land. As we have frequently said, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal Co.*, 260 U.S. at 413. Thus, the law has not, and should not, convert all temporary-access-permitting regulations into *per se* takings automatically requiring compensation.

Consider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an “invasion of”) a property owner’s land. They include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements. See, e.g., 29 U.S.C. § 657(a) (authorizing inspections and investigations of “any . . . workplace or environment where work is performed” during “regular working hours and at other reasonable times”); 21 U.S.C. § 606(a) (authorizing “examination and in-

spection of all meat food products . . . at all times, by day or night"); 42 U.S.C. § 5413(b) (authorizing inspections anywhere "manufactured homes are manufactured, stored, or held for sale" at "reasonable times and without advance notice"); Miss. Code Ann. § 49-27-63 (2012) (authorizing inspections of "coastal wetlands" "from time to time"); Mich. Comp. Laws § 208.1435(5) (2010) (authorizing inspections of any "historic resource" "at any time during the rehabilitation process"); Mont. Code Ann. § 81-22-304 (2019) (granting a "right of entry . . . [into] any premises where dairy products . . . are produced, manufactured, [or] sold" "during normal business hours"); Neb. Rev. Stat. § 43-1303(5) (2016) (authorizing visitation of "foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met"); Va. Code Ann. § 22.1-289.032(C)(8) (Cum. Supp. 2020) (authorizing "annual inspection" of "preschool programs of accredited private schools"); Cincinnati, Ohio, Municipal Code § 603-1 (2021) (authorizing entry "at any time" for any place in which "animals are slaughtered"); Dallas, Tex., Code of Ordinance § 33-5(a) (2021) (authorizing inspection of "assisted living facil[ies]" "at reasonable times"); 6 N. Y. Rules & Regs. § 360.7 (Supp. 2020) (authorizing inspection of solid waste management facilities "at all reasonable times, locations, whether announced or unannounced"); see also *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352 (C.A. Fed. 2002) (affirming an injunction requiring property owner to allow Government agents to enter its property to conduct owl surveys).

The majority tries to deal with the adverse impact of treating these, and other, temporary invasions as if they were *per se* physical takings by creating a series of exceptions from its *per se* rule. It says: (1) "Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." It also would except from its *per se* rule (2) government access that is "consistent with longstanding background restrictions on property rights," including "traditional common law privileges to access private property." And it adds that (3) "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." How well will this new system work? I suspect that the majority has substituted a new, complex legal scheme for a comparatively simpler old one.

As to the first exception, what will count as "isolated"? How is an "isolated physical invasion" different from a "temporary" invasion, sufficient

under present law to invoke *Penn Central*? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent right to stop; thus the court will ask whether the school district has gone “too far.” Under the majority’s approach, the court must answer a new question (apparently about what counts as “isolated”).

As to the second exception, a court must focus on “traditional common law privileges to access private property.” Just what are they? We have said before that the government can, without paying compensation, impose a limitation on land that “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas*, 505 U.S. at 1029. But we defined a very narrow set of such background principles. See *ibid.*, and n. 16 (abatement of nuisances and cases of “‘actual necessity’” or “to forestall other grave threats to the lives and property of others”). To these the majority adds “public or private necessity,” the enforcement of criminal law “under certain circumstances,” and reasonable searches. Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, e.g., a necessity exception for preserving animal habitats?

As to the third, what is the scope of the phrase “certain benefits”? Does it include the benefit of being able to sell meat labeled “inspected” in interstate commerce? But see *Horne*, 576 U.S. at 366 (concluding that “[s]elling produce in interstate commerce” is “not a special governmental benefit”). What about the benefit of having electricity? Of sewage collection? Of internet accessibility? Myriad regulatory schemes based on just these sorts of benefits depend upon intermittent, temporary government entry onto private property.

Labor peace (brought about through union organizing) is one such benefit, at least in the view of elected representatives. They wrote laws that led to rules governing the organizing of agricultural workers. Many of them may well have believed that union organizing brings with it “benefits,” including community health and educational benefits, higher standards of living, and (as I just said) labor peace. See, e.g., 1975 Cal. Stats. ch. 1, § 1

(stating that the purpose of the Agricultural Labor Relations Act was to “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations”). A landowner, of course, may deny the existence of these benefits, but a landowner might do the same were a regulatory statute to permit brief access to verify proper preservation of wetlands or the habitat enjoyed by an endangered species or, for that matter, the safety of inspected meat. So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court’s exceptions and is a *per se* taking, then to what other forms of regulation does the Court’s *per se* conclusion also apply?

II

Finally, I touch briefly on remedies, which the majority does not address. The Takings Clause prohibits the Government from taking private property for public use without “just compensation.” U. S. Const., Amdt. 5. But the employers do not seek compensation. They seek only injunctive and declaratory relief. Indeed, they did not allege any damages. On remand, California should have the choice of foreclosing injunctive relief by providing compensation.

* * *

I recognize that the Court’s prior cases in this area are not easy to apply. Moreover, words such as “temporary,” “permanent,” or “too far” do not define themselves. But I do not believe that the Court has made matters clearer or better. Rather than adopt a new broad rule and indeterminate exceptions, I would stick with the approach that I believe the Court’s case law sets forth. “Better the devil we know” A right of access such as the right at issue here, a nonpermanent right, is not automatically a “taking.” It is a regulation that falls within the scope of *Penn Central*. Because the Court takes a different view, I respectfully dissent.

Notes and Questions

23.36. **The baseline scope of the *per se* rule.** Both the majority and dissent appear to agree that state-mandated intrusions into the right to exclude are common and that many (most? some?) of these regulations are not takings. So what makes *this* intrusion a taking as a categorical matter while, say, a mandatory health inspection is (presumably) not?

Let's begin with the apparent scope of the *per se* rule. The majority declares that the access regulation is a *per se* physical taking because it "appropriates a right to invade the growers' property." What does that mean, precisely? Does the "right to invade" parallel any property interest we have discussed in this course? (And does it matter if it doesn't?) Could any regulation of the right to exclude (e.g., a rent control law) be similarly characterized as an appropriation of a right to invade? The Court also states that "the regulation appropriates for the enjoyment of third parties the owners' right to exclude." Why isn't the same true for the mandate to a restaurant to admit a health inspector?

As addressed in following notes, the majority proffers arguments for why health inspection regimes are *not* takings (at least if reasonable in the Court's eyes) and that concerns to the contrary are "unfounded." Before we turn to them, there is a question of their purpose. Does the survival of any access regulation now *depend* on the regulation's ability to fit itself into one of these exceptions? Stated another way, have we now flipped the baseline on regulations that regulate the right to exclude from being presumptively constitutional to presumptively suspect?

23.37. The trespass/takings distinction. First, the majority observes that "our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." Justice Breyer's dissent raises the critique that it is uncertain what will distinguish "isolated physical invasions" from "appropriations." In any case, this provision likely has little applicability to regulatory programs, as inspectors would seem to have a "granted right of access."

23.38. Background principles. Second, the majority argues that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." This justification is taken from the discussion in *Lucas* of "pre-existing limitation upon the land owner's title." There, it was invoked to note a potential exception to the "wipeout" categorical rule. *Lucas* focused on the prospect of a regulation preventing a nuisance, which, being a nuisance, the landowner never had a right to maintain in the first place. In *Lucas*, the majority indicated that this class of cases is small, provoking the Justice Blackmun to observe in dissent that, "There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?"

Justice Breyer's dissent echoes this concern, asking if "only those exceptions that existed in, say, 1789 count?"

For the majority, the relevant background principles are broader than preventing nuisance and include the expectation that some government activities may require grants of access. These include matters of public or private necessity (concerning the need to prevent disaster or "serious harm"), entry to effect an arrest, and the conduct of a search. Here, the Court invokes the body of case law concerning the Fourth Amendment's applicability to administrative searches. In *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967), cited by the majority, the Court held that a warrant was required before a building inspector could enter premises without consent. *Camara* explains, however, that the requirements for probable cause in the administrative context are weaker than in the criminal setting.

This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of "probable cause" to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant.

Id. at 538. The ins and outs of what the Fourth Amendment requires in the administrative search context constitute, as might be expected, a complicated body of law. See, e.g., *New York v. Burger*, 482 U.S. 691, 702-03 (1987) (warrantless inspections of businesses in "pervasively regulated" allowed if industries may be searched without a warrant when they are justified by a substantial government interest, necessary to further the regulatory scheme and provide protections to the searched that effectively substitute for the protections of a warrant).

23.39. **Exactions.** Third, the majority notes that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." Note that this is an invocation of exac-

tions doctrine, in which the state demands, as a condition to receiving a government benefit, that the property owner give up an interest that the state could not take without paying compensation. But *Cedar Point* is not a review of an exaction, but rather of a state regulation. Normally, economic regulations are evaluated under rational basis review, but here the Court seems to suggest that regulations involving access must meet the rough proportionality test of *Dolan* (at least if they do not want to run afoul of the *Cedar Point per se* rule). In effect, therefore, a certain class of regulations must now meet heightened scrutiny. Alternatively, has the Court greatly expanded the scope of state action considered to be an exaction?

Of course, regulatory regimes will often not reflect the exactions fact pattern. This can be seen here, as the majority notes that “the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.” But is that always true of the regulations that the majority says are safe from *Cedar Point*? And how direct must “public risk” be? Are measures to protect endangered species a sufficient necessity, or will later opinions see them as too attenuated? This ties to the dissent’s question of why “labor peace” is not a sufficiently important goal? Are courts in a better position to make these calls than democratically accountable actors? Likewise, why cannot the state make certain labor practices a condition of being able to practice agriculture on an industrial scale?

To be sure, the majority may just have determined that these interests are insufficiently important given the relative intrusiveness of the regulation. If so, that sounds an awful lot like balancing, doesn’t it? The very balancing that the majority says is inappropriate under its perhaps-not-so-categorical approach.

23.40. A *Cedar Point* hypothetical. Consider this law pertaining to land surveyors:

A professional land surveyor, or persons under his or her direct supervision, together with his or her survey party, who, in the course of making a survey, finds it necessary to go upon the land of a party or parties other than the one for whom the survey is being made is not liable for civil or criminal trespass and is liable only for any actual damage done to the land or property.

225 ILL. COMP. STAT. ANN. 330/45. Many states have similar measures. Is this a taking under *Cedar Point*? Is this a regulation about health or safety? Does it confer a benefit to the owner of the burdened property? What would be just compensation if this were adjudicated to be a taking?

As noted above, *PruneYard* ruled that it was not a taking for state law to require a shopping mall to permit speech and petition activities by visitors, and the opinion evaluated the question using the *Penn Central* factors. *Cedar Point* distinguishes *PruneYard* as being about space open to the public. Why does openness to the public matter? What kind of openness to the public is necessary to be out from under the *Cedar Point* *per se* rule? Or is it the significance of the intruder's interest that matters?

Likewise, what is the precise doctrinal effect of openness to the public? Does it mean that the property is not subject to the *Cedar Point* rule—that is that the case does not involve an appropriation of a right to invade? Or does public openness flag a situation in which one of the majority's limitations to *Cedar Point*'s scope comes into effect (e.g., the openness of the mall to the public allows the state to demand an exaction)?

23.41. **How far is too far?** For the dissent, short of a permanent occupation, state access regulation should be evaluated under *Penn Central* unless the state's access rises to the level of a discrete property interest (e.g., being the equivalent of an easement, lease, or some such). If something allows access but doesn't rise to the level of a recognized property right, then *Penn Central* should apply. Would that formalist approach be sufficiently protective of property owners? To what extent might the majority be reacting to the difficulty to property owners of prevailing under the *Penn Central* analysis? Do considerations of landowner autonomy play a role insofar as having to tolerate an unwanted visitor might be seen as a particularly significant intrusion? On that note, consider this exchange from oral argument between Justice Barrett and the California Solicitor General:

JUSTICE BARRETT: . . . Let's imagine [my house is] situated on the corner of two busy streets and a city decides that it would be beneficial to allow people to protest on my lawn because it's so highly visible to the traffic that's passing by. But exactly like this one, you know, it says you can do it 120 days a year and three hours at a time just during rush hour. I take it, under your theory, that's not a *per se* taking, that would be subject to *Penn Central*.

MR. MONGAN: Yes, that would be a powerful *Penn Central* case.

JUSTICE BARRETT: Okay, but why would it be a powerful *Penn Central*? I mean, in the reply brief, your friends on the other side point out that the Ninth Circuit and the Federal Circuit couldn't

identify any *Penn Central* cases in which a court has found a taking where the diminution in value is less than 50 percent. And, surely, my property value hasn't decreased more than 50 percent as a result of the regulation I just described. . . .

MR. MONGAN: [Penn Central] says that if there is a regulation authorizing a physical intrusion, courts should be more likely to find a taking. . . . And if there's a concern that courts are not properly applying *Penn Central* to this type of situation, then the solution would be to take that type of case, as I mentioned, and clarify how it should apply. . . .

JUSTICE BARRETT: . . . *Penn Central* is deliberately designed to be permissive towards regulations given the pervasiveness of regulations on property use in modern life. And so . . . it's stacked in favor of regulations. But . . . you're saying that physical occupations are different. So, if physical occupations are different, why isn't the easier way to handle them the rule that we announced in *Loretto*, which is to say they're subject to a *per se* rule?

23.42. Just compensation. Suppose California wants the access regulation to remain in force. What should it (or the union) have to pay to allow union representatives on the land under the terms of the regulation? How should the amount be calculated? Is there a market for such matters that can provide data on just compensation? If the value is low, does that lower the stakes? Recall *Loretto*, in which the ultimate compensation required proved to be quite low, indeed.

23.43. What about *State v. Shack*? Recall *State v. Shack*. Is the New Jersey Supreme Court's dictate that "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises" a reflection of New Jersey background principles that the *Cedar Point* majority would accept? Note that *Shack* uses the language of necessity ("Hence it has long been true that necessity, private or public, may justify entry upon the lands of another . . ."). Does the fact that the farmers lived on the land fit the case within the distinction drawn by Justice Kavanaugh's concurrence?

Part V

Use

Chapter 24

Nuisance

There is perhaps no more impenetrable jungle in the entire law than that regarding the word “nuisance.”

W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984).

People want to use land for different things. We've already seen how the resulting conflicts provide a rationale for property rights. In the so-called tragedy of the commons, for example, each cattle owner has an incentive to use the pasture for grazing before someone else beats him or her to it. The race to consume leaves the pasture depleted and everyone worse off. Property rights are one, but by no means the only, mechanism for addressing the problem, as an individual owner may have the necessary incentive to ensure that the plot is not overconsumed. Likewise property rights enable owners to manage their holdings free from external interference. The farmer may plant her corn even though her neighbor wishes a hotel were there. And property rights facilitate the reconciliation of incompatible interests without outside intervention. Determining whether Blackacre is better off as a hotel or a farm might be a hard call for an outside regulator. But with enough money, the would-be hotelier may simply buy out the farmer (or vice versa).

This hardly exhausts the universe of potential dispute. As we have already seen, disputes may emerge within property boundaries. One joint tenant may want to use a pond for irrigation; the other, fishing. Property law provides another set of management mechanisms for this kind of disagreement—e.g. partition actions—that we studied in our unit on concurrent interests. Likewise the law of leaseholds has its own set of doctrines for managing the inevitable battles of the landlord/tenant relationship.

Here we are interested in conflicts that arise between neighboring property owners. The collision is not within an ownership interest (as with covenants) but between such interests. My lifelong dream of operating the world's smokiest factory may be incompatible with my neighbor's desire for odorless living. We each own our respective land. What then?

One solution is to engage in private governance. We might strike a deal, and the law of servitudes lets us bind our successors in ownership to the arrangement. Alternatively, the state might resolve our dispute via regulation—the government may declare my facility illegal via zoning law or air quality regulation, effectively picking a winner between competing interests.

The law of **nuisance** takes a different tack. It also involves picking a winner, but turns the choice over to a court. The court's role, however, is not explicitly regulatory. Rather, it is there to determine whether the complained-of act is contrary to someone else's property rights. Stated another way, if my factory is a nuisance, your property rights *already* preclude its operation. The nuisance action merely clarifies that I violated your property rights (and that my property rights did not extend to the action in question). In essence, the court is determining whether a boundary has been crossed. But from another perspective, nuisance looks a lot like regulation. A judicial regulator (rather than a politically accountable agency) takes a look at the facts and decides whose interests ought to prevail. We might look at nuisance questions from either view, which complicates the doctrine.

24.1 The Problem of Nuisance Definition

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1979). What does that mean? Nuisance law is a history of courts trying to come to grips with a fairly vague exhortation. Judges sometimes invoke the maxim **sic utere tuo ut alienum non laedas**. "[O]ne must so use his own rights as not to infringe upon the rights of another. The principle of *sic utere* precludes use of land so as to injure the property of another." *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 17 (Va. 2012).

That's intuitive, but unhelpful. Back to the factory versus the home. If my ownership of land includes the right to emit smoke, I interfere with my neighbor's ability to enjoy her home. But if her property right includes the ability to shut me down, then her preferred property use interferes with *my* ability to use

my property as I see fit. The harms are reciprocal. Appeals to *sic utere* beg the question. That said, there is something intuitively appealing about the maxim, and perhaps you have a strong intuition (based on what?) that factories "cause" harm in a way that homes do not. How far do intuitions of harm go? What if, instead of using my property, I prefer to let it fall into disuse? Does this passive act cause harm?

Puritan Holding Co. v. Holloschitz

372 N.Y.S.2d 500 (Sup. Ct. 1975)

WALTER M. SCHACKMAN, J.

Plaintiff owns a small apartment building, recently renovated, on West 93rd Street in Manhattan, almost directly across the street from a building owned by the defendant. The latter building has been abandoned. Plaintiff claims the defendant has created a nuisance by not properly caring for her property and claims it has suffered damages as a result. Defendant did not appear in the action and an inquest was held before the court.

The uncontested proof at trial was that defendant's building had deteriorated, become unsightly and been taken over by derelicts. The building's condition has caused a deterioration in values on the block. A real estate expert testified that the depreciation in value of plaintiff's property since the abandonment of defendant's building was \$30,000 to \$35,000. He further stated it would be impossible for plaintiff to obtain a mortgage because of the condition of the defendant's property. The question for the court is whether the failure of the defendant to supervise her abandoned property constitutes the maintenance of a private nuisance.

An excellent definition of nuisance appears in 4 ALR3d 908: "The nuisance doctrine operates as a restriction upon the right of an owner of property to make such use of it as he pleases. In legal phraseology the term 'nuisance' is applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, and which produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. It is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen in his person, property, the enjoyment of his property, or his comfort. It has been said that the term 'nuisance' is incapable of an exact and exhaustive definition which will fit all cases,

because the controlling facts are seldom alike, and each case stands on its own footing."

The court has made a search of the reported cases in New York and has been unable to find any similar to the case at bar. However, it has been held that "every person who suffered actual damages, whether direct or consequential, from a nuisance, might maintain an action for his own particular injury." (*Lansing v Smith*, 4 Wend 9.) There are numerous cases where property owners, adjacent to or in the vicinity of a nuisance, were entitled to damages. Examples are: where a tire shop emitted offensive odors and fumes; the discharge of large quantities of dust; an open burning operation by a city in a landfill area and blasting operations.

In considering whether an activity is a nuisance, the court must be mindful of the location and surroundings as well as other circumstances. An activity which occurs in a particular location and surroundings may be reasonable, while the same activity in another location and in other surroundings may be a nuisance.

West 93rd Street is in the West Side Urban Renewal area which has recently seen a marked upward trend in real estate values. Annually there are thousands of buildings abandoned throughout New York City. Some buildings abandoned and left in disrepair in certain deteriorating neighborhoods of the city may not constitute a nuisance. However, here a building has been abandoned in a location where property owners are trying to maintain and upgrade the housing standards. Defendant has clearly violated section C26-80.0 of the Administrative Code of the City of New York which requires that vacant buildings must be either continuously guarded or sealed. The court is of the opinion that defendant's actions constitute a nuisance.

The court is not unmindful of the fact that given the number of abandonments, estimated by the Housing and Development Administration of the City of New York at approximately 12,000 units per year, and the further fact that the city does not have the funds to force the owners to maintain these properties, a decision in favor of plaintiff herein could result in a multiplicity of lawsuits. However, one bad building may eventually destroy an entire neighborhood. The courts have a duty to examine each situation independently.

Plaintiff has provided sufficient proof that defendant's building is, in its present condition, a nuisance. It is entitled to the difference between the market value of the building before and after the nuisance. Plaintiff's

expert has testified that the difference in value is \$30,000 to \$35,000. The court finds in favor of the plaintiff in the sum of \$30,000.

Notes and Questions

24.1. How much should it matter that the defendant independently violated a local regulation?

24.2. If *Holloschitz* does not go too far, how much freedom should courts have to judge land uses? Are there any metrics that would both provide judicial discretion as well as contain it? We will examine several approaches below, but the question underscores the problem of unclear boundaries in nuisance law. A lot of property doctrine exists to help us determine the scope of property rights *without* asking a judge. The metes and bounds in a deed tell us what is a trespass. The adverse possession limitations period lets expectations settle. Title recording gives notice of competing interests. And so on. When push comes to shove, litigation may be necessary to resolve disputed boundaries, but in most cases there are ways to determine them without the aid of a court. By contrast, the boundaries clarified by nuisance law are harder to ascertain ex ante in part because nuisance is more a flexible standard than a bright-line rule. What measures short of litigation are available to people like the plaintiff here? To be sure, the law cannot anticipate every possible conflict between property owners. There is therefore something to be said for ex post determinations of what is a reasonable use of land. Is this reason enough to use nuisance law to supplement regulatory and zoning schemes?

24.3. **Aesthetics.** Courts generally reject nuisance claims based on aesthetic harm, but that reluctance may be eroding. *Rattigan v. Wile*, 841 N.E.2d 680, 683 (Mass. 2006) (“We conclude in this appeal that activities on one’s property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance.”); *id.* at 689-90 (arguing that the modern trend is to allow such claims). Courts also sometimes consider aesthetic harm as part of the larger nuisance analysis. *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 430 (Nev. 2013) (“[W]e hold that the aesthetics of a wind turbine alone are not grounds for finding a nuisance. However, we conclude that a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.”).

24.4. What if a building became dilapidated because its owner could not afford upkeep? If so, does *Holloschitz* hint at nuisance’s potential to serve as a tool of exclusion of poor people? What other activities (or groups) might the law

target? See generally Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 331-33 (2005) (discussing attempts to use nuisance law as a tool of racial discrimination); John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276-94 (2001) (discussing range of activities targeted by nuisance plaintiffs). For commentary on the disability rights implications of a recent nuisance suit between neighbors, see David Perry, *Flowers v Gopal—Rich folks try to declare autistic boy a “Public Nuisance”* (September 23, 2015), <https://www.davidmperry.com/flowers-v-gopal-rich-folks-try-to/>. Could the mere presence of a sex offender in a residential community of families with young children be considered a nuisance? Some public nuisance ordinances deem repeated 911 calls a nuisance; what effect might such property law rules have on victims of domestic violence? See Emily Werth, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (Aug. 2013), <http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf>.

24.5. Nuisance and Trespass. Historically, trespass and nuisance were two distinct common-law classes of injury involving real property. 9 R. POWELL, REAL PROPERTY § 64.01[1], at 64-5 (1999); 4 RESTATEMENT (SECOND) OF TORTS § 821D cmt. a (1979). A defendant who invaded a plaintiff’s possession was a trespasser; a defendant who interfered with a plaintiff’s use and enjoyment of his property by acts done elsewhere than on the plaintiff’s land was subject to a claim of nuisance.

This ancient distinction between trespass and nuisance, on the basis of whether an invasion of a plaintiff’s land was direct or indirect, is not followed by more recent cases. Instead, recent case law treats trespass cases as involving acts that interfere with a plaintiff’s exclusive possession of real property and nuisance cases as involving acts interfering with a plaintiff’s use and enjoyment of real property. In other words, the distinction no longer rests on the means by which the invasion is effected but, instead, on the nature of the right with which the tortfeasor interferes. When viewed in this way, claims of nuisance may include an instance of trespass in that a physical entry onto land possessed exclusively by another also may affect, in the abstract, the possessor’s use and enjoyment of the land.

Boyne v. Town of Glastonbury, 955 A.2d 645, 652-53 (Conn. App. 2008) (successive citations to POWELL and the RESTATEMENT omitted); see also, e.g., *Cook v.*

DeSoto Fuels, Inc., 169 S.W.3d 94, 103 (Mo. Ct. App. 2005) (“[Plaintiffs’] allegations that [defendant] caused gasoline to enter their property can constitute a claim for both trespass and nuisance because that contamination involves a direct physical invasion that interferes with both the right to possession and the use and enjoyment of property.”); *Md. Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218 (Mo. Ct. App. 1985) (complaint of low-level radiation emissions stated claim for nuisance and trespass).

24.2 Adjudicating Nuisance

Although some acts are treated as *per se* nuisances (typically illegal activities) courts must generally engage in contextual assessments of harm to determine whether a nuisance exists in fact (also referred to as a nuisance *per acci-dens*).

Sans v. Ramsey Golf & Country Club, Inc.

149 A.2d 599 (N.J. 1959)

FRANCIS, J.

An injunction was issued by the Chancery Division of the Superior Court against defendant Ramsey Golf and Country Club, Inc., barring the further use of the men’s and women’s third tees of its golf course. The Appellate Division affirmed. . . .

The issue presented is a novel one. The facts which created it are not seriously in dispute. The physical setting which forms its background is the product of the ingenuity of a real estate developer.

[The defendant operated a residential and country club development with a nine-hole golf course.] The development tract contained three small lakes, one of which, called Mirror Lake, became the water hazard hole about which this controversy centers. . . .

In 1949 the plaintiffs, husband and wife, purchased a lot in the development. Naturally, they were aware of the existence of the golf course, and they became members of the club. They commenced construction of a home on the lot in 1950, after which they acquired two adjoining parcels. One side of their property adjoins the fairway of the second hole. The rear line of the three lots is near Mirror Lake but does not run to the water. It

is separated from the edge of the lake by a strip of land varying in width from 11 to 40 feet, which is owned by the golf club.

In 1948 the present third women's tee was built. Its location was designed to create a short par 4 water hole. . . . [T]he tee had been in continuous use since its installation, although the plaintiff Ralph Sans testified that he did not notice it until 1950 when his home was being built. Subsequently, apparently in 1949, a separate men's tee was built for this hole about 30 feet farther from the northerly edge of the lake. The purpose was to lengthen the water hazard for the men. Both tees are on golf club property. According to Sans, the men's tee is "roughly" 50 to 60 feet from the southerly corner of the rear of his house; the women's tee is closer.

In order to reach the third tees from the second green, the golfers walk along the 11 to 40-foot-wide path (owned by defendant and described above) separating plaintiffs' rear lawn from the lake.

Plaintiffs moved into their new home in June or July of 1951, and have lived there since that time. They have two children, who were 10 and 11 years of age when the case was heard. As the membership of the club grew, play on the golf course increased, and the players' use of the third tees and the path to reach them became annoying and burdensome to plaintiffs. They began to complain to defendant's officials, and thereafter and until this suit was brought, they sought to effect the relocation of the tees to the north of the northerly line of the lake. Such a change is feasible. In fact, when a stay of the restraint issued by the trial court was denied, a new temporary tee was built and has been in use pending the determination of this appeal. The objection of defendant to adopting it permanently is that an attractive short par 4 water hole is transformed into an ordinary par 3 one on a nine-hole course which already has three par 3 holes.

Plaintiffs' complaint charged defendant and its members with trespassing on their land by using the pathway along the lake in walking to the ladies' and men's tees in question. This contention was abandoned when it appeared that plaintiffs did not own the strip and that, although National had not conveyed it to defendant in the original 1945 deed, a transfer had been made by deed in 1955. Other allegations, however, in company with the issues appearing in the pretrial order, were deemed by the trial court to present a claim that the location of the tees and the manner and incidents of their use by defendant and its members constituted a private nuisance as to plaintiffs. The trial was conducted on the latter basis.

Proof was adduced that in the golf season play begins on the third tees

as early as 6 A.M. and continues throughout the day until twilight. On week-ends and holidays the activity is more intense. Sans spoke of an "endless stream of golfers" using the path just in back of his house. . . .

When Sans bought his first lot in 1949, the one on which his home was later constructed, he did not see the tee or tees in question. And there is no proof that anyone called them to his attention. It does appear that a certain brochure respecting the development had been given to him. A similar one was introduced in evidence. It contained what appeared to be an aerial color view of the tract, including the course. Although the tees were indicated, none was depicted on plaintiffs' side of the lake. When an inquiry was made on cross-examination as to whether he did not know that he was "buying a piece of property immediately adjacent to the golf course," he answered: "No, we did not buy a piece adjacent to the golf course. We had a choice of three lots on that end and we bought the lot away from the golf course." And as has been indicated, he testified further that he did not see a tee in the rear of his lots until some time in 1950 when his home was being erected.

According to plaintiffs, the constant movement of the players to and from the tee in close proximity to their rear lawn and house was accompanied by a flow of conversation which became annoying and burdensome to them. It awakened them and their children as early as 7 in the morning and it pervaded their home all day long until twilight. Moreover, they have a consciousness that everything they say in or around the house can be heard out on the path and so they are "under a constant strain and constant tension." They "never feel relaxed or free at home"; "(w)e never know when there is someone in our back yard." Occasionally, a low hook or slice or heeled shot of a golfer carries upon their lawn. Then, by means of a trespass, the ball is retrieved. Sometimes it is played from that position. Apparently there are no out-of-bounds stakes in the area. The combination of difficulties makes it impossible to sit outside and "enjoy supper."

At times there are as many as 12 persons waiting to use the ladies' and men's tees. On a short course containing three par 3 holes, such backing up of playing groups, particularly at a 260-yard water hole, might well be expected. This gathering adds to the conversation, and the voices can be heard in the house. While silence is the conventional courtesy when a golfer is addressing his ball and swinging, the ban is relaxed between shots, and presumably the nature of the comments depends in some measure upon the success or failure of the player in negotiating the hazardous

water.

But an even more serious objection involves plaintiffs' children. They have no freedom of play on their back lawn. Golfers tell them not to play there and constantly admonish them to be quiet. If they move their activities to the north side of the property, they are endangered by balls being driven on the second fairway. This exposure has constantly worried Mrs. Sans. The children have a dog. On one occasion they were cavorting in the rear of the house and the dog was barking. A golfer instructed them to keep it quiet, and when they were unable to do so he walked on plaintiffs' property and knocked the animal unconscious with a club—even though one of the children pleaded with him not to do it. Complaint about the incident to one of defendant's officials met with the response that "The dog had no right to be there." At times the players allow their own dogs to accompany them around the course, and they have attacked plaintiffs' dog when it was on the rear lawn.

The resident members of the club have the common right to use the lakes for fishing and boating. Plaintiffs have an aluminum boat in the lake immediately to the rear of their house. If the children take the boat out, the golfers at these tees order them off the water. They cannot fish with safety from the banks to the rear of the house for the same reason, and because of the danger of being struck by golf balls. Even in the winter, when children were ice skating there, golfers were hitting balls over their heads to the third fairway. . . .

Defendant recognized the danger, and at times during the winter the tee was closed off to avoid possible injury to the skaters. When this happened the hole was played from the other side of the lake—presumably in a manner similar to that followed since the injunction in this case.

On the basis of the evidence, which stands without substantial dispute, plaintiffs claim that the third tees in their present location constitute a private nuisance and that their use should be enjoined. Defendant denies that the facts in their total impact warrant that conclusion. Further, it claims that plaintiffs bought their lots, built their home and moved into the area with full knowledge of the existence and use of the golf course and therefore assumed any annoyances and inconveniences incident to the playing of the game.

The circumstances here are unique. A situation where a person buys or builds a home adjoining a wholly independent, unrelated and existing conventional type golf course is quite dissimilar. The basic theme of this

development was residence. The recreational facilities, including the golf course were subordinate. Their purpose and existence were to make the area a desirable one in which to dwell. Note the ecstatic exclamations of the developer's brochures:

The perfect home location; . . . a millionaire's paradise for moderate income families; . . . Ramsey Country Club Estates is the culmination of a ten year search for the perfect home location . . . Each approved purchaser will automatically receive a share representing proportionate ownership in the Country Club and all its properties. The Club will own the impressive \$100,000 ivy covered stone mansion for its club house. Here will be the center of social life for this unusual new community . . . Owner-members of the Ramsey Country Club will own for their *exclusive use* the new 9-hole golf course . . . (the record contains no explanation of how the associate members-non-owners of property in the development-happened to be admitted to the club. Sans understood that membership was to be limited to property owners.), spacious sand bathing beaches, three picturesque lakes for canoeing, boating and fishing . . . complete facilities for the enjoyment of all winter sports . . . Residents will enjoy swimming, canoeing, fishing, ice-skating in the comfort and safety of their own private community. . . . This magnificent club house and its grounds—all of these wonderful recreational facilities—will be shared, owned and enjoyed by a selected group of families who will live luxuriously in these unusual and incomparable surroundings for less than the cost of a small city apartment. (Emphasis added, insertion ours.)

The plaintiffs may justly assert that these comments add equitable strength to their position in the present controversy. The brochure given to them before they became purchasers in 1949 portrayed the layout of the course; the greens were numbered and the tees were indicated. As has been pointed out, no tee appeared on their side of Mirror Lake. No suggestion is made that any representative of the developer or of defendant apprised them of any such tee. And it is not shown on the detailed map on file in the county clerk's office. In the factual context, the element of reliance by the Sans cannot be overlooked.

Thus the heart of the project was and is the home. The pastime facilities were intended to be no more than an aid to the enjoyment of the home, as the veins facilitate the functions of the heart. An avoidable and readily curable ailment in one vein should not be permitted to impair the central organ. Especially is this true when the remedy calls for a comparatively simple adjustment which will not materially impair the physical structure in its entirety.

The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. The elements are myriad. The law has never undertaken to define all of the possible sources of annoyance and discomfort which would justify such a finding. Pollock, *Torts* (1887), 260, 261. Litigation of this type usually deals with the conflicting interests of property owners and the question of the reasonableness of the defendant's mode of use of his land. The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests. The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business. Prosser, *Torts* (2d ed. 1955), 410. As the Court of Appeals of Ohio put it in *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752, 759 (1947):

The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor.

Defendant's members have the right to the ordinary and expected use of the golf course. Plaintiffs have the correlative right to the enjoyment of their property. The element of reciprocity must be emphasized because the parties' interests stem from a common source and are more mutually interdependent than in the usual case. The Appellate Division properly suggests the pertinent inquiry to be "whether defendant's activities materially and unreasonably interfere with plaintiffs' comforts or existence, 'not according to exceptionally refined, uncommon, or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people.'"

In the unusual circumstances of this case, the activities of defendant are manifestly incompatible with the ordinary and expected comfortable life in plaintiffs' home and the normal use of their property. The evaluation of the conflicting equities must be made in the factual framework presented. And any relief granted must result from a reasonable accommodation of those equities to each other in the light of the evaluation. In our judgment, the facts considered in their totality demonstrate that plaintiffs' interests are paramount and demand reasonable protection. The trial court and the Appellate Division felt that a proper balance of equitable convenience could be achieved by requiring defendant to relocate the ladies' and men's third tees. Such relief, in our opinion, does not represent a burden disproportionate to the travail which would be suffered by plaintiffs and their family through the perpetuation of the present method of play on the course.

Judgment affirmed.

Notes and Questions

24.6. Why does *Sans* conclude that the "conflicting equities" favor the plaintiff?

24.7. **Threshold harms.** One way courts avoid getting too involved in nuisance cases is by requiring significant harm before engaging in the balancing of equities. RESTATEMENT (SECOND) OF TORTS § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.");

Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and en-

joyment of his, the former is liable for the injury inflicted.

Watts v. Pama Mfg. Co., 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962) (citing 4 RESTATEMENT (FIRST) OF THE LAW OF TORTS § 822, cmts. g & j).

24.8. Restatement standards. The RESTATEMENT (SECOND) OF TORTS standard for a private nuisance is an activity that invades another's interest in the use and enjoyment of land where the invasion is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822 (1979). We will focus on the first prong, intentional conduct that a court nonetheless finds unreasonable. Section 826 sets forth two tests. The invasion is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct" or 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 of the conduct not feasible."¹

24.9. "Coming to" a nuisance. One way to adjudicate between competing interests is through first-in-time, first-in-right principles. Generally, whether the plaintiff **came to the nuisance** (i.e., acquired its property interest *after* the commencement of the allegedly unreasonable activity by the defendant) is treated as a factor to be considered in balancing the equities, and not as a bar to a nuisance suit. Why do you think that is? Are there circumstances in which you think coming to a nuisance ought to bar a suit? Likewise, compliance with zoning ordinances is a non-dispositive factor in the defendant's favor.

24.10. Idiosyncratic harms. The harm giving rise to nuisance liability must be "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." RESTATEMENT (SECOND) OF TORTS § 821F (1979). This creates difficulty for a range of asserted, but unproven, harms. See, e.g., *San Diego Gas & Electric Co. v. Superior Court*, 55 Cal. Rptr. 2d 724, 752 (1996) (rejecting nuisance claim based on fear of power-line electromagnetic fields). What about technological change? American law generally rejects the notion that one has a right to light from adjacent properties. But what if one has a solar panel? *Prah v. Maretti*, 321 N.W.2d 182, 191 (Wis.

¹The RESTATEMENT likewise provides standards for assessing the gravity of the harm to the plaintiff, including factors like degree, duration, character, ability to avoid, and nature of the plaintiff's activity (e.g., social value and local suitability). § 827. As the list indicates, they leave room for subjective interpretation. Likewise, the assessment of the defendant's conduct includes considerations of social value, suitability to the location, and ability to avoid or prevent. § 828.

1982) (allowing nuisance claim by owner of a solar heated home to proceed).

24.11. **Malice.** There is little utility to actions taken for the purposes of harming a neighbor, and the RESTATEMENT provides that such acts are nuisances when they cause harm to a property owner's interests. RESTATEMENT (SECOND) OF TORTS § 829.² "Spite fences" are often explicitly the subject of statutes. See, e.g., N.H. REV. STAT. ANN. § 476:1 ("Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance.").

24.12. **Private arrangements.** If a nuisance is a violation of a property right, it stands to reason that the right may have been transferred prior to the nuisance suit. Cf. *DeSarno v. Jam Golf Mgmt., LLC*, 670 S.E.2d 889, 890 (Ga. 2008) (distinguishing *Sans* and holding no trespass or nuisance claims were possible because "the easement in this case explicitly permitted the complained-of conduct and indeed exonerated the golf course owner from any liability for damages caused by the errant golf balls").

Note on the Clarity of Rights and Coase

The vagaries of nuisance standards reflect the difficulty of properly assigning the right (either to continue action or to enjoin the action). But perhaps all that really matters is the clarity of the property right. This was the suggestion of Nobel-Prize-winning economist Ronald Coase (1910–2013) in his famous article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The article concerned the previously encountered problem of externalities—costs or benefits of an action that are borne by someone other than the actor. When a factory emits smoke, for example, the smoke causes harms to others that the factory owner does not experience. They are external to his decision to operate, and therefore more likely to be produced than we might want. Externalities need not be negative. The factory might stimulate economic development, e.g., by attracting restaurants to open nearby to cater to its workers.

It has been argued that property rights emerge when the benefits of internalizing externalities outweigh the costs of establishing a property system. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347

²The provision also treats acts contrary to "common standards of decency" as a nuisance, offering as an illustration a farmer who breeds animals in full view of a neighbor's family. *Id.* cmt. d.

(1967). To return to the pasture held in common, suppose we make the land subject to private ownership. Giving property rights to a single party means that she will bear the cost of overgrazing (and thus take them into account before allowing that to happen, thereby internalizing the externality). She will likewise reap the benefits of improvements like an irrigation system, which without property rights would have been shared by too many to make the investment worthwhile.

But other externalities may remain. What happens when the smells of the pasture annoy the neighbors? Or if the land is used for fracking? Or a factory? How do we address the resulting harms to others? Regulation is a traditional answer to the problem of externality. The party causing the harm can either be made to pay or, if the harm is serious enough, cease the offending activity.

Enter Coase. He argued that the traditional approach, of trying to stop the harm, is question-begging in light of the reciprocity of harms:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Coase, *supra*, at 2. In other words, the issue is not stopping harm, but rather ascertaining whether the complained-of act does more harm than good. The market can help here, so long as property rights are clear and transaction costs are ignored. “It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.” *Id.* at 15.

So imagine a world in which there is only a smoke-producing factory (and its owner) and a house (and its owner, who has sued the factory for causing a nuisance). Suppose further that the homeowner values life without smoke at \$50, and the factory owner values operating at \$100. The nuisance suit then clarifies who has the relevant property right. If the homeowner wins, he now has the right to enjoin the factory owner. In a world without transactions costs, what happens next? We would expect the factory owner to pay the homeowner to release the injunction (as she values operation more than he values life without smoke). What if the activity is deemed to *not* be a nuisance? Then there is no

deal to be had. The factory owner's property rights encompass the right to emit smoke, and she values it more than the homeowner.

One interesting consequence of our hypothetical scenario is that the initial allocation of property rights *does not matter* with regards to whether the factory operates. Absent transaction costs, operations continue no matter which property owner "wins" the right to harm the other.³ Coase argued that

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Id. at 8. This insight is referred to as the **Coase Theorem**.⁴ The theorem has a variety of expressions. It is the idea that absent transactions costs, parties will bargain to efficient outcomes concerning externalities regardless of the initial allocation of property rights. The implication for nuisance law is the suggestion that if transaction costs are low, it might matter more that property rights be clear than that they be properly assigned in the first instance.

The Problem of Social Cost is one of the more cited and debated articles in legal history. One problem with characterizing the debate is that it involves not only Coase's work, but the various interpretations that may or may not be a fair representation of his ideas. See, e.g., Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989) ("Coase's name is consistently attached to propositions that he has explicitly repudiated."). For present purposes, it is worth noting four reasons to be cautious in drawing normative lessons from Coase. First, as Coase himself emphasized, transactions costs are always present in the real world and often quite high. So if a factory is emitting smoke that falls on a neighborhood (rather than a single homeowner), bargaining costs may be large. The neighbors will face the difficulty of coordination (and the attendant problems of free riders and holdouts). Moreover, the health consequences of the factory may not be well known (i.e., there is a cost to simply having the information necessary for the neighborhood to know how highly it

³To make sure you understand this point, repeat the exercise with reversed dollar values. You will see that the factory will *shut down* regardless of whether it is a nuisance.

⁴The term "Coase Theorem" to describe Coase's insight is generally ascribed to George Stigler.

values freedom from smoke). Second, even if property rights allocations matter less than we think with respect to the production of externalities, they remain important from the perspective of distributive justice. When a judge decides whether A must pay B, or vice versa, one becomes wealthier at the expense of the other. The Coase Theorem tells us nothing about who merits the windfall. Likewise, wealth matters with respect to how the gain or loss is experienced insofar as money has a diminishing marginal utility. So, someone with only \$1000 to his name is likely to value an additional \$1000 more than would a millionaire. Third, unequal baseline distributions of wealth mean that many hypothesized transactions based on competing subjective valuations of entitlements may be impossible: what might it mean for a person with net financial worth of \$10,000 to value their respiratory health at \$100,000? Could such a person effectively bargain over another's right to pollute the air they breathe? Fourth, the proposition that initial allocations do not matter has been empirically challenged. It has been observed that people value what they possess more than what they do not. I may, for example, be willing to pay \$50 to shut a factory down. But if my starting point is one in which the factory is not yet operating and I have a veto, I might demand \$100 to release it. The "endowment effect" might mean that initial allocations therefore matter. For a colorful example of this effect in play over the right to recline an airline seat, see Christopher Buccafusco & Christopher Jon Sprigman, *Who Deserves Those 4 Inches of Airplane Seat Space?* SLATE (Sept. 23, 2014), http://www.slate.com/articles/health_and_science/science/2014/09/airplane_seat_reclining_can_economics_reveal_who_deserves_the_space.single.html.

All that said, Coase's article suggests that we keep in mind the value of clear property rights and the prospect that market mechanisms may sometimes be preferable to judicial allocations. Likewise Coase reminds us anew that law is not all. And, indeed, neither is the market. Social norms may play a powerful role in resolving usage disputes. These norms may be powerful enough to resolve disputes notwithstanding changes in the underlying legal regime. For a classic account of this dynamic, concerning payments by farmers for damage done by wandering cattle, see ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

24.3 Remedies

Nuisance plaintiffs usually seek injunctions. The ongoing harm of the nuisance suggests equitable relief, as damages for past harms would not address those that would follow if the nuisance continues. 9 POWELL ON REAL PROPERTY § 64.07. But because equity involves balancing, courts sometimes decline injunctions or offer more tailored remedies.

Boomer v. Atlantic Cement Co.

257 N.E.2d 870 (N.Y. 1970)

BERGAN, Judge.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

The cement making operations of defendant have been found by the court of Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in fo-

cus in *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805. A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was "a lower riparian owner". The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted. "Such a balancing of injuries cannot be justified by the circumstances of this case", Judge Werner noted. He continued: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction".

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., \$100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency.

There are cases where injunction has been denied. *McCann v. Chasm Power Co.*, 211 N.Y. 301, 105 N.E. 416 is one of them. There, however, the damage shown by plaintiffs was not only unsubstantial, it was nonexistent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse consequence to plaintiffs, and thus injunctive relief was denied. . . . Thus if, within *Whalen v. Union Bag & Paper Co.*, Supra which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is "not unsubstantial", an injunction should follow.

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was \$185,000. This

basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period—e.g., 18 months—the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones

who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance. . . .

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S. Nuisances s 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance. . . .

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (See *United States v. Causby*, 328 U.S. 256 (1946), where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees.

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to ex-examine this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

JASEN, Judge (dissenting).

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution.

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs,⁵ but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing

⁵There are seven plaintiffs here who have been substantially damaged by the maintenance of this nuisance. The trial court found their total permanent damages to equal \$185,000.

wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. This is made clear by the State Constitution which provides that "(p)rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private use*.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control

devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

Notes and Questions

24.13. What are the costs and benefits of leaving the question of the cement plant's legality to the legislature? Modern environmental law is characterized by far-reaching federal legislation (e.g., the Clean Air Act, the Clean Water Act, the Endangered Species Act, etc.). How might things have been different had nuisance law been the primary mechanism of environmental regulation?

24.14. **Preemption.** State and federal legislation offers the prospect of more comprehensive regulation than case-by-case nuisance adjudication. Once these regulations are in place, defendants often claim they preempt resort to private nuisance remedies. See 9-64 POWELL ON REAL PROPERTY § 64.06 (collecting examples of successful and unsuccessful preemption defenses). Should compliance with, for example, a federal clean air regime provide immunity to a local nuisance suit based on air pollution? Is federal regulation best seen as a ceiling or a floor for environmental standards?

On this question, note that federal environmental laws are often criticized for interfering with "property rights." But to the extent they limit the availability of local nuisance law, might they also be seen as interfering with the property rights of would-be nuisance plaintiffs?

Note on “Property Rules” and “Liability Rules”

When should a court award damages and when is an injunction appropriate? One of the most famous takes on the problem is found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The authors outline a framework for the protection of entitlements, distinguishing **property** and **liability rules**.

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.

Id. at 1091.⁵ We might think of an injunction against trespass as an illustration of a property rule. The trespasser must keep out unless the property owner agrees to let her enter. Contract damages are an example of a liability rule. If one is willing to pay damages, one is free to breach. As the examples suggest, property rules are associated with, well, property rights, while liability rules are associated with contract remedies. But there are exceptions in both subjects.

⁵And some entitlements, as the authors discuss, are inalienable.

For example, some states allow for private condemnation of rights of way to provide access to landlocked privately owned land. The owner of the property has no ability to say no to another's entry into his land, but is limited to a compensation remedy. Conversely, under certain circumstances a contract may be enforced by specific performance.

Calabresi and Melamed spend some time on the question of how entitlements are assigned in the first instance (i.e., is the factory a nuisance or does its owner have the right to pollute), but for present purposes we will focus on the question of deciding how to protect an entitlement once assigned. In a vacuum, property rules let parties decide for themselves how to value entitlements, but in the real world, transaction costs get in the way. Holdouts and freeriders may interfere with the coordination of multiple purchasers or sellers of entitlement (e.g., when multiple neighbors live near an offending factory). When negotiation costs exceed the entitlement's value, it will remain with the party to whom it was assigned, regardless of overall efficiency. In such cases, a liability rule might be preferable.

As applied to nuisance, the authors observe:

Traditionally . . . the nuisance-pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let us assume), Marshall, allows it (Marshall may enjoin Taney's nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages). Third, Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney's pollution is not held to be a nuisance to Marshall). In our terminology rules one and two (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney's price can Marshall end the pollution.

The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute,

but an entitlement which is protected only by a liability rule. The fourth rule . . . can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.

Id. at 1115-16 (footnotes omitted). In a low-transaction cost world, Calabresi and Melamed would use property rules, and assign the entitlement based on whether or not the polluter is the low-cost risk avoider. In such cases improper allocations have distributive consequences, but transactions would at least ensure economic efficiency. (Do you see why?)

The moment we assume, however, that transactions are not cheap, the situation changes dramatically. Assume we enjoin Taney and there are 10,000 injured Marshalls. Now even if the right to pollute is worth more to Taney than the right to be free from pollution is to the sum of the Marshalls, the injunction will probably stand. The cost of buying out all the Marshalls, given holdout problems, is likely to be too great, and an equivalent of eminent domain in Taney would be needed to alter the initial injunction. Conversely, if we denied a nuisance remedy, the 10,000 Marshalls could only with enormous difficulty, given freeloader problems, get together to buy out even one Taney and prevent the pollution. This would be so even if the pollution harm was greater than the value to Taney of the right to pollute.

Id. at 1119. In such situations, the "rule four" possibility would increase the range of options in a nuisance case. If circumstances made a liability remedy appropriate, a court would be free to assign the entitlement to either party as efficiency or distributional concerns warranted. *Id.* at 1120.

Like a particle predicted by atomic theory, the rule four injunction option was described, but awaited observation in nature. It would not take long.

Spur Industries, Inc. v. Del E. Webb Development Co.
494 P.2d 700 (Ariz. 1972)

CAMERON, Vice Chief Justice.

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb

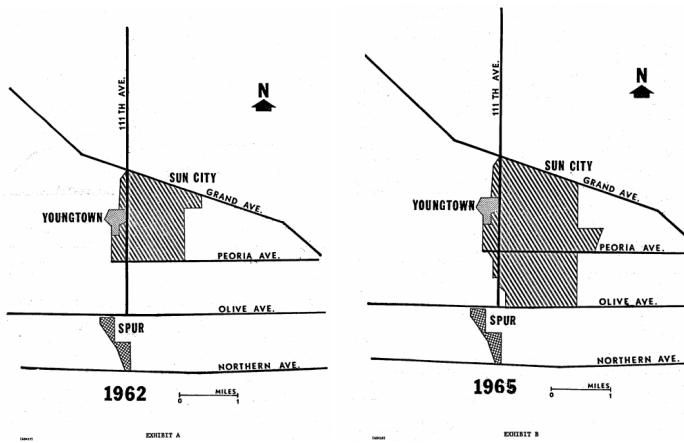


Figure 24.1: Exhibits A and B to *Spur Industries*.

Development Company's Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?
2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west. See Exhibits A and B [in Figure 24.1].

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the Agua Fria River, though land to the east remained dependent upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue. Along 111th Avenue, approximately one mile south of Grand Avenue and 1 1/2 miles north of Olive Avenue, the community of Youngtown was commenced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feed-lots, about 1/2 mile south of Olive Avenue, in an area between the confluence of the usually dry Agua Fria and New Rivers. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for \$15,000,000 or \$750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres. See Exhibit A above.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2 1/2 miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens

a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell. . . .

By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north. See Exhibit B above. Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area. . . .

It is noted . . . however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del E. Webb Development Company and Spur Industries, Inc.

May Spur Be Enjoined?

The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood.

Where the injury is slight, the remedy for minor inconveniences lies

in an action for damages rather than in one for an injunction. Moreover, some courts have held, in the "balancing of conveniences" cases, that damages may be the sole remedy. See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590 (1970), and annotation comments, 40 A.L.R.3d 601.

Thus, it would appear from the admittedly incomplete record as developed in the trial court, that, at most, residents of Youngtown would be entitled to damages rather than injunctive relief.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinal public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

§ 36-601, subsec. A reads as follows:

§ 36-601. Public nuisances dangerous to public health

A. The following conditions are specifically declared public nuisances dangerous to the public health:

1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.

By this statute, before an otherwise lawful (and necessary) business may be declared a public nuisance, there must be a "populous" area in which people are injured:

... (I)t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance. (citations omitted) A business which is not per se a public nuisance may become such by being carried on at a place where the health, comfort, or convenience of a populous neighborhood is affected. . . . What might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. . . .

MacDonald v. Perry, 32 Ariz. 39, 49-50, 255 P. 494, 497 (1927).

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully

maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

Must Del Webb Indemnify Spur?

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

§ 104. Where public interest is involved.

Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest. . . .

27 Am.Jur.2d, Equity, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being *primarily agricultural*, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting,

subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.

People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages.

Dill v. Excel Packing Company, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958). See also *East St. Johns Shingle Co. v. City of Portland*, 195 Or. 505, 246 P.2d 554, 560-562 (1952).

And:

. . . a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. . . .

Gilbert v. Showerman, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city. . . .

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the

part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitable or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs. . . .

Notes and Questions

24.15. What if there had been no “guilty” developer like Del Webb? Why doesn’t the logic of the coming to a nuisance cases (quoted by the opinion) apply to those who chose to purchase from Del Webb?

24.16. **Public vs. Private Nuisances.** **Public nuisances** involve unreasonable interferences with rights held by the general public. Under the RESTATEMENT, they arise when the complained-of actions threaten public health, violate statutory law (including administrative regulations), or otherwise have a significant effect on a public right. RESTATEMENT (SECOND) OF TORTS § 821B (1979). Unlike private nuisances, they do not require an interference with the use of land. *Id.* cmt. h. As *Spur* indicates, one may sue on a public nuisance if one al-

leges a “special injury” specific to the plaintiff and not shared by the public at large.

24.17. In addition to using “coming to” nuisance arguments, feedlot operators may be specifically protected from nuisance suits. Some states explicitly insulate agricultural operations from nuisance liability with “right to farm” legislation. Kan. St. Ann. 2-3201 provides:

It is the declared policy of this state to conserve and protect and encourage the development and improvement of farmland for the production of food and other agricultural products. The legislature finds that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses. It is therefore the purpose of this act to provide agricultural activities conducted on farmland protection from nuisance lawsuits.

Chapter 25

Zoning

Zoning is a perennial issue for local governments. For most homeowners, their home is their largest asset, and they are exquisitely sensitive to any threats to its value—but threats can mean either the behavior of their neighbors, or constraints on their own behavior, setting up a seemingly irresolvable tension. (Economist William Fischel calls them “homevoters” in recognition of the way that their property interests shape their political choices.) In addition, local governments and would-be developers of new properties have interests of their own. Developers too seek to maximize their own property values, including their ability to develop future projects, which may lead them to sacrifice the theoretical maximum value of any given parcel. Governments want to protect their authority and their revenues, goals which they try to accomplish in a variety of ways.

Zoning is a way of answering the question: What—and where—do we want the places where we live to be? Our goals in this chapter are to understand the justifications for and modern varieties of zoning. As you read and review, consider how zoning compares to other types of land use controls, including nuisance, private covenants, and the implied warranty of habitability.

Many of our examples in this chapter will come from St. Louis, Missouri, and its surrounding suburbs. We focus on St. Louis not because it is unique, but because property law developments in and around St. Louis are broadly representative of the evolution of metropolitan areas around the country over the past century. Missouri allows particularly easy formation of new cities from unincorporated land, and that has contributed to the proliferation of local governments, so some of the issues are presented particularly starkly in Missouri. Nonetheless, you should expect similar dynamics to operate throughout the



Figure 25.1: Houses under construction, Fairfax, VA, by Zachary Schrag, Aug. 24, 2015

United States.

25.1 Euclidean Zoning

25.1.1 *Euclid Decision and History*

Euclid v. Ambler Realty Co.
272 U.S. 365 (1926)

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farmlands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue,

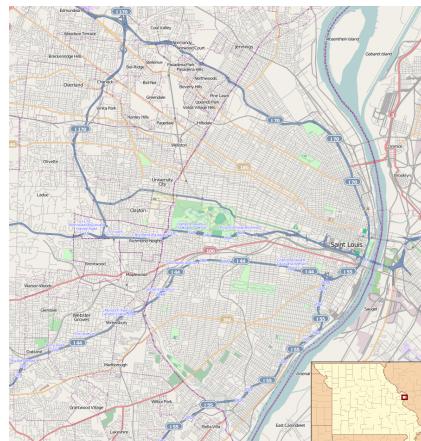


Figure 25.2: OpenStreetMap map of St. Louis, https://commons.wikimedia.org/wiki/File:Location_map_USA_St._Louis.png, BY-SA

and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive, and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, noncommercial greenhouse nurseries and truck gardening; U-2 is extended to include two-

family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes, the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1, and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these,

certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: in A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

Annexed to the ordinance, and made a part of it, is a zone map showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions

The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that, for such uses, it has a market value of about \$10,000 per acre, but if the use be limited to residential pur-

poses, the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is, or may be, a demand for any part of appellee's land for any of the last named uses, and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. . . .

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require,

and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted not to the meaning, but to the application of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution of course must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue]. And the law of nuisances likewise may be consulted not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to

control.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing author-

ties, presumably representing a majority of its inhabitants and voicing their will, have determined not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.

. . . The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that, in such sections, very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one

apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality.

. . . Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance, in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

Note: Facial v. As-Applied Challenges

Euclid held that a zoning ordinance would not be struck down as an unwarranted interference with property rights on its face, but left open the possibility of as-applied challenges to applications of zoning to prohibit particular developments. The Court then made clear that as-applied challenges would almost always fail as well, unless the harm to the property owner rose to the level of a taking requiring compensation under the Fifth and Fourteenth amendments. See *Takings, supra*. In the absence of a taking, courts were not to interfere with zoning authorities' determinations unless they were arbitrary and irrational, even if they were wrong. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). Lower courts received the Court's message clearly and left zoning authorities almost entirely free to zone as they wished.

Richard H. Chused, *Euclid's Historical Imagery*

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. . . No one should be surprised that land use and urban planning emerged and flowered in the 1920s. Chaos in America's developing urban centers, unprecedented levels of immigration from Europe and migration from the southern United States, burgeoning sales of automobiles, and development of new building construction techniques generated enormous controversy during the end of the nineteenth and beginning of the twentieth centuries. As American cities grew like wildfire, cries of distress became common. Muckraking authors produced "hit" books reflecting upon widespread concern about the state of urban America. From holding only about twenty-five percent of the nation's population in 1870, urban areas held just over half only fifty years later. Between just 1905 and 1915, immigration increased the nation's population by more than ten percent. With most of those arrivals settling in highly populated areas along the coasts and industrial cities in the heartland, responding to immigration was a

major concern in urban America. The blare of urban life became a cacophony as the number of registered automobiles passed the ten million mark in 1921.

. . . The largely undeveloped Village of Euclid, just east of Cleveland, was caught up in this wave of planning reforms. The Village of Euclid actually adopted its first zoning ordinance in 1922, two years before the Commerce Department published its final draft of the Standard Zoning Enabling Act. Euclid followed in the footsteps of New York City, which adopted its first zoning ordinance in 1916, two years after the New York state legislature adopted the nation's first zoning enabling statute. . . .

It should surprise no one that race, ethnicity, and poverty were on the minds of those handling the dispute over Euclid's zoning scheme. The solidification of the Jim Crow system from the end of Reconstruction through the 1920s is a well-known story. Other startling events also brought racial and ethnic issues to public attention on a regular basis. Race riots occurred in numerous cities in the late nineteenth and early twentieth centuries. These were not like the urban disturbances that began in Watts in 1965 and appeared repeatedly until after the assassination of Reverend Martin Luther King, Jr. in 1968. In 1919 alone, for example, over twenty-five cities were faced with mobs of white people destroying African-American neighborhoods and killing residents. . . . Though lynching of individuals or small groups of people peaked near the end of the nineteenth century, urban mob killings more than made up for the decline in the numbers of people strung up on trees individually or in small groups. The Ku Klux Klan was a major political force at the time. Its members held elected offices in a number of states during the first few decades of the twentieth century. . . .

In addition, opposition to immigration was fierce by the time Judge Westenhaver decided Euclid. Acts restricting immigration were enacted in 1885, 1891, 1903, 1907, and 1917. The quota system, favoring those seeking admission from northern Europe and severely limiting entry from other parts of Europe and the rest of the world, was imposed by legislation passed in 1921 and 1924. Immigration dropped dramatically after the last of these enactments was signed into law. Fueled by racism and anti-semitism, and given intellectual cover by Social Darwinism, many native-born whites saw themselves as the saviors of culture and civilization

When viewed in light of such a setting, the debate in *Euclid* takes on new meanings. It was not just a case about the ability of legislative bodies

to regulate property and contracts, but a debate about the sorts of social forces—good, bad, and indifferent—that could legitimately be taken into account by those elected to state legislatures

By using a “nuisance analogy”—the idea that single use zones were likely to prevent land use conflicts—as the central feature of his argument, [Alfred Bettman, leader of the National Conference on City Planning,] sidestepped the intractable and circular debates . . . about the dichotomy between the police power, on the one hand, and takings or freedom of contract, on the other. . . .

As Bettman himself noted in a paper he wrote while *Euclid* was pending, barring apartment buildings from residential zones was thought by many to be the most troublesome feature of the typical planning ordinances. Responding to claims that such zoning tactics were merely aesthetic controls and therefore outside the police power, Bettman called upon telling imagery of middle and upper class men protecting their children from moral risk to justify single family residential zones:

[T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. . . . Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself.

In this passage, it becomes clear that use of the nuisance analogy also permitted one other crucial step—the introduction of “politely” ugly discourse. By putting the home/apartment dichotomy into the nuisance analogy, Bettman could call forth a host of phrases well suited to convince the conservative instincts of Supreme Court Justices that zoning was a positive good. The moral strength of upper-class children was at risk, Bettman warned. Keeping the kids away from a “disorderly, noisy, slovenly, blighted and slum-like district” was the only protection.

. . . Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture

It was therefore possible, without ever mentioning race, immigration, or tenement houses, to call upon other code words that had the same impact. . . .

Notes and Questions

25.1. Does Chused's account make you think differently about *Euclid*? Suppose the Court had ruled the other way, that zoning was an unwarranted interference with property rights. How would our cities and suburbs look now? (Consider this question again when you study restrictive covenants, later in this book.)

25.2. William A. Fischel puts a different emphasis on historical causes, and asks why zoning became so much more restrictive over time. William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317 (2004), <https://journals.sagepub.com/doi/abs/10.1080/0042098032000165271>. Fischel argues that zoning developed, and then tightened its grip, because of homeowners' fears that the value of their single largest asset was threatened by new transportation technologies. The bus and truck came first, in the 1910s, corresponding with the initial adoption of zoning. The development of the interstate highway system in the 1960s then "put suburban homeowners at risk from value-reducing development in their neighborhoods and communities," causing them to support increasingly restrictive zoning. Zoning spread quickly to suburbs and small towns (like Euclid itself), rather than being driven by the well-known planners of the big cities.

Before 1880, most people walked to work in American cities, and rich men tended to live close to their jobs to avoid frustrating and time-consuming commutes. Electric-powered streetcars then made it possible for urban workers to live in residential areas, commuting to city jobs. As he notes, streetcar routes exploded from 3,000 miles of horse-drawn routes in 1882 to 22,500 mostly electrified miles in 1902. Developers built houses for the well-off workers who could afford streetcar fares, and the rich began moving to the suburbs, but not with zoning. Zoning wasn't yet needed: apartments and stores were located near streetcar lines, but it was simple for homebuilders to avoid those areas by building only a few blocks away from the tracks. Homebuilders and homeowners also used political clout to keep streetcar lines from going through exclusively residential areas.

But then, Fischel argues, trucks and buses became common, and the constraints imposed on poorer people by streetcars diminished. It became prof-

itable to sell a vacant lot in a residential neighborhood to an industrial user or apartment builder, who could expect easy access to all the resources of the city through the new means of transportation. Restrictive covenants weren't enough to stem the flow of intensive uses, because they usually covered only relatively small areas of land, and restricted communities were vulnerable to development just on the border. Instead of trying to buy up even bigger tracts of land, developers began to support zoning, not because they trusted planners, but because they wanted to "induce homeowners to invest their savings in a large, undiversified asset As planning-historian Christine Boyer points out, zoning was seen as a way to provide 'an insurance policy that the single-family home owner's investment would be protected in stable neighborhood communities'"

The next development was political. Up to the first decade of the twentieth century, suburban governments were routinely formed and then absorbed into the expanding city. By the 1920s, however, suburbs became unwilling to give up their independence, and unincorporated parts of surrounding counties became more difficult for core cities to annex. Before zoning, Fischel contends, suburbs regarded merger with the city, and the intrusion of city problems and costs, as inevitable. As they grew, they needed more services, making the better-organized city police, firefighting companies, and utilities seem more attractive. But with zoning, suburbs determined that they could control their own growth and fiscal destiny. Instead of merging with the city, suburbs began cooperating with each other to provide water and other services that had previously only been available from the central city—a pattern seen today in many St. Louis suburbs.

People who live near where they work, Fischel posits, have to balance their interests as homeowners with their interests as businesspeople, employers, or employees—they are more likely to support growth than people who fear only disruption of their living conditions from growth. Commuters, by contrast, didn't vote where they worked, so they only voted based on the value of their homes. Homeowners can't buy insurance against the risk that their homes will become less valuable, and most homeowners can't diversify their assets because they don't have much in the way of assets other than a home. This makes them anxious and politically active: "They know that if things go bad in their neighborhood, they will be stuck having paid a lot for an asset that they could sell only at a loss. They can avoid the personal consequences of a school system that has unexpectedly gone bad by moving, but they cannot avoid the financial consequences. Potential buyers can see the declining test scores as well

as seller.” As author Reihan Salam puts it, “Renters might react to demographic change with relative equanimity, knowing that even if it had negative consequences, it wouldn’t endanger their biggest investment. Homeowners felt they couldn’t afford not to panic.” When demographic change nonetheless arrived, the result, in the St. Louis suburbs and elsewhere, was “round after round of white flight, each one of which leaves a suburban ghetto in its wake.” Reihan Salam, *How the Suburbs Got Poor*, SLATE, Sept. 4, 2014.

For the first fifty years of zoning, pro-development forces could win victories in the suburbs—if one suburb resisted, another nearby might well be more accommodating. However, Fischel argues, this changed in the 1970s, when the suburbanization of employment and the gains of the civil rights movement changed the political behavior of suburbs. The interstate highways of the 1960s enabled jobs to move out to the suburbs, in “industrial parks.” Low-income workers whose jobs had previously been in city centers now found that they needed to go out to the suburbs to find work. More people, including poorer people, got cars—up to 82% of all households in 1970. With the ability to get to a job in the city center less of a constraint, residential amenities such as schools became far more important to homeowners, who became even more anxious and insistent on keeping development away.¹

Meanwhile, civil rights laws barred overt discrimination, including informal discrimination such as steering different races to different areas. While courts were hostile to racial zoning, they accepted facially neutral economic discrimination, which just happened to preserve racial lines. (Fischel points out that nearly all-white states like Vermont and New Hampshire underwent the same evolution towards increasingly restrictive zoning, suggesting that class was independently sufficient to drive this change.) Suburban homeowners adopted the rhetoric of environmentalism and demanded limits on growth and density, restricting development for everyone, not just for low-income people. Forced to choose between letting everyone in and letting no one in, they opted for no one. Fischel concludes: “The mottoes of no-growth, slow growth, managed growth, and (currently) ‘smart growth’ are all facially neutral watchwords which nonetheless are effective substitutes for more selective means of keeping the

¹ Although much of the discourse surrounding home values has to do with schools, there is no evidence that state-level equalization of school funding, which makes property taxes less important, has reduced exclusionary zoning. California equalized school finance and imposed a limit on property taxes that meant that homeowners didn’t need to worry that low-income housing would increase their taxes, but exclusionary zoning didn’t diminish and even intensified.

poor out of the suburbs.” Changes in local government structure, such as environmental impact statement requirements and the “double veto” structure in which larger regional governments can block development but not force it, strengthened the anti-growth forces’ hand.

25.1.2 Euclidean Zoning Theory

The dominance of the single-family home. Americans love their homes, and homeownership remains a cornerstone of the “American dream.” Alexis de Tocqueville noted this several hundred years ago, and also commented that Americans would build homes and sell them as soon as the roof was complete. A particular ideal of the home developed in the twentieth century: “A separate house surrounded by a yard is the ideal kind of home.” MARY LOCKWOOD MATTHEWS, ELEMENTARY HOME ECONOMICS (1931). As a Wilmington, Delaware real estate ad from 1905 instructed, “Get your children into the country. The cities murder children. The hot pavements, the dust, the noise are fatal in many cases, and harmful always. The history of successful men is nearly always the history of country boys.”

Results from the 2013 American Household Survey (AHS), <http://www.census.gov / programs - surveys / ahs / data / 2013 / metropolitan - summary - tables---ahs-2013.html>, show that 64% of all occupied housing, and 62% of recently built units, are detached single-family homes. Even in central cities, 79% of owner-occupied units are detached single-family houses. The average owner-occupied dwelling takes up nearly a third of an acre, as does the average recently built dwelling; bus service usually requires at least seven dwellings per acre to be viable.²

Homeownership has definite benefits. Homeowners are more likely to support school funding; even childless homeowners want their chief asset to be valuable because of its proximity to good schools. Homeowners participate more in local politics and community life than renters do, and their children seem to benefit as well. On the other hand, homeownership can be an anchor—when the structure of employment changes radically, and the best jobs are available in other regions, homeownership, and the resulting loss on a major asset, can deter people from moving, depressing economic growth and individual income.

²Only 55% of housing units have sidewalks, and the percentage is lower for over-65 homeowners.

Segregation of uses. The key principle behind Euclidean zoning is segregation of uses, in order to protect the single-family home. One clear cost is sprawl. Living away from density has other consequences: Wages are about thirty-five percent higher in cities, and research shows that this is because urban residents tend to have greater wage growth than residents in rural areas, suggesting that growth in human capacity is enhanced by density and interacting with closely situated others. Density allows for greater specialization and more productive interactions with a greater variety of people. Another consequence of use segregation is that undesirable uses tend to get concentrated in ghettos or red-light districts, or left to inner cities.

However, even opponents of Euclidean zoning might consider some segregation of uses desirable. In 2013, a Texas fertilizer plant explosion leveled houses and destroyed the middle school across the street. A former city council member said that he couldn't recall the town discussing whether it was a good idea to build houses and the school so close to the plant, which has been there since 1962. "The land was available out there that way . . . There never was any thought about it. Maybe that was wrong." Theodoric Meyer, *Could regulators have prevented the Texas fertilizer plant explosion?*, SALON, Apr. 28, 2013, http://www.salon.com/2013/04/28/where_were_the_regulators_before_the_texas_fertilizer_plant_explosion_partner/.

Churches. It might fairly be said that many homevoters' concern for their property values amounts to religious fervor. Numerous zoning disputes have involved the location of churches, to which neighbors often object on grounds of weekend congestion—or, in the case of minority religions, for other reasons. *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959), involved a religious organization (a Jewish synagogue) that wished to construct a new building for religious purposes, including services and religious education. Two weeks after Temple Israel bought the land, residents petitioned to change the zoning. Before Temple Israel began construction, the City changed the zoning to exclude churches and schools. It also established a complex and burdensome procedure to seek an exception allowing church or school use, and made the exception discretionary rather than mandatory. The Missouri Supreme Court ruled that municipalities had no authority to regulate the placement of churches or schools. Under the state's Zoning Enabling Act, Section 89.020 allowed them to regulate "the location and use of buildings, structures and land for trade, industry, residence and other purposes." Given the constitutional interest in freedom of religion, and the history of locating churches in residential areas, the court interpreted "other purposes" to exclude control over

the location and use of buildings for churches and schools, though municipalities could regulate the buildings for health and safety purposes.

The land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq., now protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws. The Department of Justice has explained:

Religious assemblies, especially, new, small, or unfamiliar ones, may be illegally discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the zoning codes or landmarking laws may permit religious assemblies only with individualized permission from the zoning board or landmarking commission, and zoning boards or landmarking commission may use that authority in illegally discriminatory ways.

To address these concerns, RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.

U.S. Dep't of Justice, Religious Land Use and Institutionalized Persons Act, Aug. 6, 2015, <http://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act>.

Longstanding critiques of suburbia. Since their inception, suburbs have been criticized for isolating and insulating the families who lived there. Social critic Louis Mumford wrote: “[T]he suburb served as an asylum for the preservation of illusion. Here domesticity could flourish, forgetful of the exploitation

on which so much of it was based. Here individuality could prosper, oblivious of the pervasive regimentation beyond. This was not merely a child-centered environment, it was based on a childish view of the world, in which reality was sacrificed to the pleasure principle.” *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 464 (1961).

Zoning raises distributional as well as efficiency concerns. Proponents of use zoning defend its contribution to “home values,” while critics of growth restrictions talk about “housing prices”; the former takes the perspective of existing owners while the latter suggests more concern for people who are priced out of ownership. Indeed, use zoning does seem to raise the price of single-family homes, though it’s less clear that it raises overall property values. Studies find that, in most parts of the country, home prices are roughly at or near the costs of construction. But, where zoning limits construction, prices can increase substantially. Thus, in heavily regulated urban areas like New York City and many parts of California, home prices shot up in the past few decades.

A recent study found that land use restrictions added \$200,000 to the price of houses in Seattle, Washington; Seattle was in the top 3%, nationally, in approval delays for new projects. The executive officer of the Master Builders Association of King & Snohomish Counties estimated that regulatory costs comprised up to 30 percent of the total cost of building a new house (land costs included), including transportation, school and park impact fees, stormwater management fees, critical-areas mitigation and monitoring, pavement requirements and rockery permits. Neighborhood-based design review committees, which use citizen volunteers, delay the process further, sometimes requiring three or four rounds of review. Elizabeth Rhodes, *UW study: Rules add \$200,000 to Seattle house price*, SEATTLE TIMES, Feb. 14, 2008, <http://www.seattletimes.com/business/uw-study-rules-add-200000-to-seattle-house-price/>.

25.1.3 How It Works (and Doesn’t)

Zoning’s proponents hoped that comprehensive planning would result in a zoning plan that would last into the indefinite future. Reality quickly set in, and municipalities realized that they would need ongoing modification of their zoning codes. New uses had to be included and excluded; plans had to be revised to account for changes in population; and so on.

Planning and Zoning Procedures for Missouri Municipalities

Missouri Municipal League (Sept. 2004)

All cities, towns and villages in Missouri may adopt planning and zoning. Statutory authority to enact planning and zoning is found in Chapter 89 of the Revised Statutes of Missouri (RSMo). Chapter 89 establishes the procedural framework in which planning and zoning is enacted and administered. . . . Left uncoordinated, land use patterns are unpredictable and public services are provided in a haphazard manner, often adversely affecting the quality of life within the community. Zoning is the set of regulations that prescribe how land within a municipality is used. . . .

The Missouri Revised Statutes makes provisions for a zoning commission (Section 89.070 RSMo) and a planning commission (Section 89.320 RSMo). The purpose of the zoning commission is to write the original zoning ordinance. The planning commission's function is to plan for the development of the municipality. . . .

Planning Staff

Many large and moderate sized cities hire a professional planning staff to assist the planning and zoning commission in the preparation and administration of the comprehensive development plan, zoning ordinance and subdivision regulations. However, in most smaller cities the planning commission functions without a professional staff. In this situation the planning commission mainly will be concerned with the administration of the zoning ordinance and subdivision regulations. . . .

Zoning and the Comprehensive Plan

The distinction between the zoning ordinance and the comprehensive plan is sometimes a confusing subject for those outside the planning profession. This confusion arises out of the fact that many cities adopt zoning ordinances before a comprehensive plan is prepared. Therefore, it sometimes is difficult to understand the logical connection between the two documents.

According to state law (Section 89.040 RSMo), a zoning ordinance must be based on a comprehensive plan. A zoning ordinance that is not based on a comprehensive plan is not legally sound. . . . When a zoning ordinance is not based on a comprehensive plan, there is a tendency for development

to become frozen in existing patterns or for an undesirable development pattern to occur. An ordinance that is not developed in accordance with a plan generally requires many amendments, which makes the ordinance very difficult to interpret and administer.

What A Zoning Ordinance Does Not Do

The zoning ordinance is not designed to regulate the types of materials used for the construction of buildings or the manner in which buildings are constructed. This is the function of building codes. Also, the zoning ordinance does not establish the minimum cost of permitted structures nor control their appearance. These matters are generally controlled by protective covenants contained in the deed to property.

The zoning ordinance does not regulate the design of streets, the installation of utilities or the dedication of parks, street rights-of-way and school sites and related matters. These are controlled by the subdivision regulations and by an official map preserving beds of proposed streets against encroachment.

Zoning ordinances deal primarily with future development and cannot be used to correct existing conditions. These generally are addressed by the housing code, which establishes minimum housing standards and requires the rehabilitation or demolition of existing substandard structures

Necessary Information

Most of the information needed to develop the zoning ordinance already should have been assembled and included in the city's comprehensive plan. Following is the type of information that will be useful in preparing the zoning ordinance.

- 1) The existing use of every piece of property within the city;
- 2) The terms of restrictive covenants applying to large sections of the city;
- 3) The location and capacities of all utility lines and major streets;
- 4) The assessed valuation of properties in different sections of the city;
- 5) The location and characteristics of all vacant land in the city;

- 6) The location of all new buildings erected during the past five years;
- 7) The width of streets;
- 8) The size of front, side and rear yards;
- 9) The heights of buildings;
- 10) The dimensions of lots; and
- 11) The number of families in each dwelling.

Once this information has been gathered and mapped, it should be analyzed. Analysis of the information should focus on the amount of land used for dwellings, businesses and industries; the predominant yard size; building heights; population densities; availability of utilities and street types. These studies along with the economic studies and population studies in the comprehensive plan can aid the city in forecasting future land requirements for each land use.

Elements Of A Zoning Ordinance

Most zoning ordinances consist of two parts: a zoning map indicating the boundaries of the various zoning districts and written regulations defining the manner in which property may be used in each district.

The Zoning Map

. . . [I]t generally is the case, when attempting to formulate a zoning district map, that existing land use patterns conflict with the land use plan to some degree. When this occurs, a compromise must be made between existing land use patterns and the city's desired land use pattern as developed in the land use plan. The land use plan then becomes a guide for this decision process, as well as a guide to be followed in making later amendments to the zoning ordinance. One of the most difficult aspects of developing a zoning district map is the drawing of exact boundary lines between districts, since all boundary lines are somewhat arbitrary, and individual property owners are likely to raise protests that are hard to resolve

Zoning Regulations

. . . Each type of district will have regulations that control the height of buildings, bulk of buildings, lot coverage, yard requirements and a special provision dealing with off-street parking and loading

Notes and Questions

25.3. Despite the formal insistence on a division between the plan and the implementation of the plan through zoning, many states allow a zoning ordinance to be treated as the plan itself. This collapse between planning and zoning was almost coextensive with the implementation of zoning. The New York City zoning ordinance imitated by other American cities was, according to Mel Scott, “a setback to the city planning movement because it contributed to the widespread practice of zoning before planning and, in many cities, to the acceptance of zoning as a substitute for planning.” MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890: A HISTORY COMMEMORATING THE FIFTIETH ANNIVERSARY OF THE AMERICAN INSTITUTE OF PLANNERS (1971). In the 1920s, three times as many cities adopted zoning as adopted master plans.

Why is zoning acceptable without a separate master plan? How is a court to judge its rationality or reasonability without a master plan?

25.4. Over time, the tendency in zoning was towards complexity. The city of Euclid had six use zoning districts in 1926, but now has almost twenty. It wasn’t alone: 70% of municipalities made their zoning rules more restrictive between 1997 and 2002, while only 16% made them less restrictive. Between 1976 and 2002, the percentage of zoning decisions that took over two years doubled.

25.5. For further background on zoning concepts, New York City’s Zoning website, <http://157.188.76.60:8004/site/planning/zoning/about-zoning.page?>, is a helpful guide.

25.6. **Two examples.** The pages that follow offer descriptions of and portions from two cities’ planning documents and zoning ordinances. Consider the similarities and differences between Ladue and Ferguson—rather than reading every word of the ordinances, you should skim them to get a sense of the behaviors and uses these cities believe they need to regulate. What would each city do if a new business, say an e-cigarette store (to take a category of business that did not exist a decade ago) wanted to open?

25.1.3.1 *Ladue, Missouri*

Ladue is the wealthiest suburb of Missouri. Ladue’s African-American population is 1.0%, compared to nearby Ferguson’s 2/3rds. Per capita income in



Figure 25.3: Bob Bawell, Pond at St. Louis Country Club (Ladue, Mo.), Oct. 28, 2012, BY-NC. Seventy percent of Ladue's acreage is comprised of open space.

Ladue is \$88,000, compared to Ferguson's under \$21,000.³

City of Ladue, Missouri, *Comprehensive Plan Update*
September 27, 2006, <https://web.archive.org/web/20161201182531/http://www.cityofladue-mo.gov/mm/files/LadueComprehensivePlan.pdf>

In 1936, several villages officially consolidated as the City of Ladue. At the time it was the largest municipality in St. Louis County, with 4,553 acres of land. Its first comprehensive plan, the *Preliminary Report Upon a City Plan*, was completed in 1939. . . . The plan articulated the following

³A few years ago, Ladue's police chief was fired, allegedly for refusing to target black drivers who passed through the city limits. *Former Ladue Police Chief alleges he was ordered to profile black motorists*, KMOV.com, May 4, 2014, <http://www.kmov.com/story/28975097/former-ladue-police-chief-alleges-he-was-ordered-to-profile-black-motorists>. Ladue sought to cover a \$300,000 city budget shortfall through traffic tickets rather than by raising taxes on its millionaire homeowners. In 2006, African-Americans made up 22.5% of traffic stops by Ladue police. In 2014, though the percentage had decreased somewhat, African-Americans were still 16 times as likely to be stopped as their percentage of the population would predict. Walter Moskop, *Traffic enforcement report: Black drivers in Missouri still stopped at higher rate*, St. Louis Post-DISPATCH, June 2, 2015, http://www.stltoday.com/news/local.metro/traffic-enforcement-report-black-drivers-in-missouri-still-stopped-at/article_19fb1738-7708-50e7-989c-d7da41886945.html.

imperative which is equally applicable today:

It should be recognized that cities now are judged more by the character or quality than they are by their size. This factor will be increasingly important in the future with the entire country approaching a stabilized population. The areas that will grow are those that provide desirable living conditions and reasonable tax rates, and such areas will probably grow at the expense of some other area having less favorable conditions. Thus the protection and perpetuation of the present advantages are not only essential for the welfare of the citizens, but are important measures of insuring continued healthy growth.

. . . Large residential lots predominated, with 13% of all residences situated on lots of at least five acres. The plan noted "no other large suburban town in the St. Louis region contains such a low population density or such a spacious character of development." . . .

In accordance with the residential character objective, the 1939 plan proposed five residential districts with largely overlapping uses, but with differences in lot area and yard regulations. Permitted minimum lot sizes ranged from 10,000 square feet to three acres. Industry was confined to grandfathered areas. The commercial district was expanded to only 15.2 acres with a neighborhood focus, and this was deemed adequate for the target population of 10,000, given the fact that commercial areas were available in adjoining communities.

Significantly, the ordinance did not make provision for apartments. The plan was clear and consistent regarding the Commission's residential character objective.

[From the 1939 report: "The opening of any section of the city for this use would invite speculation, result in undue concentration of population, and make it extremely difficult to prevent the spreading of this use throughout the entire city. Apartment development would especially overburden the school facilities, which are now adequate and have been planned for a continuation of the present type of development. If apartment construction would be permitted in the City of Ladue, it would enhance the value of the property of a few individual owners, but, on the other hand, it would seriously depreciate surrounding property, overtax school and sewer systems, and necessitate many additional governmental services, all of which would unduly increase taxes . . ."]

. . . Ladue's character can be described as follows:

- "Spacious" (an attribute that was already defined in the City's 1939 plan)
- "Spacious residential character" (as stated by the City's first Zoning Commission)
- A substantial legacy of fine estates, large homes, and elegant cottages
- Predominant single family residential land use
- Rolling hills
- Countryside setting overlain with an extensive blanket of mature vegetation
- Architectural quality and diversity
- Contained commercial areas
- A network of old country-type roads that frame and help to define the city's historic roots
- A demographically concentrated community of civically prominent and active residents
- A multigenerational family heritage
- Premium land values

[The report notes that Ladue, like most inner ring communities in the St. Louis region, is shrinking, but not by very much.] Even with substantial demographic shifts in St. Louis County that result in slow growth, the County is expected to retain its central position of economic power both within the region as well as in the State of Missouri. Approximately half of the jobs in the entire St. Louis region are located in St. Louis County. Moreover, considerable wealth is concentrated here, where one-fourth of all state sales tax revenue and over one-third of all income tax revenue are generated. This is despite the fact that the county represents only 19% of the state's population. Its disproportionate role in the state's income tax base results directly from a high concentration of affluent households.

Given the county's continued economic prominence in the region as well as the sustained affluence of county residents in general, Ladue seems to be particularly well positioned to retain its role as one of the leading affluent cities not only within the county but also in the region and the entire state

1. Issues

- The need to retain Ladue's existing housing character and general densities as infill occurs.
- The challenge of infills built to the maximum allowable footprint—"McMansions"—which are frequently out of scale to surrounding structures, negatively affect the visual quality of the blockface, and reduce the open space and landscapes that are such an important part of Ladue's character.
- The desire of older residents to have downsized high-end housing options available in Ladue, and the nature of such housing
- The need to maintain existing retail areas at present levels of development.
- The corresponding need for commercial development within existing commercial districts as a tax-generating entity to meet rising municipal costs

A. Goals and Objectives

...

1. Maintain, Preserve and Improve the City's Present Residential Character Within Already-Developed Areas.

- a. Maintain present low densities within already-developed areas to preserve the characteristic of spaciousness.
- b. Guide and direct land use activity within the estate residential districts to retain their position of visual prominence in the City's housing stock.

- c. Preserve Ladue's predominantly single-family characteristics in existing neighborhoods and developments.
- d. Promote architectural quality and diversity.
- e. Preserve and foster the City's countryside setting of rolling hills, mature trees and extensive vegetation. . . .

Downsized Luxury Housing Opportunities. The demand for downsized luxury housing in Ladue appears to be increasing, based on comments heard from Ladue residents as well as by general market trends and regional development activity. The City recognizes the need to consider this type of housing for residents who seek it and who prefer to continue residing in the City rather than move to another community. However, the City also recognizes the need to maintain its present low-density estate and high-end residential character. Accordingly, Ladue may encourage development of such housing within the following parameters:

- It should not result in a net increase in unit density from the site's present zoning

Zoning

. . . The City has had a carefully developed and strictly enforced zoning ordinance since 1938 with a major emphasis on estate and high-end residential patterns that reinforce, sustain, and further its unique residential character. To that end, all other zoning categories are intended to complement and support rather than compete with quality residential development, which comprises approximately 97% of the City's total land area.

"A" Residential District. The "A" residential district is a visually prominent land use form in Ladue. It is the framework for the extensive development of estates that over the years have come to form the backbone of the City's residential makeup. . . . This district contains a 3-acre minimum lot area (130,680 s.f.) with front, side and rear yard distances of 75 feet, 50 feet, and 50 feet respectively. Minimum required frontage is 150 feet. Required minimum lot width is 200 feet. Maximum building area is 15,000 square feet, absent a special use permit.

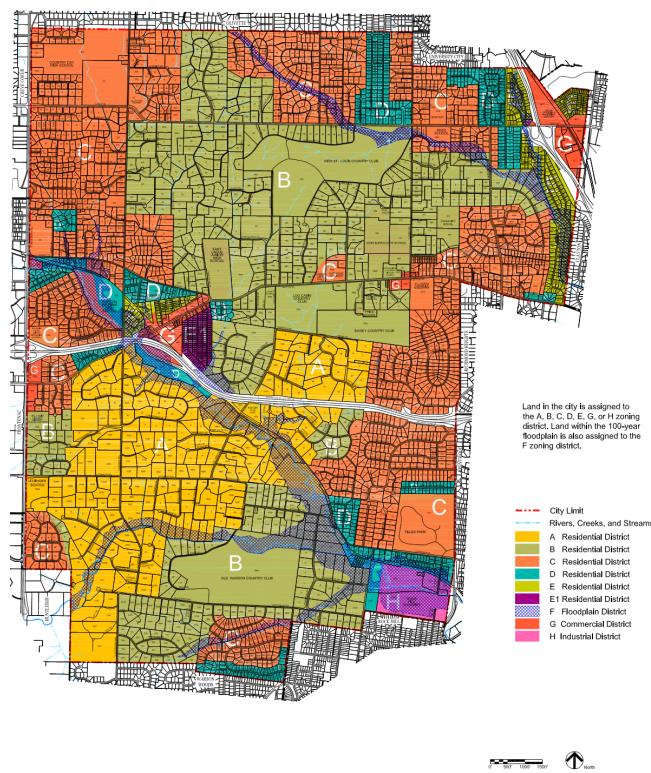


Figure 25.4: Ladue Zoning map (Kuhlmann Design Group).

"B" Residential District. This district requires a 1.8-acre (78,408 s.f.) minimum lot area with front, side, and rear yard distances of 50 feet each. Frontage minimum is 135 feet, and minimum lot width is 180 feet. Maximum building area is 15,000 square feet. The "B" District, coupled with the "A" District, together comprise the most prominent land use forms in the city.

"C" Residential District. The "C" residential district requires a lot area minimum of 30,000 square feet. Front, side and rear yard distances are 50 feet, 10 feet/10% of lot width up to 20 feet and 30 feet respectively. Minimum lot frontage is 90 feet, with minimum required lot width of 120 feet. Building area maximum is 15,000 square feet.

"D" Residential District. This district requires lots of no less than 15,000 square feet with front, side and rear yard distances of 40 feet, 10 feet/10% of lot width up to 15 feet and 30 feet respectively. Minimum required frontage is 55 feet, with minimum required lot width of 75 feet.

"E" Residential District. "E" residential is the smallest residential district in Ladue. It requires lots of no less than 10,000 square feet. Required front, side and rear yard distances are 40 feet, 10 feet and 30 feet respectively. Minimum required lot frontage is 50 feet, with a required minimum lot width of 75 feet.

"E-1" Residential District. This district requires lots of not less than 10,000 square feet, with required front, side and rear yards of 25, 10, and 30 respectively. Minimum required frontage is 50 feet with a minimum lot width of 70 feet

"F" Floodplain District. Ladue's regulations for the Flood Plain district prohibit construction, reconstruction or alterations to buildings within its boundaries, except in conformity with the City's Flood Plain Ordinance. . . .

"G" Commercial District. . . . Ladue's commercial district regulations permit the following uses: Banks (drive-in facilities are not allowed except as a Special Use), barbershops, beauty parlors, offices including medical/dental, parks, restaurants (no drive-in facilities or outside seating except by Special Use), and retail businesses (except automotive sales)

"H" Industrial District. Ladue's single remaining industrial district is located at the old Rock Hill Quarry site, which has been operating as a landfill

Permitted uses in the Industrial district include: Any commercial use (per above); light manufacturing not considered a nuisance because of

noise, odors, dust, gases, smoke, vibration or other factors; and enclosed storage.

....

Future Land Use Plan

... The city is already completely developed, with only one large additional underdeveloped site available (the Landfill), totaling approximately 64 acres. Although this site is not recommended for residential development, a small portion of land to its immediate north is already so designated and might be appropriately considered for creative residential uses.

[T]here is a growing market for the replacement of existing homes with new structures, driven by buyers who prefer larger rooms and additional storage space that new homes can provide. The elevations and footprints of these infills often dwarf not only their own lots but adjoining property as well. They can also negatively affect a larger area when their mass is sufficient to loom over the entire block face. In no residential area is this more potentially harmful than in the very small-lot district ("E") with its 10,000 square-foot minimum. Here, the City should discourage the use of variances from historic front, side and rear yard requirements, as well as elevations that are out-of-scale to surrounding buildings.

[Because Ladue is presently successful, the Plan recommends only minor changes, including tightening the standards for new construction to make sure it's attractive and limiting the grant of variances, discussed further in the next Part of the materials. To deal with the McMansions problem, the proposal would focus on the size and height of a building when viewed from the curb, "emphasizing narrower and deeper designs rather than taller and wider configurations." The plan would also "[p]romote the limited development of downsized luxury housing with no net increase in existing densities. Downsized Luxury Housing is defined as a single-family owner- occupied unit either with or without common walls, 1-3 person occupancy within a reduced living area, and with sufficient elements of architectural detail, craftsmanship, and character to make it both elegant and uniquely personal.]

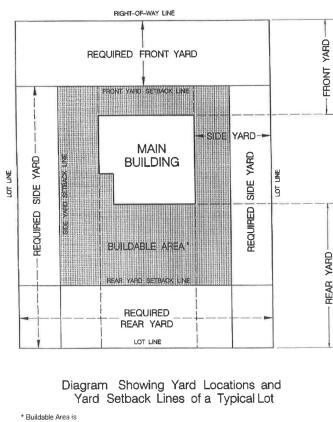


Figure 25.5: Diagram of required setbacks between the property line and the buildable area, according to Ladue's zoning ordinance.

Ladue, Missouri Zoning Ordinance

Ordinance 1175, as amended through Feb. 2016,

<https://web.archive.org/web/20160607011905/http://www.cityofladue-mo.gov/mm/files/ZoningOrd1175.pdf>

... II. A. (10) The only uses permitted within the City of Ladue are those specifically listed in this Zoning Ordinance. Notwithstanding, the following uses are expressly prohibited within any Zoning district:

- (a) Multiple-family dwellings and condominiums
- (b) Multi-level parking structures
- (c) Automotive sales
- (d) Drive-through auto washing facilities
- (e) Funeral homes
- (f) Massage parlors
- (g) Commercial pool parlors and game rooms
- (h) Nursing homes.
- (i) Hospitals
- (j) Motels

... IV.A.(4)(d) An accessory building or structure may not be used for dwelling purposes except as living accommodations for persons employed for domestic or related services to a resident of the main building.

(e) No vehicle whether automotive or a trailer, mobile home or similar item, whether supported by wheels or with wheels removed, shall be kept or used in this city for temporary or permanent living purposes

[The ordinance goes on to impose substantial off-street parking requirements for all homes and businesses and to regulate, among other things, the appearance of driveway monuments, the height of driveway gates, and the amount of space that must be visible between the bars of such gates.]

. . . .

VI.A.H.4. No commercial vehicle shall be parked on residentially-zoned land except such vehicles temporarily parked on a lot for purpose of providing permitted construction, or for maintenance or other contracted services Vehicles engaged in maintenance or other contracted services may not remain on the site for more than 7 calendar days and must be moved from the site within 24 hours of job completion.

. . . .

VII.E.3. [Oversized houses may be allowed by special permit. For all oversized houses, there must be at least 10 square feet of lot for every square foot of house, and the footprint of the house can't cover more than 10% of the lot.]

Notes and Questions

25.7. Did planning succeed in its objectives in Ladue?

25.8. What is a “McMansion,” and why do the residents of Ladue dislike them? Why might neighbors think that McMansions decrease property values or otherwise harm them? They are far from alone. One letter writer lamented, “All over Staten Island, we have seen what happens when the wrong people buy the right homes.” Jim Ferreri, *Great Good News in Westerleigh, But . . . ,* STATEN ISLAND LIVE, Nov. 5, 2007, https://www.silive.com/designingman/2007/11/great_good_news_in_westerleigh.html. The author wanted to expand minimum lot sizes and ban two-family homes on Staten Island, even though he acknowledged that those changes wouldn’t prevent McMansions, which were the subject of his complaint. Perhaps more effectively, he also suggested that all the homes in his area be designated historic to prevent teardowns.

25.1.3.2 *Ferguson, Missouri*

A review of Ferguson's 1998 planning document, the most recent available,⁴ shows the same embrace of Euclidean zoning as Ladue, but with a different economic context. CITY OF FERGUSON VISION 2015 PLAN UPDATE (Aug. 1998), <https://www.fergusoncity.com/DocumentCenter/View/536/2015-Vision-Plan-Comprehensive-Plan-1998-2015->. As the document explains, Ferguson is approximately 13 miles northwest of downtown St. Louis, near the interstate highway system. Ferguson was incorporated in 1894, and a streetcar line to St. Louis was completed in 1900. The city grew rapidly after World War II, aided by the rise of cars. The population peaked in the 1970s, then declined 22.5% between 1970 and 1990, in line with the experience of many other St. Louis suburbs. From the document's introductory materials:

Ferguson is one of 92 municipalities in St. Louis County. The County's local government structure is a confusing mass of small municipalities, school districts, fire protection districts, isolated pockets of unincorporated lands and special districts. Many cities are in more than one school district and some cities are protected by more than one fire protection district. For many years, there have been discussions about consolidating the City of St. Louis and St. Louis County and all of its municipalities into a single government entity. Such a government would serve a population of more than 1.3 million people. While this might seem desirable in that it would cut down on duplication of services, the likelihood of this occurring in the near future seems remote.

Ferguson embraces separation of uses as a goal, along with maintaining or reducing residential density. In the downtown area, Ferguson would like to encourage mixed-use development, but not to the extent of disrupting existing residential neighborhoods. The plan considers suburban residential development at four single-family houses per acre desirable.

The planning document noted, however, that residential land use generates little in the way of taxes, either property taxes or sales taxes. Moreover, Ferguson considered that rental properties were a problem, because "some owners

⁴In December 2020, the City of Ferguson put forward a new plan, OUR FERGUSON 2040 (2020), <https://www.fergusoncity.com/DocumentCenter/View/4897/OurFerguson-2040-Comprehensive-Plan>.

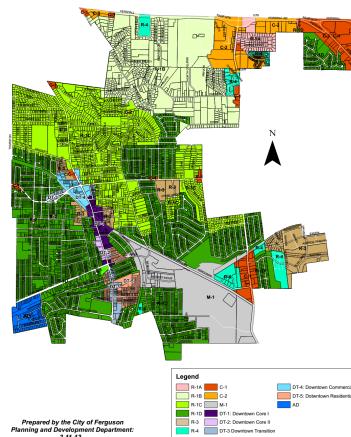


Figure 25.6: Ferguson Master Zoning Map

of rental property (particularly absentee owners who do not live in the community) do not maintain the property as well as many owner-occupied dwellings are maintained,” causing health and safety problems. The recommended solution was to require inspections of rental property for any change in occupancy; the result contributed to the fine-based scheme of city financing, discussed above. The plan also recommended taking measures to decrease the number of units that were rented, but that didn’t work.

In addition, because of the general downward economic drift of the area, Ferguson was confronted with new businesses, which were in need of regulation: “commercial uses such as pawn shops, check cashing agencies and other establishments which are associated with communities in decline, should be closely regulated by the city to prohibit the concentration of such uses in any one area and . . . such uses should be prohibited near churches, schools and residences.” The current code extensively regulates both the location and the physical configuration of these businesses.

Ferguson has 14 zoning districts, four for single-family houses, one for one- or two-family houses, one for multiple-family residences, a “planned residence” district, a planned “mixed use” district, a general commercial district, a planned commercial district, a downtown core business district, a downtown area business district, an industrial district, and an airport district. Required minimum lot sizes vary in the single-family districts from a minimum of 20,000 square feet per family to a minimum of 7,500 square feet. The residential districts also

allow public facilities such as parks and museums, community gardens, communication towers, group homes, foster care homes, churches, and family day care homes, as well as other assorted uses (stables in one; bed and breakfast inns in all but the single-family residential district with the largest minimum lot size; “urban agriculture” on 2 acres or more in the single-family residential district with the smallest minimum lot size). The two-family residence district is like the 7,500 square feet-minimum residential district, but also allows two-family homes on lots of at least 5,000 square feet. The multiple-family residence district also allows multiple-family homes on lots of at least 5,000 square feet, as well as state licensed nursing facilities and residential treatment facilities.

The planned residence district is supposed to mix types of housing, and also allows adult day care. The planned mixed-use district is similar, with the addition of “commercial, cultural, and institutional uses” and the goals of minimizing car travel and putting employment and retail closer to higher-density housing. The allowed commercial activities are limited.⁵ The general commercial district “is designed to allow considerable latitude in the range of retail uses allowed, provided that the uses are legal and no outdoor storage is conducted” except as specifically allowed by the code. What that “considerable latitude” looks like can be seen by skimming (*please do not try to grasp every detail*) the following list of allowed uses:

- Agricultural Services
- Veterinary Services
- Transportation and Communication Uses.
- Local and Suburban Transit and Interurban Highway Passenger Transportation
- U.S. Postal Service

⁵Private clubs or lodges; retail sales including appliance, bakery, book store, card and gift shop, carpeting, clothing, department store, drug store, electronics, fabrics, food store, furniture store, furrier, garden shop, hardware store, health foods, hobby shop, ice cream parlor, jewelry store, liquor store, newsstand, pet shop, radio and T.V. stores and sporting goods; financial institutions without drive-up facilities, and offices including business, dental, laboratory testing, medical, research and veterinarian. Special permits are available for residential treatment facilities; group quarters; billiard parlors, bowling alleys, racquetball courts, tennis facilities, theaters, restaurants and bars; drive-through facilities for financial institutions; and Automated Teller Machines (ATMs).

- Communication
- Building Materials, Hardware, and Garden Supply, including only the following:
 - Lumber and Other Building Materials Dealers including only:
 - * Doors—retail.
 - * Fencing dealers—retail.
 - * Flooring, wood—retail.
 - * Garage doors—retail.
 - * Lumber and building material dealers—retail.
 - * Lumber and planing mill product dealers—retail.
 - * Millwork and lumber dealers—retail.
 - * Paneling—retail.
 - * Storm windows and sash, wood or metal—retail.
 - Paint, Glass, and Wallpaper Stores
 - Hardware Stores
 - Retail Nurseries, Lawn and Garden Supply Stores
- General Merchandise Stores
- Food Stores
- Automotive Dealers and Gasoline, Service Stations, including only the following:
 - Motor Vehicle Dealers-New or New and Used.
 - Auto and Home Supply Stores.
 - Gasoline Service Stations.
 - Boat Dealers.
 - Recreational and Utility Trailer Dealers.
 - Motorcycle Dealers.
 - Other New Automotive Dealers.
- Apparel and Accessory Stores.

- Furniture, Home Furnishings and Equipment Stores.
- Eating Places (provided that such does not have a drive-through window and is not a drive-in business).
- Miscellaneous Retail, including only the following:
 - Drug Stores and Proprietary Stores.
 - Liquor Stores.
 - Miscellaneous Shopping Goods Stores.
 - Retail Stores, Not Elsewhere Classified (except auction rooms); the term "Retail Stores, Not Elsewhere Classified" shall not include adult-related businesses, including adult bookstores, adult novelty shops, and adult retail stores
- Depository Institutions, including only the following:
 - Central Reserve Depository Institutions.
 - Commercial Banks.
 - Savings Institutions.
 - Credit Unions.
 - Foreign Banking.
- Functions Related to Depository Banking, including:
 - Non-deposit Trust Facilities.
 - Functions Related to Depository Banking, Not Elsewhere Classified (except Check Cashing agencies).
- Non-depository Credit Institutions, including only the following:
 - Federal and Federally-Sponsored Credit Agencies.
 - Business Credit Institutions.
 - Mortgage Bankers and Brokers.
 - Security and Commodity Brokers, Dealers, Exchanges, and Services
- Insurance

- Insurance Agents, Brokers, and Service
- Real Estate, including only the following:
 - Real Estate Operators (except Developers) and Lessors, including only the following:
 - Operators of Nonresidential Buildings
 - Operators of Apartments.
 - Operators of Dwellings Other Than Apartment Buildings.
 - Real Estate Agents and Managers
 - Title Abstract Offices
 - Sub-dividers and Developers, Except Cemeteries
- Holding and Other Investment Offices
- Hotels, Motels, and Tourist Courts
- Personal Services, including only the following:
 - Laundry, Cleaning, and Garment Services, including only the following:
 - * Garment Pressing and Agents for Laundries and Dry Cleaners
 - * Coin-Operated Laundries and Dry Cleaning.
 - * Laundry and Garment Services, not elsewhere classified.
 - Photographic Studios, Portrait
 - Beauty Shops
 - Barber Shops
 - Shoe Repair Shops and Shoeshine Parlors
 - Funeral Service and Crematories
 - Miscellaneous Personal Services.
- Tax Return Preparation Services.
- Miscellaneous Personal Services, Not Elsewhere Classified (except escort services, massage parlors, steam baths, tattoo parlors, and Turkish baths).

- Business Services, including only the following:
 - Advertising
 - Consumer Credit Reporting Agencies, Mercantile Reporting Agencies, and Adjustment and Collection Agencies
 - Mailing, Reproduction, Commercial Art and Photography, and Stenographic Services
 - Miscellaneous Equipment Rental and Leasing, including only the following:
 - * Medical Equipment Rental and Leasing
 - * Equipment Rental and Leasing, Not Elsewhere Classified (except airplane rental and leasing, industrial truck rental and leasing, oil field equipment rental and leasing, and oil well drilling equipment rental and leasing)
 - Personnel Supply Services
 - Computer Programming, Data Processing, and Other Computer Related Services
 - Miscellaneous Business Services, including only the following:
 - * Detective, Guard, and Armored Car Services
 - * Security Systems Services
 - * News Syndicates
 - * Photo finishing Laboratories
 - * Business Services, Not Elsewhere Classified (except Gas systems, contract conversion from manufactured to natural gas, and Scrap steel cuffing on a contract or fee basis).
- Automotive Repair, Services, and Garages, including only the following:
 - Automotive Rental and Leasing, Without Drivers.
 - Automobile Parking.
 - Car Washes (except bus washing and truck washing).
- Miscellaneous Repair Services, including only the following:
 - Electrical Repair Shops.

- Watch, Clock, and Jewelry Repair.
- Re-upholstery and Furniture Repair.
- Motion Pictures.
- Amusement and Recreation Services.
- Health Services.
- Legal Services.
- Educational Services.
- Social Services, including only the following:
 - Individual and Family Social Services including Adult Day Care Centers.
 - Job Training and Vocational Rehabilitation Services.
- Museums, Art Galleries, Botanical and Zoological Gardens
- Membership Organizations, including only the following:
 - Business Associations.
 - Professional Membership Organizations.
 - Labor Unions and Similar Labor Organizations.
 - Civic, Social, and Fraternal Associations.
 - Political Organizations.
 - Other Membership Organizations.
- Engineering, Accounting, Research, Management, and Related Services, including only the following:
 - Engineering, Architectural, and Surveying Services.
 - Accounting, Auditing, and Bookkeeping Services.
 - Research, Development, and Testing Services, including only the following:
 - Commercial Economic, Sociological, and Educational Research.

- Management and Public Relations Services, including only the following:
 - Management Services.
 - Management Consulting Services.
 - Public Relations Services.
- Business Consulting Services, Not Elsewhere Classified.
- Services Not Elsewhere Classified.
- Public Administration, including only the following:
 - Executive, Legislative, and General Government, except Finance.
 - Justice, Public Order, and Safety, including only the following:
 - * Courts.
 - * Police Protection.
 - * Legal Counsel and Prosecution.
 - * Fire Protection.
 - * Other Public Order and Safety.
 - Public Finance, Taxation, and Monetary Policy.
 - Administration of Human Resources Programs.
 - Administration of Environmental Quality and Housing Programs.
 - Administration of Economic Programs.
 - National Security and International Affairs.

Allowed with a permit:

- Used Vehicle Sales
- Used Merchandise Sales and Auction Rooms.
- Antique stores.
- Book stores, secondhand.
- Clothing stores, secondhand.
- Furniture stores.

- Furniture, antique.
- Glassware, antique.
- Home furnishings, secondhand.
- Home furnishings, antique.
- Musical instrument stores, secondhand.
- Objects of art, antique.
- Pawnshops
- Phonograph and phonograph records stores, secondhand.
- Shoe stores, secondhand.
- Auction rooms.
- Check Cashing Agencies and Personal Credit Institutions (except Short-term Loan Establishments)⁶
- Miscellaneous Personal Services.⁷
- Automotive Repair Shops and Automotive Services, Except Repair
- Religious Organizations
- General Warehousing and Storage including only Mini-warehouses and Self-Service Storage Facilities
- Child Day Care Services
- Automated Teller Machines (ATMs).

⁶With limits on how close they can be to places of worship, schools, and residential zones; requirements that each store be at least 1,000 feet from similar stores including pawnshops; limits on hours of operations; bans on walk-up or drive-up windows; bans on having bars, heavy mesh screens or similar material visible from outside; and other restrictions.

⁷Escort services, massage parlors, steam baths, tattoo parlors, and Turkish baths may be allowed, subject to similar restrictions on locations near places of worship, schools, residentially zoned property, pawn shops, check cashing establishments, and any other miscellaneous personal service establishment.

- Eating Places (all uses which have drive-through windows or is a drive-in business) and Drinking Places (Alcoholic Beverages).

The planned commercial district is supposed to be planned as a unit, with a narrower range of allowable commercial uses. The industrial district allows light manufacturing and wholesale uses:

- Construction Uses including only the following:
 - Building Construction—General Contractors and Operative Builders.
 - Heavy Construction other than Building Construction—Contractors.
 - Construction—Special Trade Contractors.
- Manufacturing Uses including only the following:
 - Bakery Products.
 - Bottled and Canned Soft Drinks and Carbonated Waters.
 - Manufactured Ice.
 - Textile Mill Products.
 - Apparel and other Finished Products made from Fabrics and Similar Materials.
 - Millwork, Veneer, Plywood, and Structural Wood Members.
 - Wood Containers.
 - Wood Buildings and Mobile Homes.
 - Miscellaneous Wood Products.
 - Furniture and Fixtures.
 - Paperboard Containers and Boxes.
 - Converted Paper and Paperboard Products, Except Containers and Boxes.
 - Printing, Publishing, and Allied Industries.
 - Rubber and Miscellaneous Plastics Products.
 - Leather and Leather Products.
 - Flat Glass.

- Glass and Glassware, Pressed or Blown.
 - Glass Products, Made of Purchased Glass.
 - Pottery and Related Products.
 - Metal Cans and Shipping Containers.
 - Cutlery, Hand Tools and General Hardware.
 - Heating Equipment and Plumbing Fixtures.
 - Fabricated Structural Metal Products.
 - Screw Machine Products, and Bolts, Nuts, Screws, Rivets, and Washers.
 - Metal forgings and stampings.
 - Coating, Engraving, and Allied Services.
 - Miscellaneous Fabricated Metal Products.
 - Machinery.
 - Electronic and other Electrical Equipment and Components.
 - Measuring, Analyzing, and Controlling Instruments, Photographic, Medical, and Optical Goods; Watches and Clocks.
 - Miscellaneous Manufacturing Industries.
- Transportation and Communication Uses Including only the following:
 - Local and Suburban Transit and Interurban Highway Passenger Transportation.
 - Motor Freight Transportation and Warehousing.
 - U.S. Postal Service.
 - Pipe Lines, Except Natural Gas.
 - Transportation Services.
 - Communication.
 - Communication antennae.
 - Communication towers.
 - Electric, Gas, and Sanitary Services including only the following:

- Electric Services, including facilities which are engaged in the transmission and/or distribution of electric energy for sale.
- Natural Gas Distribution.
- Sanitary Services, Not Elsewhere Classified.
- Steam and Air-Conditioning Supply.
- Irrigation Systems.
- Wholesale Trade—Durable Goods including only the following:
 - Motor Vehicles and Automotive Parts and Supplies.
 - Furniture and Home Furnishings.
 - Lumber and other Construction Materials.
 - Professional and Commercial Equipment and Supplies.
 - Electrical Goods.
 - Hardware, Plumbing and Heating Equipment and Supplies.
 - Machinery, Equipment, and Supplies.
 - Miscellaneous Durable Goods.
- Wholesale Trade—Nondurable Goods including only the following:
 - Paper and Paper Products.
 - Drugs, Drug Proprietaries and Druggists' Sundries.
 - Apparel, Piece Goods, and Notions.
 - Groceries and Related Products.
 - Beer, Wine, and Distilled Alcoholic Beverages.
 - Books, Periodicals, and Newspapers.
 - Flowers, Nursery Stock, and Florists' Supplies.
 - Tobacco and Tobacco Products.
 - Miscellaneous Nondurable Goods, Not Elsewhere Classified.
- Retail Trade including only the following:
 - Lumber and other Building Materials Dealers.

- Paint, Glass and Wallpaper Stores.
- Hardware Stores.
- Retail Nurseries, Lawn and Garden Supply Stores.
- Gasoline Service Stations.
- Furniture, Home Furnishings, and Equipment Stores.
- Services including only the following:
 - Laundry, Cleaning, and Garment Services.
 - Business Services.
 - Automotive Repair, Services and Garages.
 - Miscellaneous Repair Services.
- Amusement and Recreation Services including only the following:
 - Commercial Sports.
 - Miscellaneous Amusement and Recreation Services.
- Health Services including only the following:
 - Medical and Dental Laboratories.
 - Health and Allied Services.
- Educational Services including only the following:
 - Correspondence Schools and Vocational Schools.
 - Research/Development and Testing Services.
 - Miscellaneous Services.
- Public Administration including only the following:
 - Executive, Legislative, and General Government.
 - Police Protection.
 - Fire Protection.
- Adult-Related Business.

By permit:

- Eating Establishments: (all uses, excluding outdoor seating).
- Utilities:
 - Water Supply storage.
 - Sewage Treatment Plants.
- Adult Entertainment Establishments
- Parking facilities for Tractor Trailers
- Short-Term Loan Establishments⁸

The other districts add little to this list, other than an airport.

Notes and Questions

25.9. Do you have a good idea of how big a 3-acre lot is? A 5,000-square foot house? By way of comparison, the average McDonald's restaurant is about 4,000 square feet, not including the parking lot. Figure 25.7 gives a comparative for the size of an acre.

25.2 Nonconforming Uses, Variances and Exceptions

At times, new zoning precludes uses that were previously allowed. The remaining allowed uses may be inappropriate for a particular parcel of land within a zone. Conditions may have changed, making previous zoning inappropriate, or developers may wish to build more than current zoning allows. Zoning authorities may have determined that particular uses are acceptable, but only

⁸Subject to further regulation, including to avoid "over-concentration," meaning "a similar use within two miles of the proposed establishment or more than one such establishment per 10,000 population." Where an over-concentration of such uses is found, permit shall be granted. Distance, hours, and other restrictions apply, including that the property shall not also be used to issue money orders, cash checks, or sell lottery tickets; no repossessed property or cars can be stored on site; no extra advertising materials are allowed, including balloons, lights, flags, etc.; no writing, printing, or color is allowed on the exterior except for phone number and office hours in two-inch letters and numbers; and security guards are required.

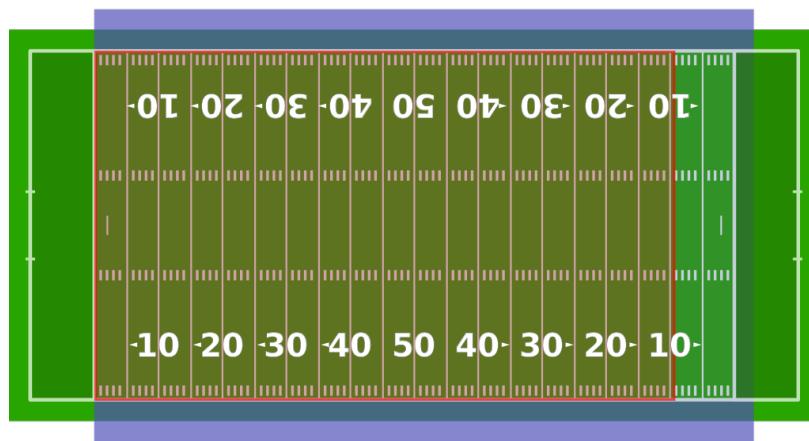


Figure 25.7: An acre (red outline) compared to an American football field (green) and a football pitch (soccer field, blue).

under specified conditions requiring a more detailed permit process. All these possibilities require some way of addressing unusual conditions and ongoing change. This section reviews various techniques zoning authorities use in such circumstances.

25.2.1 Nonconforming Uses

When zoning first began, there were a number of existing uses that would be prohibited by the new regimes. Zoning authorities expected these to die out naturally, but in fact, they often persisted for decades, in part because they often had local monopolies—a nonconforming use might be the only gas station in a residential neighborhood, for example. Many supporters of zoning wanted to do more to get rid of such uses.

Moreover, because zoning often changes—usually in the direction of becoming more restrictive—existing uses that were fine under the previous zoning regime can become newly unlawful. This is especially true when an unanticipated use begins and the rest of the neighbors want to change the zoning in response. But what about the interests of the property owner with the disfavored use, now known as a **nonconforming use?**

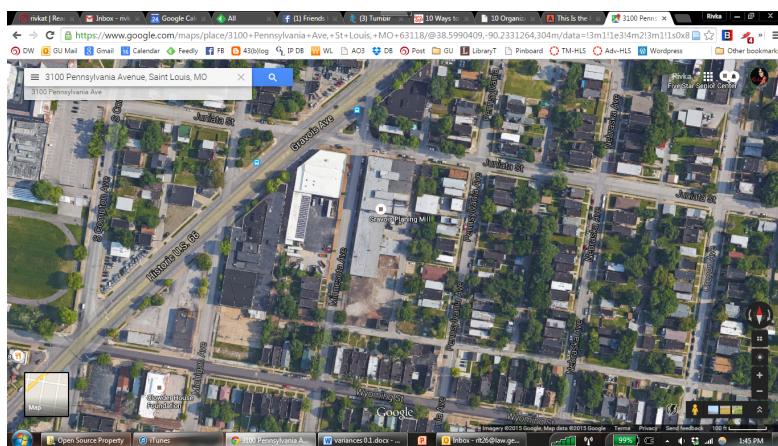


Figure 25.8: Google Earth image, 2015, with contested block in center

Hoffmann v. Kinealy
389 S.W.2d 745 (Mo. 1965)

A. P. STONE, Jr., Special Judge.

This is an appeal by Carl O. Hoffmann, Jr., and Mrs. Geraldine St. Denis (herein called relators), the owners of two adjoining lots (frequently referred to as the lots) in the 3100 block of Pennsylvania in the City of St. Louis, from the judgment of the Circuit Court of the City of St. Louis affirming, upon review by certiorari, a decision of the board of adjustment sustaining a decision of the building commissioner which denied relators' application for a certificate of occupancy of the lots for a pre-existing lawful nonconforming use, to wit, for the open storage of lumber, building materials and construction equipment.

... Portions of the block, i.e., that portion in which the lots are located, [and certain other parcels], are in a "B" two-family dwelling district, while the remainder of the block, . . . is in a "J" industrial district and is used for the operation of a planing mill and for open storage of lumber. A small building housing the general offices of Hoffmann Construction Company, relators' business in connection with which the lots have been used, is located in the "B" two-family dwelling district . . . just across the alley from the lots.

The exhibits presented at the hearing before the board of adjustment,

and brought to us with the transcript on appeal, indicate that there are fourteen buildings in the same portion of the block in which the lots are situate, including a tavern . . . , one three-family residence, eleven other residences, and at the rear of one residence a building identified on a plat as used for "tractor parts"; ten buildings in that portion of the block . . . , including a grocery store . . . , eight residences (all owned by relators), and at the rear of one residence the above-mentioned office building of Hoffmann Construction Company; and that, on the other three corners . . . , there are two taverns and a cleaning and pressing shop.

Counsel for the city conceded at the hearing before the board of adjustment, and the subsequent finding of the board (not here disputed) was, that the lots were being used at the time of hearing for the open storage of lumber, building materials and construction equipment and that (in the language of the board's finding) "these premises have been used for this same purpose continuously since the year 1910." The front end of the lots is "landscaped" with a hedge and shrubbery, and the area used for open storage is enclosed with a high fence.

The first comprehensive zoning ordinance of the City of St. Louis became effective in 1926. On April 25, 1950, numerous sections of the zoning code were amended by Ordinance 45309. Section 5 A 1 of that ordinance provided that "No building or land shall be used for a use other than those permitted in the district in which such premises are located unless . . . such use existed prior to the effective date of this ordinance." Section 5 B of the same ordinance . . . provided that "The use of land within any dwelling district . . . for purposes of open storage . . . which do not conform to the provisions of this ordinance shall be discontinued within six (6) years from the effective date of this ordinance."

About six years and three months later, to wit, on July 24, 1956, Ordinance 48007 was enacted, amending that portion of Section 5 B of Ordinance 45309, with which we are here concerned, to read as follows: "The use of land within any dwelling district for the purpose of open storage is hereby prohibited." [The code was subsequently revised, but not in any way that changed this provision, and the relevant provision was renumbered as Section 903.030.]

. . . Relators' petition in the circuit court, upon which the writ of certiorari was issued, charged that Section 903.030 of the zoning code was unconstitutional, null and void and was of no effect as to relators' lots because, by prohibiting continuance of the pre-existing lawful nonconform-

ing use of the lots, said section would impair, restrict and deprive relators of vested property rights and thereby would take and damage relators' private property for public use without just compensation in violation of Article 1, Section 26, Missouri Constitution of 1945.

. . . Respondants' position is that, under the statutory grant of police power in municipal zoning and planning, the city was empowered to enact . . . a so-called "amortization" or "toleration" provision which required discontinuance within six years thereafter of the nonconforming use of land within any dwelling district for purposes of open storage, and that, such six-year "amortization" or "toleration" period having run in April 1956, the subsequent absolute prohibition of said nonconforming use of land . . . was valid.

. . . Of course, it has long been settled that a comprehensive zoning ordinance operating prospectively, which has a substantial relationship to the public health, safety, morals or general welfare and is not unreasonable or discriminatory, is valid as a proper exercise of the police power. This is so even though, in restricting future uses, any such ordinance may impose hardship and inflict economic loss upon some property owners, for it is recognized that "[e]very valid exercise of the police power is apt to affect the property of some one adversely."

In earlier days of zoning legislation, it generally was recognized and conceded that termination of pre-existing lawful nonconforming uses would be unconstitutional . . . In *Women's Christian Ass'n. of Kansas City v. Brown*, 190 S.W.2d 900 (Mo. 1945), involving an attempted change of nonconforming use from a riding academy to a dance hall, this court said that: . . . "Within a period of another twenty years, a large number of such 'nonconforming' uses will have disappeared, either through the necessity of enlargement and expansion which invariably is forbidden or limited by ordinance, or by the owners realizing that it is unwise and uneconomic to be located in a district which probably is not suitable for the nonconforming purpose, or by obsolescence, destruction by fire or by the elements or similar inability to be used; so that many of these nonconforming uses will 'fade out,' with a resulting substantial and definite benefit to all communities."

. . . Certainly, the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses, and to that end municipalities have employed various approved regulatory methods such as prohibiting the resumption of a nonconforming use after its abandonment or

discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses, and prohibiting or rigidly restricting a change from one nonconforming use to another. Even so, pre-existing lawful nonconforming uses have not faded out or eliminated themselves as quickly as had been anticipated, so zoning zealots have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In so doing, only infrequent use has been made of the power of eminent domain, primarily because of the expense of compensating damaged property owners, but increasing emphasis has been placed upon the "amortization" or "tolerance" technique which conveniently bypasses the troublesome element of compensation.

Stated in its simplest terms, amortization contemplates the compulsory termination of a non-conformity at the expiration of a specified period of time, which period is equaled (sic) to the useful economic life of the non-conformity. The basic idea is to determine the remaining normal useful life of a pre-existing nonconforming use. The owner is then allowed to continue his use for this period and at the end must either conform or eliminate it. Courts approving the amortization technique as a valid exercise of the police power rationalize their holdings in this fashion:

The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer . . . If the amortization period is reasonable the loss to the owner may be small when compared

with the benefit to the public.

City of Los Angeles v. Gage, 274 P.2d 34 (Cal. Ct. App. 1954).

Several cases in other jurisdictions have approved the termination of pre-existing nonconforming uses by the amortization technique. However, there are a number of decisions to the opposite effect, and it may be fairly said that there is "a decided lack of accord" in this area.

. . . But, although the holdings in other jurisdictions may, in some instances, be enlightening and persuasive, it is neither our duty nor our inclination to rule a question of first impression in this state simply by counting foreign cases and then falling off the judicial fence on the side on which more cases can be found. Rather, our concern should be and is to determine the basic constitutional right of the matter, as we see it. Property is defined as including not only ownership and possession but also the right of use and enjoyment for lawful purposes. In fact, "[t]he substantial value of property lies in its use." It follows that: "[t]he constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution."

. . . The amortization provision under review would terminate and take from instant relators the right to continue a lawful nonconforming use of their lots which has been exercised and enjoyed since 1910—a right of the character to which the courts traditionally have referred as a "vested right." To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated immediately. In fact, the contrary is implicit in the amortization technique itself which would validate a taking presently unconstitutional by the simple expedient of postponing such taking for a "reasonable" time. All of this . . . prompts us to repeat the caveat of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." . . .

. . . Accordingly, the judgment of the circuit court is set aside and the cause is remanded with directions to enter judgment ordering respondents, constituting the board of adjustment of the City of St. Louis, to issue,

or cause to be issued, to relators a certificate of occupancy for continuance of the pre-existing lawful nonconforming use of relators' lots for the open storage of lumber, building materials and construction equipment.

HYDE, Judge (dissenting).

. . . In the leading case of *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, the Court said that zoning and "all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." The court pointed out the following reasons for this use of the police power: "[T]he segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accident, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children." . . .

In view of these applicable principles, it does not seem reasonable to say that the existence of a particular use of vacant land when a zoning ordinance is adopted gives the owner a vested right to continue it in perpetuity, especially the right to pile material on vacant ground. . . . High piles of stored material are not conducive to the maintenance or development of a good residential environment not only because they are unsightly but also because they could provide a lurking place for thieves and other criminals and also could attract children who might be injured playing there. While such open storage has not been classified as a nuisance, it thus has some of the undesirable characteristics of nuisance in a residential district. Therefore, I would hold the ordinance in this case, for termination of open storage in residential districts after six years, a reasonable exercise of the police power and valid.

Notes and Questions

25.10. As the opinion notes, states are divided on whether **amortization** is an acceptable technique to deal with nonconforming uses. See cases collected at *Annotation, Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R. 3d (1968 & Supp. 1990).

Why not allow amortization? Consider the following hypothetical: Troy

Barnes and Abed Nadir each buy a parcel of unzoned land for \$100,000, each expecting to use the land for a business. Barnes constructs a building for \$50,000, while Nadir holds off while he develops his filmmaking career. Barnes' business opens, making \$20,000 net each year. Five years after Barnes' business opens, the jurisdiction converts the zoning to residential only. Each parcel, used for residences, is worth only \$15,000. If Barnes is given an amortization period of five more years, what is the result for Barnes, assuming the building can't be converted to a residence? How much has Nadir lost? What justifies treating their situations differently?

25.11. Jurisdictions that reject amortization may face some pressure to limit what counts as a nonconforming use. See, e.g., *University City v. Diveley Auto Body Co., Inc.*, 417 S.W.2d 107 (Mo. 1967) (holding that a zoning ordinance requiring the owner of a signboard to comply with its provisions within three years was a regulation of existing property and not a taking); *St. Charles County v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272 (Mo. Ct. App. 2007) (finding that an ordinance mandating that businesses storing inventory outdoors consisting of "reclaimed, junked, salvaged, scrapped or otherwise previously used inventory" must enclose such storage with fencing was a reasonable exercise of the police power but not a zoning ordinance, and therefore no prior nonconforming use exception was required).

25.12. **Terminating a nonconforming use.** Many situations can justify the end of a nonconforming use exception for a particular parcel. *City of Sugar Creek v. Reese*, 969 S.W.2d 888 (Mo. Ct. App. 1998):

In determining the legislative intent, courts consider that "the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses." Thus, courts have allowed municipalities to regulate and limit nonconforming uses by various means such as prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses and prohibiting or rigidly restricting a change from one nonconforming use to another.

The Missouri Municipal League, Planning and Zoning Procedures for Missouri Municipalities (Sept. 2004), adds that prohibiting enlargement or extension of a nonconforming use is also common. Some zoning ordinances also require owners of nonconforming uses to receive permits within a certain period after

the adoption of the change that makes the use nonconforming, on pain of losing the right to the nonconforming use if they don't get the permit. *City of Sugar Creek* held that such rules aren't prohibited amortization: the existing property right that is protected by the no-amortization rule is the right to the specific existing use, rather than the right to change uses at will. See also *City of Belton v. Smoky Hill Railway & Historical Society, Inc.*, 170 S.W.3d 429 (Mo. Ct. App. 2005) (discontinuance of use for several years meant that prohibition on resuming nonconforming use was not an unconstitutional taking).

25.13. What about a change of ownership? Missouri holds that a transfer or change of ownership is not an abandonment of the right to a non-conforming use, because the use follows the land and not the person. *Walker v. City of Kansas City, Missouri*, 697 F. Supp. 1088 (W.D. Mo. 1988). Could you plausibly argue otherwise?

25.14. **Uses and rezoning close in time.** The not uncommon situation in which a zoning change is motivated by the appearance of a new, unpopular use is illustrated by *People Tags, Inc. v. Jackson County Legislature*, 636 F. Supp. 1345 (W.D. Mo. 1986), in which People Tags opened an adult bookstore, adult motion picture theater and adult mini motion picture theater within 1,500 feet of a church. Thereafter, the Jackson County legislature passed an ordinance precluding adult bookstore, adult motion picture theater, or adult mini motion picture theaters from being located within 1,500 feet of any church or school, with 120 days allowed for noncompliant businesses to come into compliance.⁹ Even in a jurisdiction allowing amortization, would 120 days be sufficient?

In *People Tags*, the court rejected the legislature's argument that the business was not open long enough to constitute a legitimate nonconforming use. The legislature cited *Pearce v. Lorson*, 393 S.W.2d 851 (Mo. Ct. App. 1965), in which a chiropodist bought a single family home in a residential area and placed a sign in the window which read "Dr. R.C. Pearce, Chiropodist, Foot Specialist." He had his office at another location and continued his practice at that loca-

⁹Ed. note: the law relating to First Amendment limits on state regulation of sexually-oriented businesses is extensive. When regulations are framed as zoning laws limiting the location of such businesses, they are often but not always upheld as reasonable time, place, and manner restrictions. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. In the *People Tags* case, the court found this particular regulation unconstitutional because it operated to suppress an existing business, not just determine the location of future businesses. See also *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (Massachusetts statute prohibiting sale of alcohol within 500 feet of a church "if the governing body of such church or school files written objection thereto" was an unconstitutional establishment of religion under the First Amendment).

tion throughout the time at issue, but he moved a chair and some supplies into the new building. He also treated one patient in the new office one hour before a new zoning ordinance banned medical offices in the area. The *Pearce* court held that Dr. Pearce hadn't established a nonconforming use before the ordinance passed and that his efforts to do so were a sham. The *People Tags* court distinguished *Pearce*: the adult bookstore opened on September 5, 1984, and the legislature passed the first ordinance requiring it to shut down on September 10, 1984. There was no evidence that the bookstore wasn't open during regular business hours or didn't have a reasonable inventory in that time. Nor did the bookstore open in response to the anticipated passage of a new zoning ordinance. Thus, the bookstore was a protected nonconforming use.

By contrast, *Acton v. Jackson County*, 854 S.W.2d 447 (Mo. Ct. App. 1993), involved a massage parlor that was a nonconforming use. When the county determined that the proprietor had expanded the massage parlor's activities to the illegal activity of prostitution, that expansion "changed the character of the nonconforming use and, hence, discontinued it." Why not just require the operator to resume non-illegal operations? Would it matter if there were evidence that the massage parlor was also being used for prostitution since its inception, before it became a nonconforming use? The court commented that nonconforming uses "are not favored in law because of their interference with zoning plans. Policy dictates that they should not endure any longer than necessary and should be eliminated as quickly as justice will permit." Thus, zoning ordinances should be strictly construed against them, including "rigidly restricting a change from one nonconforming use to another." See also *Huff v. Board of Adjustment of City of Independence*, 695 S.W.2d 166 (Mo. Ct. App. 1985). Relatedly, the burden of proving a nonconforming use is on the party asserting the right. *In re Coleman Highlands*, 777 S.W.2d 621 (Mo. Ct. App. 1989). Are these rules consistent with the heavily pro-property rights rhetoric in the principal case?

25.15. Despite this general distrust of nonconforming uses, not all changes or suspension of operations will deprive the owner of the right to continue the use. See *State ex rel. Keeven v. City of Hazelwood*, 585 S.W.2d 557 (Mo. Ct. App. 1979) (city that refused to renew liquor permit or act on liquor store owner's application for special use permit could not claim that nonconforming use as liquor store ended while owner was trying to comply with licensing law). But see *Matthews v. Pernell*, 582 N.E.2d 1075 (Ohio Ct. App. 1990) (where nonconforming massage parlor was shut down for a year because of prostitution on the premises, illegality prevented resumption of nonconforming use).

25.16. **Vested rights.** As *People Tags* indicates, it can be vitally important to

determine which came first, the use or the zoning that makes it a nonconforming use. Must the use be in full swing to trigger a property owner's right to continue the use? Even a state that allows amortization will confront this question, because it will determine whether an amortization period must be allowed.

In general, a use that is in progress may be a prior nonconforming use if sufficient commitments have been made, such as the construction of a building (with the then-proper permits). In Missouri, as in most states, filing a permit application under a prior zoning regime is insufficient, even if the owner bought the land in anticipation of the use and preparing the application required the investment of resources. See *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104 (Mo. Ct. App. 2009) ("To establish a nonconforming use, one must have at least made a substantial step, and a 'mere preliminary work which is not of a substantial nature does not constitute a nonconforming use.'"). Even receiving a permit is insufficient, if the work completed towards converting the land to the particular use isn't substantial. See *Outcom, Inc. v. City of Lake St. Louis*, 996 S.W.2d 571 (Mo. Ct. App. 1999); see also *Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield*, 27 S.W.3d 862 (Mo. Ct. App. 2000) (construction of sign that was intended to be illuminated, but was not illuminated, before rezoning did not establish prior nonconforming use; "mere intention does not give rise to a vested property right"). But see WASH. REV. CODE § 58.17.033 (rights under zoning ordinance vest as of the filing of a "valid and fully complete building permit application").

What should be the result when a city issues a permit in error, and the developer relies on the permit to start building? In *Parkview Associates v. City of New York*, 519 N.E.2d 1372 (N.Y. 1988), the city and the developer both misinterpreted a zoning map—they looked at an unlabeled version of a map instead of the written description of the same area in the zoning regulation—and the city gave Parkview a permit for a 31-story apartment building where it was only zoned for 19 stories. Parkview began construction. After "substantial" construction, the city discovered the error and issued a stop work order for the top 12 stories, but Parkview kept building. New York's highest court ruled that "reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error," and held that estoppel was not available against the government. The extra stories had to be torn down at a cost of roughly \$14 million. Should estoppel be available against the government? Cf. *State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890 (Mo. Ct. App. 1987) (applying equitable estoppel where city was consulted and gave assurances as to a building permit). But see *Long v. Bd. of Adjustment of City of Columbia*, 856

S.W.2d 390 (Mo. App. 1993) (estoppel does not apply to acts of government, including acts relating to zoning); *Lichte v. Heidlage*, 536 S.W.2d 898 (Mo. App. 1976). Who suffers if the government's error can't be fixed?

The government's error, however, may justify the grant of a variance allowing the continued use in appropriate circumstances, where that error creates sufficient individualized hardship. See Variances, below; *Taylor v. Board of Zoning Adjustment*, 738 S.W.2d 141 (Mo. Ct. App. 1987) (grant of variance held appropriate due to zoning board's prior erroneous grant of permit resulting in \$7,000 expenditure for oversized sign later subject to permit revocation for zoning violation).

25.17. Vested rights in easy-to-change uses? In Missouri, the nonconforming use itself need not be one that requires substantial investment, if there is no doubt it precedes the enactment of the relevant regulation. In *Rose v. Board of Zoning Adjustment Platte County*, 68 S.W.3d 507 (Mo. Ct. App. 2001), Platte County found David Rose in violation of the county's Weed Ordinance for allowing uncultivated weeds to grow more than twelve inches high on his residential property. Rose bought his property in 1976, before the Weed Ordinance was enacted; he had a degree in wildlife management and ten years of work experience as a wetlands manager with the United States Fish and Wildlife Service. He decided to transform the cut-grass yard surrounding his home into a natural woodlands area: He planted additional trees, shrubs and flowering plants and allowed the natural vegetation in the yard to grow. He did not trim or mow the yard. Over the years, the vegetation "matured into a wooded state."

Eventually, "the uncultivated condition of Rose's yard led to an investigation and complaints by the Platte County codes enforcement officer." In 1991, Rose was criminally charged with violating the county's nuisance ordinance for allowing noxious weeds (such as poison ivy and oak) to grow on his property, maintaining other weeds and wooden boards conducive to breeding insects and rodents, and having a decaying wooden deck in a dangerous condition. A jury acquitted Rose on all charges. The codes enforcement officer complained three more times, but the county prosecutor declined to pursue further criminal charges, and in 1999 the county replaced the nuisance ordinance with its new Weed Ordinance, requiring the removal of "weeds" from any parcel of land not zoned for agricultural use. The county found Rose to be in violation of the new ordinance; Rose argued that his prior nonconforming use was protected against suppression. The court of appeals found that there was a dispute over whether Rose had expanded his nonconforming use by allowing the vegetation to "become more dense and overgrown subsequent to the passage of the Weed

Ordinance,” and held that he was entitled to a hearing on the matter.

Should the court have even allowed Rose to claim a prior nonconforming use? In a state that allowed amortization, what sort of amortization period should Rose have been allowed?

25.2.2 Variances

25.2.2.1 *Generally*

Euclid treated zoning as a legislative judgment deserving substantial deference. **Variances** are more individualized decisions about specific parcels, and they raise key structural issues: How can an individualized determination avoid arbitrariness? How should courts review these individualized determinations—should they defer to zoning boards as much as they do with overall zoning schemes?

Missouri law empowers city boards of adjustment, “where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of [a zoning ordinance], to vary or modify the application of . . . such ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.” Mo. REV. STAT. § 89.090(3) (1998). This type of provision is common across the nation, though there is some state-to-state variation. The basic requirements for a variance in any state are (1) a showing of individualized hardship and (2) a lack of interference with the basic goals of the zoning scheme. Both must be shown; even substantial hardship is insufficient if granting a variance would do significant harm to the purposes of the zoning. In such a case, only a constitutional challenge or a federal law overriding local zoning could potentially allow the proposed use.

Zoning authorities’ basic hostility to variances is well expressed by the MISSOURI MUNICIPAL LEAGUE, PLANNING AND ZONING PROCEDURES FOR MISSOURI MUNICIPALITIES (Sept. 2004):

The most common situation in which variances are sought is where a developer divides his land into the greatest possible number of lots, barely meeting minimum standards, and then seeks permission to create substandard lots out of the remaining land. The subdivision regulations are intended to set forth minimum standards for development, not maximums, and the intent of the regulation is to use the remnants of land to in-



Figure 25.9: Zoning Hearing, Valdosta County, Georgia, by John S. Quarterman, Aug. 26, 2013, CC-BY. For a detailed recap of a zoning hearing and many more pictures, see John S. Quarterman, *Dollar General (Teramore Development) @ GLPC 2013-08-26, ON LAKE FRONT* (Sept. 5, 2013), <http://www.l-a-k-e.org/blog/2013/09/dollar-general-teramore-development-glpc-2013-08-26.html>.

crease lot sizes rather than create substandard lots. When variances are granted allowing substandard lots, it weakens the legal position of the city and its regulations and makes it difficult to defend its subdivision standards.

(While there is little systematic empirical evidence about actual board practice, the litigated variance cases tend not to have this “most common” fact pattern.)

Procedure. Most jurisdictions have a formal process setting out the deadlines and providing guidance to applicants on what they need to show to get a variance. See, e.g., ST. LOUIS BOARD OF ZONING ADJUSTMENT, CITIZEN’S GUIDE TO THE BOARD OF ZONING ADJUSTMENT VARIANCE PROCESS (n.d.). By contrast, the city of Ladue has no formal variance procedure at all. Instead, an applicant must seek a permit, and after the permit is denied, the City of Ladue Building Department sends the applicant a formal denial letter with Zoning Board of Adjustment instructions for an appeal.

Matthew v. Smith
707 S.W.2d 411 (Mo. 1986)

WELLIVER, Judge.

This is an appeal from a circuit court judgment affirming the Board of Zoning Adjustment's decision to grant Jim and Susan Brandt a variance. The Brandts purchased a residential lot containing two separate houses upon a tract of land zoned for a single-family use. The court of appeals reversed the circuit court judgment, and the case was then certified to this Court by a dissenting judge. We reverse and remand.

The Brandts own a tract of land comprising one and one-half plotted lots. When they purchased the property in March of 1980, there already were two houses on the land, one toward the front of Erie Street and one in the rear. Each of the buildings is occupied by one residential family as tenants of the Brandts. The two houses apparently have been used as separate residences for the past thirty years, with only intermittent vacancies. The property is zoned for Single Family Residences. At the suggestion of a city official, the Brandts applied for a variance which would allow them to rent both houses with a single family in each house. After some delay, including two hearings by the Board of Zoning Adjustment of Kansas City, the Board granted the application. Appellant, Jon Matthew, a neighboring landowner challenged the grant of the variance and sought a petition for certiorari from the Board's action. The circuit court affirmed the Board's order; on appeal, the court of appeals held that the Board was without authority to grant the requested variance. A dissenting judge certified the case to this Court

Under most zoning acts, these boards have the authority to grant variances from the strict letter of the zoning ordinance. The variance procedure "fulfil[s] a sort of 'escape hatch' or 'safety valve' function for individual landowners who would suffer special hardship from the literal application of the . . . zoning ordinance." It is often said that "[t]he variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation." The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.

Both the majority of courts and the commentators recognize two types of variances: an area (nonuse) variance and a use variance.

The two types of variances with which cases are customarily concerned

are "use" variances and "nonuse variances." The latter consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

Many zoning acts or ordinances expressly distinguish between the two types of variances. When the distinction is not statutory, "the courts have always distinguished use from area variances." Some jurisdictions, whether by express statutory directive or by court interpretation, do not permit the grant of a use variance.

[The Brandts] seek a variance to use the property in a manner not permitted under the permissible uses established by the ordinance. The ordinance clearly permits only the use of the property for a single family residence. The applicant is not seeking a variance from the area and yard restrictions which are no doubt violated because of the existence of the second residence. Such an area variance is not necessary because the applicant has a permissible nonconforming structure under the ordinance.

... [T]he express language of § 89.090, RSMo 1978, ... grants the Board the "power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the *use*, construction or alteration of buildings or structures, or the use of land" (emphasis added). We, therefore, hold that under the proper circumstances an applicant may obtain a use variance.

Section 89.090, RSMo 1978 delegates to the Board of Adjustment the power to grant a variance when the applicant establishes "practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." . . .

Almost all jurisdictions embellished the general concepts of “unnecessary hardship” or “practical difficulties” by further defining the conditions an applicant must satisfy before obtaining a variance

Unfortunately, any attempt to set forth a unified structure illustrating how all the courts have treated these conditions would, according to Professor Williams, prove unsuccessful. Williams observes that the law of variances is in “great confusion” and that aside from general themes any further attempt at unifying the law indicates “either (a) [one] has not read the case law, or (b) [one] has simply not understood it. Here far more than elsewhere in American planning law, muddle reigns supreme.” Yet, four general themes can be distilled from variance law and indicate what an applicant for a variance must prove:

- (1) relief is necessary because of the unique character of the property rather than for personal considerations; and
- (2) applying the strict letter of the ordinance would result in unnecessary hardship; and the
- (3) imposition of such a hardship is not necessary for the preservation of the plan; and
- (4) granting the variance will result in substantial justice to all.

Although all the requirements must be satisfied, it is generally held that “[u]nnecessary hardship” is the principal basis on which a variance is granted.”

Before further examining the contours of unnecessary hardship, [we] need to address the significance of the statutory dual standard of “unnecessary hardship” or “practical difficulties.” Generally, this dual standard has been treated in one of two ways. On the one hand, many courts view the two terms as interchangeable. On the other hand, a number of jurisdictions follow the approach of New York, the jurisdiction where the language originated, and hold that “practical difficulties” is a slightly lesser standard than “unnecessary hardship” and only applies to the granting of an area variance and not a use variance. The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.

In light of our decision to permit the granting of a use variance, we are persuaded that the New York rule reflects the sound approach for treating the distinction between area and use variances. To obtain a use variance, an applicant must demonstrate, *inter alia*, unnecessary hardship; and, to obtain an area variance, an applicant must establish, *inter alia*, the existence of conditions slightly less rigorous than unnecessary hardship.

. . . It is generally said that *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939) contains the classic definition of unnecessary hardship:

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. "Reasonable return is not maximum return." Rather, the landowner must demonstrate that he or she will be deprived of all beneficial use of the property under any of the permitted uses:

A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from any permitted use. Lack of a reasonable return may be shown by proof that the owner has been deprived of all beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.

Most courts agree that mere conclusory and lay opinion concerning the lack of any reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence. In a well-reasoned opinion, Judge Meyer of the New York Court of Appeals stated:

Whether the existing zoning permits of a reasonable return requires proof from which can be determined the rate of return earned by like property in the community and proof in dollars and cents form of the owner's investment in the property as well as the return that the property will produce from the various uses permissible under the existing classification.

N. Westchester Prof. Park v. Town of Bedford, 458 N.E.2d 809 (N.Y. 1983). Such pronouncements and requirements of the vast majority of jurisdictions illustrate that, if the law of variances is to have any viability, only in the exceptional case will a use variance be justified.

... [T]he record is without sufficient evidence to establish unnecessary hardship. The only evidence in the record is the conclusory opinion of Brandt that they would be deprived of a reasonable return if not allowed to rent both houses. No evidence of land values was offered; and, no dollars and cents proof was presented to demonstrate that they would be deprived of all beneficial use of their property. Appellant, in fact, was not permitted to introduce such evidence. The Board, therefore, was without authority to grant a use variance upon this record.

The record, however, indicates that the Brandts may be entitled to a nonconforming use under the ordinance. . . .

ROBERTSON, Judge, concurring in result.

[Judge Robertson concurred on the ground that the Brandts sought an area variance, not a use variance, but, under the zoning ordinance, they still needed to demonstrate that the property couldn't earn a reasonable return without the variance.] [A separate concurrence is omitted.]

Notes and Questions

25.18. Was this a use variance or an area variance?

25.19. Note that the prior nonconforming use alternative is both more stringent and more relaxed: it requires the use to predate the zoning, but it also requires no showing of hardship once that priority is established.

25.20. Although the standard of review is supposed to be deferential, reversals of zoning board decisions are not uncommon. See, e.g., *Housing Auth. v. Bd. of Adjustment*, 941 S.W.2d 725 (Mo. Ct. App. 1997) (board abused discretion in denying variances for lot size and setbacks where unusual size of parcel, which was laid out before zoning was enacted, meant that no conforming build-

ing could be erected, and where numerous other nearby properties had similar lot sizes and setbacks); *State ex rel. Klawuhn v. Board of Zoning Adjustment*, 952 S.W.2d 725 (Mo. Ct. App. 1997) (board wrongly granted three variances to allow owners to build a storage building on a vacant lot and store various vehicles and equipment in it; asserted hardship was personal to owners, “namely the large quantity of vehicles and equipment they wished to store inside the proposed storage building,” even though housing the vehicles inside a structure might be more aesthetically appealing to neighbors than keeping them in open view; when asked whether he could get by with a smaller storage shed, owner responded, “Not and put what . . . I have to put in it”).

25.21. **Mistakes.** Is a good faith mistake a self-inflicted hardship? The answer is usually yes. See, e.g., *Wehrle v. Cassor*, 708 S.W.2d 788 (Mo. Ct. App. 1986) (board erred in granting variance where violation, and hardship involved in curing violation, resulted from builders’ measurement errors).

25.22. **Purchase with knowledge of the problem.** Suppose undeveloped land is purchased by someone who knows or should know that the land can’t be developed in accordance with current restrictions without a variance. Does purchase with knowledge of a hardship count as a self-inflicted harm, disentitling the owner to a variance? See, e.g., *Conley v. Town of Brookhaven Zoning Bd. of Appeals*, 40 N.Y.2d 309 (N.Y. 1976) (self-imposed hardship through purchase with notice of restrictions didn’t preclude the zoning board from granting an area variance); *Somol v. Board of Adjustment*, 649 A.2d 422 (N.J. Super. Ct. Law Div. 1994) (as long as a prior owner didn’t create the hardship, purchase with knowledge of the restrictions is no barrier to a variance); *In re Gregor*, 627 A.2d 308 (Pa. Commw. Ct. 1993) (“The right to develop a nonconforming lot is not personal to the owner of property at the time of enactment of the zoning ordinance but runs with the land, and a purchaser’s knowledge of zoning restrictions alone is insufficient to preclude the grant of a variance unless the purchase itself gives rise to the hardship.”). In what way could a prior owner or a purchaser create the hardship?

For use variances, by contrast to area variances, purchase with knowledge precludes a claim for a variance. Why distinguish area variances from use variances in this context?

25.23. **Can refusal to sell be a self-inflicted hardship?** In *Wolfner v. Board of Adjustment of City of Warson Woods*, 114 S.W.3d 298 (Mo. Ct. App. 2003), the owners bought one lot in 1939 and built a house on it, before zoning began in 1941, thus creating a prior nonconforming use. After 1941, they acquired an adjacent lot that was too small to be built on under the 1941 zoning. Until 1995,

the owners used the adjacent lot as a sideyard. The surviving owner then sold the main lot, but not the adjacent lot. The buyer of the main lot tried to buy the adjacent lot, but the owner rejected the offer, along with other offers from surrounding property owners. She requested a variance allowing a home to be built on the adjacent lot—it was only 7,500 square feet and 60 feet wide, less than the required 8,750 square feet and 70-foot width. The Board denied her request, and that of subsequent purchasers, the Wolfners, whose purchase was conditional on getting the variance. The Wolfners agreed to pay \$80,000 for the lot on the hope they could build on it; the Board found that this was not the kind of harm that merited a variance.

The court upheld the denial, noting that it was still possible that neighboring owners would be interested in buying the lot at its fair market value as a side yard. Is this fair? Note that if the original owners had *not* owned an adjacent lot, they would almost certainly have been entitled to the variance because their property was otherwise unbuildable. *Compare, e.g., Detwiler v. Zoning Hearing Board*, 596 A.2d 1156 (Pa. Comm. Ct. 1991) (holding owners of oddly shaped parcel entitled to variance even though they bought after the zoning began); *Commons v. Westwood Zoning Board of Adjustment*, 410 A.2d 1138 (N.J. 1980) (similar result; although neighbors might be entitled to denial of variance if they were willing to buy the undersized parcel at fair market value, fair market value was to be calculated according to the value of the parcel with the variance, not the much lower value of the parcel without it).

25.24. The law in action. The legal standards governing variances are fairly easy to state, but doctrine doesn't necessarily control outcomes; facts on the ground are much more important. See Kathryn Moore, *The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later*, 100 Ky. L.J. 435 (2011-2012) (law professor who served on zoning board commented on “the Board’s tendency to make decisions that seem fair and practical rather than technically legally correct. Indeed, I am not sure that it is possible or even reasonable to expect a lay body to prefer technically legally correct decisions to practical and fair decisions, especially when the staff recommends the practical decision over the legally correct decision.”). The conventional wisdom is that courts reverse the grant of variances more often than their denial. Do you share the judicial intuition that an issued variance is more likely to be problematic than a denied one? The individual entity seeking a variance usually has a more focused interest in getting it than the rest of the neighbors have in blocking it. Some people who seek variances have even bribed zoning authorities.

William A. Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism**

Draft of Sept. 2010,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686009,
forthcoming in PROPERTY IN LAND AND OTHER RESOURCES 259 (Daniel
H. Cole & Elinor Ostrom eds., 2012)

. . . Two reflections about zoning boards might be useful to scholars. The first is that all board members are put on edge by lawyers. This includes the several lawyers who served on the board during my tenure. Having an attorney make the presentation while the applicant sits in the back of the room (or worse, fails to attend at all) makes board members assume that something is fishy about the proposal. Less articulate but sincere presentation by principals (or, for elaborate projects, their engineers and architects) are cut more slack than their polished and practiced legal agents.

The other reflection is how much actually visiting the site in question matters. Our board would hear applicants and then, in the week between the hearing and the deliberation session, travel individually to the location of the proposed project and tramp around the lot and the neighborhood. (Though its resident population is only 10,000, Hanover is a busy employment center, and its land area is the size of Boston, so locations were often unfamiliar.) Site visits could change our views of the case enormously. An applicant showed charming pictures of his antique-car hobby and sought a variance only to park some storage trailers. A visit revealed that he actually harbored a private junkyard. (Neighbors had not previously complained because the junkyard had been there before their homes were built, and the owner was a nice guy.) A barn that was proposed within a wetland setback turned out to be as high and dry as any location in Hanover. (Wetland definitions do not actually require water to be evident.)

I mention the importance of local knowledge because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. Among the earlier and better known critiques was titled, "The Zoning Board of Adjustment: A Case Study in Misrule" (Dukeminier and Stapleton 1962). A more recent study was by an attorney who statistically

*Excerpts reprinted with permission. Prof. Fischel, an economist, studies zoning; he also sat on a zoning board for several years in order to better understand its workings. —Eds.

examined variance decisions in five New Hampshire towns, one of which was Hanover, during the years 1987-1992, when I was on the zoning board. His chief finding, reported in high dudgeon, was that variances are disproportionately granted if abutters do not object (Kent 1993, cited with similar studies in Ellickson and Been 2000, pp. 330-31). To which most board members would say, privately and with palms up, "Nu? Who knows better whether the variance will have an adverse effect?" The practice illustrates the recurrence of an early, grass-roots approach to land use regulation, which required nonconforming uses to obtain permission of local property owners. The practice was struck down as unlawful delegation of the police power in several early cases such as *Eubank v. City of Richmond*, 226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Mr. Kent, the New Hampshire critic of zoning boards (and himself a New Hampshire lawyer), neglected to point out that four of the five towns in his sample have administrative officers who could discourage applicants with weak cases (Hanover's certainly did), but none of the other "misrule-by-variance" studies worries much about selection bias, either. Kent also reported (accurately) that during the period he examined, the New Hampshire Supreme Court overturned all of the ten towns whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, a 2001 decision, *Simplex v. Newington*, 145 N.H. 727, changed the court's previous zoning variance criteria, on which Kent had relied as the source of proper variances, to a less exacting standard that more closely reflected actual practice.

Legal error is not practical error, much less economic harm. While the articles critical of boards mention the possibility of variances degrading the neighborhood, even anecdotal evidence in support of that contention is scarce. Without visiting the site in question, it is often extremely difficult to tell whether the variance was warranted by legal, practical, or economic criteria. An underappreciated study by David Bryden (1977) established this more systematically. Bryden examined scores of Minnesota lakeshore building and septic variances (of which he had no part in granting) and concluded that what looked like a travesty from the legal record in almost all cases made perfectly good sense to local board members who were acquainted with the details of the sites in question. For example, building setback variances, which by themselves seemed to have been issued with

little regard to the state's standard criteria, were granted most often to allow septic systems to be even farther from the lake than the state required. The local officials knew the sites and made what Bryden inferred were appropriate tradeoffs between the serious risk of septic-tank pollution of water bodies and the less-consequential aesthetic concerns of building setbacks.

This is not to say that zoning boards are faultless. Some members can be, in my experience, petty busybodies or inclined to promote a political agenda. (My guess is that the selectboard originally suspected me of being in the latter category.) Though I never had reason to suspect corruption, I sometimes thought that favoritism and score-settling flavored some members' votes. But even the least sophisticated zoning boards have an asset that is almost never available to appellate judges or to statistical analysts: They know at least the neighborhood and usually the specific site from personal experience. Critics need to take that into account.

25.2.2.2 *The Americans with Disabilities Act*

Both the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) have provisions that can affect local zoning and variance procedures.¹⁰ People with disabilities, defined as a substantial impairment to a major life activity such as walking or seeing, as well as people who are perceived as having disabilities, are entitled to reasonable accommodations for their disabilities, which means that otherwise applicable laws and regulations may have to be waived.

The ADA and City Governments: Common Problems

U.S. Department of Justice, Civil Rights Division, Disability Rights Section, <https://archive.ada.gov/comprob.htm> (last updated Feb. 24,

¹⁰The ADA had even more profound effects on local building codes, which mandate particular building features. Along with fire and electrical codes, building codes—which specify matters such as the minimum width of doors and the maximum pitch of stairs—also profoundly shape the built environment, though we will not separately consider them here. Under the ADA, new construction of places of public accommodation must be accessible, which includes considerations such as entrance ramps and Braille labeling. See U.S. Architectural and Transportation Barriers Compliance Board (Access Board), Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities (2002), <https://www.access-board.gov/attachments/article/1350/adaag.pdf>.



Figure 25.10: Figure from *The ADA and City Governments*.

2020)

Common Problem:

City governments may fail to consider reasonable modifications in local laws, ordinances, and regulations that would avoid discrimination against individuals with disabilities.

Result:

Laws, ordinances, and regulations that appear to be neutral often adversely impact individuals with disabilities. For example, where a municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district, installing a ramp to ensure access for people who use wheelchairs may be impermissible without a variance from the city. People with disabilities are therefore unable to gain access to businesses in the city.

City zoning policies were changed to permit [the business in Figure 25.10] to install a ramp at its entrance.

Requirement:

City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local

laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks.

Notes and Questions

25.25. Suppose a business will be in violation of the ADA if it doesn't install a ramp, in violation of a setback requirement. Is it *entitled* to a variance under this guidance? What if the business should have known about the problem before constructing its building? (In that case, the zoning authority is also implicated—it shouldn't have approved any buildings that would violate the ADA. See U.S. Dep't of Justice, Civil Rts. Div., ADA Standards for Accessible Design (2010), http://www.ada.gov/2010ADASTANDARDS_index.htm.) What considerations might nonetheless justify denying the variance? What if the board argues that ramps are ugly and will decrease the value of the area? What if the board has safety concerns because the ramp will extend far enough to interfere with bicyclists? The rule that ADA requires reasonable modifications to zoning laws may mean that the standard requirement of exceptional and undue hardship to the property owner isn't applicable. But another element of the test, detriment to the overall value of the area, is relevant in determining whether a modification is reasonable.

25.26. Variances usually preclude consideration of personal characteristics that aren't inherent in the land. Where the entity seeking a variance is a business, that question isn't particularly important—even if the business changes hands, the next owner will need a ramp to make the store accessible. But suppose zoning regulations require a particular elevation for residential beachfront property, in order to address concerns about danger from flooding. A property owner uses a wheelchair and wants a variance from the elevation requirement because otherwise he won't be able to get into his house. Does the ADA require the variance?

25.2.3 Special Exceptions and Zoning Amendments

There are a variety of other refinements or complications in the zoning process that provide flexibility. In theory, they should all have to conform to the general development plan or the plan itself should have to be changed; practice is somewhat more messy. This section provides only a brief introduction to the relevant concepts. A class in land use law or local government will provide

substantially more detail.

Special exceptions/special uses/conditional uses. A special exception (varyingly known as a special use or conditional use in different states) is a ban on particular types of uses, such as apartment buildings, unless certain criteria are met. One might wonder how they differ from variances. The basic idea is that variances are necessary though not desirable, designed to deal with unexpected situations in which land uses that are otherwise banned should be allowed, usually for parcel-specific and therefore unpredictable reasons. We know that there is, in general, a need for the ability to grant variances, but we don't know which variances we will need. So the standards for variances are worded generally.

By contrast, special exceptions are authorized when the zoning body anticipates that particular uses will be appropriate, but should be carefully scrutinized. When a special exception is authorized by the zoning code, that reflects a determination that the use is generally appropriate for the zone. As a result, the zoning board must not be left with only vague criteria that do not constrain its discretion when assessing whether a particular application should be granted. With variances, the risk of arbitrary decisions has to be borne to provide the necessary flexibility. But when the zoning authority can anticipate the issues that will predictably arise with a particular use—apartments, for example, are likely to raise questions about how many parking spaces are needed—then there is no need to take the risk of arbitrary or biased enforcement. “The issuing of a permit is a ministerial act, not a discretionary act, which may not be refused if the requirements of the applicable ordinance have been met.” *State ex rel. Kugler v. City of Maryland Heights*, 817 S.W.2d 931 (Mo. Ct. App. 1991); see also *Curry Inv. Co. v. Board of Zoning Adjustment of Kansas City*, 399 S.W.3d 106 (Mo. Ct. App. 2013) (finding that the zoning board unlawfully made approval of a special use permit conditional on the removal of two nonconforming signs; signs were lawful as prior nonconforming uses, and the board’s staff concluded that all the criteria for a special use permit were met); *Waeckerle v. Board of Zoning Adjustment*, 525 S.W.2d 351 (Mo. Ct. App. 1975) (allowing the zoning board to treat a conditional use application as requiring a variance “would amount to permitting the Board to exercise legislative power,” conflicting with its administrative role; zoning board cannot repeal authorization for uses given by legislature). Relatedly, no special showing of hardship is required to grant a special use permit, unlike a variance. The inevitable legal debate over when rules are preferable to standards, or vice versa, is actualized in zoning by using both.

When a state is concerned about equalizing the burden of particular uses,

it may mandate that a sub-state jurisdiction provide for them through special exceptions. Missouri law, for example, requires municipalities with more than 500 persons to allow substance abuse treatment facilities as a permitted, conditional special use. Municipalities may establish density standards and require that exterior appearance conform to area standards. Section 89.143 RSMo.

Floating zones. Floating zones are something like special exceptions, in that they contemplate that a particular use or combination of uses will be appropriate for an area under certain circumstances, but it's not yet clear exactly where that use should be. Once a development plan is proposed by a developer and accepted by the zoning authority, the floating zone "lands." See *Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. Ct. App. 1980) (accepting floating zones so long as the determination to rezone a particular piece of property in a floating zone is not arbitrary, capricious or unreasonable). Floating zones are useful for extensively planned developments that may need more flexibility in use than the current zoning allows. The plan can also be overlaid onto an existing zoning district if there's a proposal with no need to "float"; either way, the rezoning usually only takes place once a plan is approved. See, e.g., *Heidrich v. City of Lee's Summit*, 916 S.W.2d 242 (Mo. Ct. App. 1995) (dealing with a planned district); *McCarty v. City of Kansas City*, 671 S.W.2d 790 (Mo. Ct. App. 1984) (approval of plan is a legislative act).

Planned Unit Development (PUD). A PUD is a self-contained development, often with a mixture of housing types and densities, in which the subdivision and zoning controls are applied to the project as a whole rather than to individual lots. Densities are thus calculated for the entire development, which allows clustering of houses and common open spaces. See *Turner v. City of Independence*, 186 S.W.3d 786 (Mo. Ct. App. W.D. 2006) (upholding high density residential mixed use planned unit development rezoning ordinance enacted by City as lawful and reasonable). Within a PUD, the number of uses expressly permitted is limited and the number of conditional uses is expanded, allowing the zoning authority more control over the development of the land. Developers may use a PUD to get more flexibility in terms of open space, parking, and setback requirements, in return for giving zoning authorities more control than they would normally have in matters of building appearance and landscaping. See, e.g., *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531 (Mo. Ct. App. 1998) (accepting PUD as legitimate legislative rezoning technique). Ladue has now provided for a PUD in its zoning ordinance:

This section is intended to enable the creation of a Planned

Unit Development (P.U.D.) District on properties with a minimum size of twelve (12) acres that abut a City border.

The purpose of the Planned Unit Development District overlay is to provide a means of achieving greater flexibility in development of land in a manner not possible in the underlying zoning district; to encourage development of downsized luxury housing; to encourage a more environmentally sustainable development; to promote a more desirable community environment; and to maintain maximum control over both the structure and future operation of the development.

A Planned Unit Development District overlay is not a rezoning of the property; only those uses permitted in the underlying zoning classification shall be allowed Lot area, yard setbacks, lot frontage, lot width, and other requirements and regulations contained in the underlying zoning districts may be altered or amended as set forth in the authorized Planned Unit Development District. There shall be no increase in unit density in residentially zoned districts.

Ladue, Missouri's Zoning Ordinance, Ordinance 1175, as amended through Feb. 2016.

Rezoning. Rezoning more generally is exactly what it sounds like. As long as it is part of a comprehensive plan, it is usually acceptable, even if it changes the rules substantially (and doesn't just exclude specific businesses, the way the rezoning in prior nonconforming use cases often does).

[Under Missouri law, t]he requirement for passage of the rezoning ordinance is a simple majority. It takes a two-thirds vote, however, if the owners of thirty percent or more of the land within 185 feet of the boundaries of the area of land (exclusive of streets and alleys) that is being rezoned sign and acknowledge (before a notary public) a written protest against the rezoning.

In some cities there are additional self-imposed limitations on rezoning amendments. These limitations state that, if the planning commission recommends against the proposed amendment, then it will take a three-fourths vote of the council to overturn that action.

Missouri Municipal League, *Planning and Zoning Procedures for Missouri Municipalities* (Sept. 2004).

Should we treat rezoning as legislative in nature, and thus entitled to very deferential judicial review the way the initial adoption of a zoning plan is treated under *Euclid*, or rather as quasi-judicial like a variance and subject to less deference? The courts are divided on this question.

Contract zoning. This is an often derogatory term for a rezoning in which a developer promises to provide certain benefits to the zoning jurisdiction in return for zoning that allows the developer to accomplish its goals. In theory, it should not be allowed, because it makes the idea of general planning seem like a sick joke. In practice, it is hard to distinguish from acceptable rezoning, and courts have increasingly tolerated it, perhaps reflecting the commodification of all other values. Christopher Serkin, Local Property Law: Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883 (2007). Nonetheless, most suburban communities have not accepted contract zoning, as a political matter.

Spot zoning. This is another kind of rezoning, in which a particular parcel is rezoned (rather than being given a variance, for which the standard would be much higher). Because it can be used as a variance workaround when the zoning board is on the owner's side, some courts are skeptical of spot zoning. The classic scenario involves a parcel that is zoned to "higher" use, often single-family residential, but abuts a less restrictive zone. The developer wishes to use the parcel for apartments, and argues that the neighborhood is already transitional in character and that another apartment building will be consistent with the overall area. What responses can you imagine the residential neighbors making?

Because of the potential for collusion between a zoning board and the owner of a benefitted parcel, spot zoning is more often the legal conclusion of a court striking down a zoning change than a characterization adopted by a zoning board to describe what it is doing. Courts tend to be particularly suspicious when a change confers unique benefits on a specific parcel, making it distinctly more valuable than its neighbors. It is not necessary that the new use cause hardships to the neighbors; the problem is one of unjustified favoritism.

Upzoning and downzoning. You may expect that rezoning often favors developers trying to take advantage of desirable locations. In fact, "downzoning"—making it harder to build at higher densities, which are the most profitable for developers—may often be more successful than upzoning. Homevoters, it seems, are likely to have the political power to protect new housing from coming in and diluting the value of prized locations, or attracting the

“wrong” sorts of residents. See Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIR. LEG. STUD. 227 (2014) (finding, in study of New York City, that areas in proximity to high-quality infrastructure and services were more likely to have zoning changes than other areas, but almost always in the direction of downzoning, so that parcels in high-performing school districts were 43% more likely than the typical parcel to be upzoned but 392% more likely to be downzoned; downzoning was also highly correlated with race, with parcels in areas that were 80% white more than seven times more likely to be downzoned than parcels in areas that were under 20% white).

25.3 Aesthetic Zoning

There are many ways to attempt to control residents’ ways of life. Recall that single-family homes were promoted as ways to shape personhood and citizenship as compared to apartments; the general idea of shaping our character by controlling our buildings is the same even if the mechanisms change. Many traditionally zoned areas have adopted aesthetic regulations. Typically, a city will pass an ordinance setting up an Architectural Board to approve plans for buildings. This was the case in Ladue, Missouri. It is perhaps notable that, despite the demographic uniformity of Ladue’s residents, they are still very interested in controlling each other’s property-related behavior through law rather than merely through social norms.

State ex rel. Stoyanoff v. Berkeley
458 S.W.2d 305 (Mo. 1970)

PRITCHARD, Commissioner.

Upon summary judgment the trial court issued a peremptory writ of mandamus to compel appellant to issue a residential building permit to respondents. The trial court’s judgment is that the below-mentioned ordinances are violative of Section 10, Article I of the Constitution of Missouri, 1945, in that restrictions placed by the ordinances on the use of property deprive the owners of their property without due process of law. Relators’ petition pleads that they applied to appellant Building Commissioner for a building permit to allow them to construct a single family residence in the City of Ladue, and that plans and specifications were submitted for

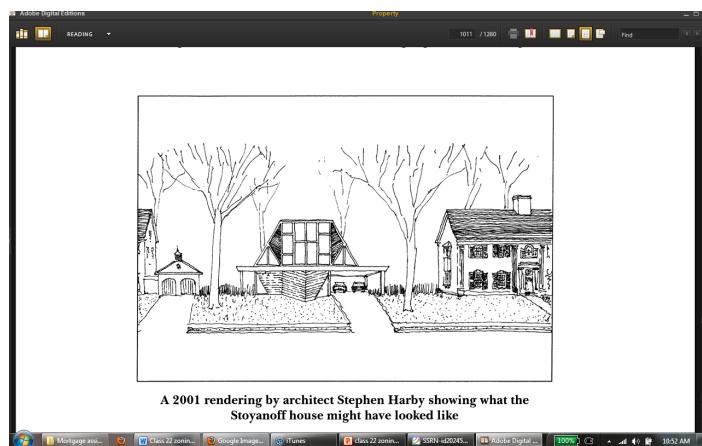


Figure 25.11: Artist's rendering of proposed house.

the proposed residence, which was unusual in design, "but complied with all existing building and zoning regulations and ordinances of the City of Ladue, Missouri."

It is further pleaded that relators were refused a building permit for the construction of their proposed residence upon the ground that the permit was not approved by the Architectural Board of the City of Ladue. Ordinance 131, as amended by Ordinance 281 of that city, purports to set up an Architectural Board to approve plans and specifications for buildings and structures erected within the city and in a preamble to "conform to certain minimum architectural standards of appearance and conformity with surrounding structures, and that unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures and residents, and to the general welfare and happiness of the community, be avoided, and that appropriate standards of beauty and conformity be fostered and encouraged." It is asserted in the petition that the ordinances are invalid, illegal and void, "are unconstitutional in that they are vague and provide no standard nor uniform rule by which to guide the architectural board," that the city acted in excess of statutory powers in enacting the ordinances, which "attempt to allow respondent to impose aesthetic standards for buildings in the City of Ladue, and are in excess of the powers granted the City of Ladue by said statute."

Relators filed a motion for summary judgment and affidavits were filed

in opposition thereto. Richard D. Shelton, Mayor of the City of Ladue, deponed that the facts in appellant's answer were true and correct, as here pertinent: that the City of Ladue constitutes one of the finer suburban residential areas of Metropolitan St. Louis, the homes therein are considerably more expensive than in cities of comparable size, being homes on lots from three fourths of an acre to three or more acres each; that a zoning ordinance was enacted by the city regulating the height, number of stories, size of buildings, percentage of lot occupancy, yard sizes, and the location and use of buildings and land for trade, industry, residence and other purposes; that the zoning regulations were made in accordance with a comprehensive plan "designed to promote the health and general welfare of the residents of the City of Ladue," which in furtherance of said objectives duly enacted said Ordinances numbered 131 and 281. Appellant also asserted in his answer that these ordinances were a reasonable exercise of the city's governmental, legislative and police powers, as determined by its legislative body, and as stated in the above-quoted preamble to the ordinances. It is then pleaded that relators' description of their proposed residence as "'unusual in design' is the understatement of the year. It is in fact a monstrosity of grotesque design, which would seriously impair the value of property in the neighborhood."

The affidavit of Harold C. Simon, a developer of residential subdivisions in St. Louis County, is that he is familiar with relators' lot upon which they seek to build a house, and with the surrounding houses in the neighborhood; that the houses therein existent are virtually all two-story houses of conventional architectural design, such as Colonial, French Provincial or English; and that the house which relators propose to construct is of ultramodern design which would clash with and not be in conformity with any other house in the entire neighborhood. It is Mr. Simon's opinion that the design and appearance of relators' proposed residence would have a substantial adverse effect upon the market values of other residential property in the neighborhood, such average market value ranging from \$60,000 to \$85,000 each.

As a part of the affidavit of Russell H. Riley, consultant for the city planning and engineering firm of Harland Bartholomew & Associates, photographic exhibits of homes surrounding relators' lot were attached. To the south is the conventional frame residence of Mrs. T. R. Collins. To the west is the Colonial two-story frame house of the Lewis family. To the northeast is the large brick English Tudor home of Mrs. Elmer Hubbs. Immediately

to the north are the large Colonial homes of Mr. Alex Cornwall and Mr. L. Peter Wetzel. In substance Mr. Riley went on to say that the City of Ladue is one of the finer residential suburbs in the St. Louis area with a minimum of commercial or industrial usage. The development of residences in the city has been primarily by private subdivisions, usually with one main lane or drive leading therein (such as Lorenzo Road Subdivision which runs north off of Ladue Road in which relators' lot is located). The homes are considerably more expensive than average homes found in a city of comparable size. The ordinance which has been adopted by the City of Ladue is typical of those which have been adopted by a number of suburban cities in St. Louis County and in similar cities throughout the United States, the need therefor being based upon the protection of existing property values by preventing the construction of houses that are in complete conflict with the general type of houses in a given area. The intrusion into this neighborhood of relators' unusual, grotesque and nonconforming structure would have a substantial adverse effect on market values of other homes in the immediate area. According to Mr. Riley the standards of Ordinance 131, as amended by Ordinance 281, are usually and customarily applied in city planning work and are: "(1) whether the proposed house meets the customary architectural requirements in appearance and design for a house of the particular type which is proposed (whether it be Colonial, Tudor English, French Provincial, or Modern), (2) whether the proposed house is in general conformity with the style and design of surrounding structures, and (3) whether the proposed house lends itself to the proper architectural development of the City; and that in applying said standards the Architectural Board and its Chairman are to determine whether the proposed house will have an adverse affect on the stability of values in the surrounding area."

Photographic exhibits of relators' proposed residence were also attached to Mr. Riley's affidavit. They show the residence to be of a pyramid shape, with a flat top, and with triangular shaped windows or doors at one or more corners

Section 89.020 provides: "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features

of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.” Section 89.040 provides: “Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the *character of the district and its peculiar suitability for particular uses*, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.” (italics added)

. . . [The statutory language embraces considerations] relating to the character of the district, its suitability for particular uses, and the conservation of the values of buildings therein. These considerations, sanctioned by statute, are directly related to the general welfare of the community. . . . “We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.” . . . “The stabilizing of property values, and giving some assurance to the public that, if property is purchased in a residential district, its value as such will be preserved, is probably the most cogent reason back of zoning ordinances.” The preamble to Ordinance 131, quoted above in part, demonstrates that its purpose is to conform to the dictates of § 89.040, with reference to preserving values of property by zoning procedure and restrictions on the use of property. This is an illustration of . . . a growing number of cases recognizing a change in the scope of the term “general welfare.” . . . “Property use which offends sensibilities and debases property values affects not only the adjoining property owners in that vicinity but the general public as well because when such property values are destroyed or seriously impaired, the tax base of the community is affected and the public suffers economically as a result.”

Relators say further that Ordinances 131 and 281 are invalid and unconstitutional as being an unreasonable and arbitrary exercise of the police power. It is argued that a mere reading of these ordinances shows that they are based entirely on aesthetic factors in that the stated purpose of the Ar-

chitectural Board is to maintain "conformity with surrounding structures" and to assure that structures "conform to certain minimum architectural standards of appearance." The argument ignores the further provisos in the ordinance: ". . . and that unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures, and residents, and to the general welfare and happiness of the community, be avoided, and that appropriate standards of beauty and conformity be fostered and encouraged." (Italics added.) Relators' proposed residence does not descend to the "'patently offensive character of vehicle graveyards in close proximity to such highways'" . . . Nevertheless, the aesthetic factor to be taken into account by the Architectural Board is not to be considered alone. Along with that inherent factor is the effect that the proposed residence would have upon the property values in the area. In this time of burgeoning urban areas, congested with people and structures, it is certainly in keeping with the ultimate ideal of general welfare that the Architectural Board, in its function, preserve and protect existing areas in which structures of a general conformity of architecture have been erected. The area under consideration is clearly, from the record, a fashionable one. In *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440, 444 (La. 1923), the court said, "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood." [Other cases accept] the principle that aesthetics is a factor to be considered in zoning matters.

In the matter of enacting zoning ordinances and the procedures for determining whether any certain proposed structure or use is in compliance with or offends the basic ordinance, it is well settled that courts will not substitute their judgments for the city's legislative body, if the result is not oppressive, arbitrary or unreasonable and does not infringe upon a valid preexisting nonconforming use. The denial by appellant of a building permit for relators' highly modernistic residence in this area where traditional Colonial, French Provincial and English Tudor styles of architecture are erected does not appear to be arbitrary and unreasonable when the basic purpose to be served is that of the general welfare of persons in

the entire community.

In addition to the above-stated purpose in the preamble to Ordinance 131, it establishes an Architectural Board of three members, all of whom must be architects. Meetings of the Board are to be open to the public, and every application for a building permit, except those not affecting the outward appearance of a building, shall be submitted to the Board along with plans, elevations, detail drawings and specifications, before being approved by the Building Commissioner. . . .

Ordinances 131 and 281 are sufficient in their general standards calling for a factual determination of the suitability of any proposed structure with reference to the character of the surrounding neighborhood and to the determination of any adverse effect on the general welfare and preservation of property values of the community

Anderson v. City of Issaquah
851 P. 2d 744 (Wash. Ct. App. 1993)

Appellants M. Bruce Anderson, Gary D. LaChance, and M. Bruce Anderson, Inc. (hereinafter referred to as Anderson), challenge the denial of their application for a land use certification, arguing, inter alia, that the building design requirements contained in Issaquah Municipal Code (IMC) 16.16.060 are unconstitutionally vague. The Superior Court rejected this constitutional challenge. We reverse and direct that Anderson's land use certification be issued. . . .

Facts

Anderson owns property located at 145 N.W. Gilman Boulevard in the city of Issaquah (City). In 1988, Anderson applied to the City for a land use certification to develop the property. The property is zoned for general commercial use. Anderson desired to build a 6,800-square-foot commercial building for several retail tenants.

After obtaining architectural plans, Anderson submitted the project to various City departments for the necessary approvals. The process went smoothly until the approval of the Issaquah Development Commission (Development Commission) was sought. This commission was created to administer and enforce the City's land use regulations. It has the authority to approve or deny applications for land use certification.

Section 16.16.060 of the IMC enumerates various building design objectives which the Development Commission is required to administer and enforce. Insofar as is relevant to this appeal, the Development Commission is to be guided by the following criteria:

IMC 16.16.060(B). Relationship of Building and Site to Adjoining Area.

1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.

2. Harmony in texture, lines, and masses shall be encouraged.

...

IMC 16.16.060(D). Building Design.

1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.

2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.

3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.

4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings.

5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.

6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights

of buildings, or other methods shall be used to prevent a monotonous design.

As initially designed, Anderson's proposed structure was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a "modern" style with an unbroken "warehouse" appearance in the rear, and large retail-style windows in the front. The City moved a Victorian era residence, the "Alexander House", onto the neighboring property to serve as a visitors' center. Across the street from the Anderson site is a gasoline station that looks like a gasoline station. Located nearby and within view from the proposed building site are two more gasoline stations, the First Mutual Bank Building built in the "Issaquah territorial style", an Elks hall which is described in the record by the Mayor of Issaquah as a "box building", an auto repair shop, and a veterinary clinic with a cyclone-fenced dog run. The area is described in the record as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman [Boulevard]."

The Development Commission reviewed Anderson's application for the first time at a public hearing on December 21, 1988. Commissioner Nash commented that "the facade did not fit with the concept of the surrounding area." Commissioner McGinnis agreed. Commissioner Nash expressed concern about the building color and stated that he did not think the building was compatible with the image of Issaquah. Commissioner Larson said that he would like to see more depth to the building facade. Commissioner Nash said there should be some interest created along the blank back wall. Commissioner Garrison suggested that the rear facade needed to be redesigned.

At the conclusion of the meeting, the Development Commission voted to continue the hearing to give Anderson an opportunity to modify the building design. On January 18, 1989, Anderson came back before the Development Commission with modified plans which included changing the roofing from metal to tile, changing the color of the structure from off-white to "Cape Cod" gray with "Tahoe" blue trim, and adding brick to the front facade. During the ensuing discussion among the commissioners, Commissioner Larson stated that the revisions to the front facade had not satisfied his concerns from the last meeting. In response to Anderson's request for more specific design guidelines, Commissioner McGinnis stated that the Development Commission had "been giving direction; it is the ap-

plicant's responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes." Commissioner Larson then suggested that "the facade can be broken up with sculptures, benches, fountains, etc."

Commissioner Nash suggested that Anderson "drive up and down Gilman and look at both good and bad examples of what has been done with flat facades."

As the discussion continued, Commissioner Larson stated that Anderson "should present a [plan] that achieves what the Commission is trying to achieve through its comments/suggestions at these meetings" and stated that "architectural screens, fountains, paving of brick, wood or other similar methods of screening in lieu of vegetative landscaping are examples of design suggestions that can be used to break up the front facade." Commissioner Davis objected to the front facade, stating that he could not see putting an expanse of glass facing Gilman Boulevard. "The building is not compatible with Gilman." Commissioner O'Shea agreed. Commissioner Nash stated that "the application needs major changes to be acceptable." Commissioner O'Shea agreed. Commissioner Nash stated that "this facade does not create the same feeling as the building/environment around this site."

Commissioner Nash continued, stating that he "personally liked the introduction of brick and the use of tiles rather than metal on the roof." Commissioner Larson stated that he would like to see a review of the blue to be used: "Tahoe blue may be too dark." Commissioner Steinwachs agreed. Commissioner Larson noted that "the front of the building could be modulated [to] have other design techniques employed to make the front facade more interesting."

With this, the Development Commission voted to continue the discussion to a future hearing.

On February 15, 1989, Anderson came back before the Development Commission. In the meantime, Anderson's architects had added a 5-foot overhang and a 7-foot accent overhang to the plans for the front of the building. More brick had been added to the front of the building. Wood trim and accent colors had been added to the back of the building and trees were added to the landscaping to further break up the rear facade.

Anderson explained the plans still called for large, floor to ceiling windows as this was to be a retail premises: "[A] glass front is necessary to rent the space . . .". Commissioner Steinwachs stated that he had driven

Gilman Boulevard and taken notes. The following verbatim statement by Steinwachs was placed into the minutes:

"My General Observation From Driving Up and Down Gilman Boulevard."

I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design.

Commissioner Nash agreed stating, "There is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give this same feeling." Commissioner Steinwachs wondered if the applicant had any option but to start "from scratch." Anderson responded that he would be willing to change from stucco to wood facing but that, after working on the project for 9 months and experiencing total frustration, he was not willing to make additional design changes.

At that point, the Development Commission denied Anderson's application, giving four reasons:

1. After four [sic] lengthy review meetings of the Development Commission, the applicant has not been sufficiently responsive to concerns expressed by the Commission to warrant approval or an additional continuance of the review.
2. The primary concerns expressed relate to the building architecture as it relates to Gilman Boulevard in general, and the immediate neighborhood in particular.
3. The Development Commission is charged with protecting, preserving and enhancing the aesthetic values that have

established the desirable quality and unique character of Issaquah, reference IMC 16.16.010C.3

4. We see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. On Gilman Boulevard we see heavy use of brick, wood and tile. We see minimal use of stucco. We see various methods used to provide both horizontal and vertical modulation, including gables, breaks in rooflines, bay windows, recesses and protrusions in front face. We see long, sloping, conspicuous roofs with large overhangs. We see no windows that extend to ground level. We see brick and wood panels at intervals between windows. We see earthtone colors avoiding extreme contrast.

Anderson, who by this time had an estimated \$250,000 into the project, timely appealed the adverse ruling to the Issaquah City Council (City Council). After a lengthy hearing and much debate, the City Council decided to affirm the Development Commission's decision by a vote of 4 to 3. . . .

Anderson filed a complaint in King County Superior Court. . . .

Following trial, the court dismissed Anderson's complaint, rejecting the same claims now raised in this appeal.

Discussion

. . . .

2. Constitutionality of IMC 16.16.060 (Building Design Provisions).

[A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning, generally will be sustained against a charge of vagueness. The vagueness test does not require a statute to meet impossible standards of specificity.

In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply

with the ordinance and/or who is alleged to have failed to comply. The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law.

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of “appropriate proportions”, its colors should be “harmonious” and seldom “bright” or “brilliant”; its mechanical equipment should be screened from public view; its exterior lighting should be “harmonious” with the building design and “monotony should be avoided.” The project should also be “interesting”. IMC 16.16.060(D)(1)-(6). If the building is not “compatible” with adjacent buildings, it should be “made compatible” by the use of screens and site breaks “or other suitable methods and materials.” “Harmony in texture, lines, and masses [is] encouraged.” The landscaping should provide an “attractive . . . transition” to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of *amicus curiae*, we conclude that these code sections “do not give effective or meaningful guidance” to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earthtones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as “interesting” versus “monotonous” and as “harmonious” with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although “harmony in texture, lines, and masses” is certainly encouraged. IMC 16.16.060(B)(2).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective “feelings” about the “image of Issaquah” and as to whether this project was “compatible” or “interesting”. The commissioners stated that the City was “making a statement” on its “signature street” and invited Anderson to take a drive up and down Gilman Boulevard and “look at good and bad examples of what has been done with flat facades.” One commissioner

drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law. . . .

As well illustrated by the appendices to the brief of *amicus curiae*, aesthetic considerations are not impossible to define in a code or ordinance. Moreover, the procedural safeguards contained in the Issaquah Municipal Code (providing for appeal to the City Council and to the courts) do not cure the constitutional defects here apparent. . . .

Certainly, the IMC grants Anderson the right to appeal the adverse decision of the Development Commission. But just as IMC 16.16.060 provides no standards by which an applicant or the Development Commission or the City Council can determine whether a given building design passes muster under the code, it provides no ascertainable criteria by which a court can review a decision at issue, regardless of whether the court applies the arbitrary and capricious standard as the City argues is appropriate or the clearly erroneous standard as Anderson argues is appropriate. Under either standard of review, the appellate process is to no avail where the statute at issue contains no ascertainable standards and where, as

here, the Development Commission was not empowered to adopt clearly ascertainable standards of its own. The procedural safeguards provided here do not save the ordinance. . . .

Clearly, however, aesthetic standards are an appropriate component of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished “statements” a given community may wish to make on or off its “signature street”. It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board such as the Issaquah Development Commission to create standards on an ad hoc basis, during the design review process.

Conclusion

It is not disputed that Anderson’s project meets all of the City’s land use requirements except for those unwritten and therefore unenforceable requirements relating to building design which the Development Commission unsuccessfully tried to articulate during the course of several hearings. We order that Anderson’s land use certification be issued, provided however, that those changes which Anderson agreed to through the hearing before the City Council may validly be imposed.

Notes and Questions

25.27. Are these two cases compatible? Does one represent a better approach than the other?

25.28. Mrs. Joan Stoyanoff believed that the opposition to the proposed Stoyanoff house was due to the fact that the Stoyanoffs were perceived to be Jewish (though they were not). The Stoyanoffs ultimately moved to Florida, where Mr. Stoyanoff worked as an architect and Mrs. Stoyanoff managed property.

25.29. Consider the opinion of James Howard Kuntsler:

The public consensus about how to build a human settlement . . . has collapsed. Standards of excellence in architecture and town planning have collapsed These codes will invoke



Figure 25.12: Robin Hutton, Shaved Head Family stickers 2 (Sept. 25, 2012), available under a Creative Commons Attribution, Non-Commercial, No-Derivatives 2.0 Generic License <https://www.flickr.com/photos/robinhutton/8021270744>.

in words and graphic images standards of excellence that previously existed in the minds of ordinary citizens but which have been forsaken and forgotten. The codes, therefore, aim to restore the collective cultural consciousness.

HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE 21ST CENTURY (1988). Is this a sufficient justification for aesthetic zoning? Does it raise First Amendment issues?

25.4 Exclusionary Zoning: Family Status Zoning

Any zoning scheme which creates a single-family zoning district, or even a standard for what single-family homes must look like, must contain a definition of family.

City of Ladue v. Horn
720 S.W.2d 745 (Mo. Ct. App. 1986)

Defendants, Joan Horn and E. Terrence Jones, appeal from the judg-

ment of the trial court in favor of plaintiff, City of Ladue (Ladue), which enjoined defendants from occupying their home in violation of Ladue's zoning ordinance and which dismissed defendants' counterclaim. We affirm.

The case was submitted to the trial court on stipulated facts. Ladue's Zoning Ordinance No. 1175 was in effect at all times pertinent to the present action. Certain zones were designated as one-family residential. The zoning ordinance defined family as: "One or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization." The only authorized accessory use in residential districts was for "[a]ccommodations for domestic persons employed and living on the premises and home occupations." The purpose of Ladue's zoning ordinance was broadly stated as to promote "the health, safety, morals and general welfare" of Ladue.

In July, 1981, defendants purchased a seven-bedroom, four-bathroom house which was located in a single-family residential zone in Ladue. Residing in defendants' home were Horn's two children (aged 16 and 19) and Jones's one child (age 18). The two older children attended out-of-state universities and lived in the house only on a part-time basis. Although defendants were not married, they shared a common bedroom, maintained a joint checking account for the household expenses, ate their meals together, entertained together, and disciplined each other's children. Ladue made demands upon defendants to vacate their home because their household did not comprise a family, as defined by Ladue's zoning ordinance, and therefore they could not live in an area zoned for single-family dwellings. When defendants refused to vacate, Ladue sought to enjoin defendants' continued violation of the zoning ordinance. Defendants counterclaimed, seeking a declaration that the zoning ordinance was constitutionally void. They also sought attorneys' fees and costs. The trial court entered a permanent injunction in favor of Ladue and dismissed defendants' counterclaim. Enforcement of the injunction was stayed pending this appeal.

. . . In Missouri, the scope of appellate review in zoning matters is limited; and the reviewing court may not substitute its judgment for that of the zoning authority. A zoning ordinance is presumed valid. The legislative body is vested with broad discretion and the appellate court cannot interfere unless it is shown that the legislative body has acted arbitrarily. "If the council's action is fairly debatable, the court cannot substitute its

opinion."

. . . Capsulated, defendants' attack on Ladue's ordinance is three-pronged. First, the zoning limitations foreclose them from exercising their right to associate freely with whomever they wish. Second, their right to privacy is violated by the zoning restrictions. Third, the zoning classification distinguishes between related persons and unrelated persons. Defendants allege that the United States and Missouri Constitutions grant each of them the right to share his or her residence with whomever he or she chooses. They assert that Ladue has not demonstrated a compelling, much less rational, justification for the overly prescriptive blood or legal relationship requirement in its zoning ordinance.

Defendants posit that the term "family" is susceptible to several meanings. They contend that, since their household is the "functional and factual equivalent of a natural family," the ordinance may not preclude them from living in a single-family residential Ladue neighborhood. Defendants argue in their brief as follows:

The record amply demonstrates that the private, intimate interests of Horn and Jones are substantial. Horn, Jones, and their respective children have historically lived together as a single family unit. They use and occupy their home for the identical purposes and in the identical manners as families which are biologically or maritally related.

To bolster this contention, defendants elaborate on their shared duties, as set forth earlier in this opinion. Defendants acknowledge the importance of viewing themselves as a family unit, albeit a "conceptual family" as opposed to a "true non-family," in order to prevent the application of the ordinance.³

The fallacy in defendants' syllogism is that the stipulated facts do not compel the conclusion that defendants are living as a family. A man and woman living together, sharing pleasures and certain responsibilities,

³The distinction between "conceptual" or "non-traditional" families and true non-families may well be a distinction without a difference, the distinction resting in speculation and stereotypical presumptions. Further, recognition of the conceptual family suffers from the defect of commanding inquiry into who are the users rather than focusing on the use itself. See generally Note, *City of Santa Barbara v. Adamson: An Associational Right of Privacy and the End of Family Zones*, 69 Calif. L. Rev. 1052, 1068–70 (1981).

does not per se constitute a family in even the conceptual sense. To approximate a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other. Only when these characteristics are present can the conceptual family, perhaps, equate with the traditional family. In a traditional family, certain of its inherent attributes arise from the legal relationship of the family members. In a non-traditional family, those same qualities arise in fact, either by explicit agreement or by tacit understanding among the parties.

While the stipulated facts could arguably support an inference by the trial court that defendants and their children comprised a non-traditional family, they do not compel that inference. . . . We assume, arguendo, that the sole basis for the judgment entered by the trial court was that defendants were not related by blood, marriage or adoption, as required by Ladue's ordinance.

We first consider whether the ordinance violates any federally protected rights of the defendants. Generally, federal court decisions hold that a zoning classification based upon a biological or a legal relationship among household members is justifiable under constitutional police powers to protect the public health, safety, morals or welfare of the community.

More specifically, the United States Supreme Court has developed a two-tiered approach by which to examine legislation challenged as violative of the equal protection clause. If the personal interest affected by the ordinance is fundamental, "strict scrutiny" is applied and the ordinance is sustained only upon a showing that the burden imposed is necessary to protect a compelling governmental interest. If the ordinance does not contain a suspect class or impinge upon a fundamental interest, the more relaxed "rational basis" test is applied and the classification imposed by the ordinance is upheld if any facts can reasonably justify it. Defendants urge this court to recognize that their interest in choosing their own living arrangement inexorably involves their fundamental rights of freedom of association and of privacy.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the United States Supreme Court also established the due process parameters of permissible legislation. The ordinance in question must have a "foundation in reason" and bear a "substantial relation to the public health, the public morals, the

public safety or the public welfare in its proper sense."

In the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court addressed a zoning regulation of the type at issue in this case. The court held that the Village of Belle Terre ordinance involved no fundamental right, but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible governmental objective. The challenged zoning ordinance of the Village of Belle Terre defined family as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage

The court upheld the ordinance, reasoning that the ordinance constituted valid land use legislation reasonably designed to maintain traditional family values and patterns.

The importance of the family was reaffirmed in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), wherein the United States Supreme Court was confronted with a housing ordinance which defined a "family" as only certain closely related individuals. Consequently, a grandmother who lived with her son and two grandsons was convicted of violating the ordinance because her two grandsons were first cousins rather than brothers. The United States Supreme Court struck down the East Cleveland ordinance for violating the freedom of personal choice in matters of marriage and family life. The court distinguished *Belle Terre* by stating that the ordinance in that case allowed all individuals related by blood, marriage or adoption to live together; whereas East Cleveland, by restricting the number of related persons who could live together, sought "to regulate the occupancy of its housing by slicing deeply into the family itself." The court pointed out that the institution of the family is protected by the Constitution precisely because it is so deeply rooted in the American tradition and that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."

Here, because we are dealing with economic and social legislation and not with a fundamental interest or a suspect classification, the test of constitutionality is whether the ordinance is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. "[E]very line drawn by a legislature leaves some out that might well have been included.

That exercise of discretion, however, is a legislative, not a judicial, function.”

Ladue has a legitimate concern with laying out guidelines for land use addressed to family needs. “It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” The question of whether Ladue could have chosen more precise means to effectuate its legislative goals is immaterial. Ladue’s zoning ordinance is rationally related to its expressed purposes and violates no provisions of the Constitution of the United States. Further, defendants’ assertion that they have a constitutional right to share their residence with whomever they please amounts to the same argument that was made and found unpersuasive by the court in *Belle Terre*.

We next consider whether the Ladue ordinance violates any rights of defendants protected by the Missouri Constitution. . . .

For purposes of its zoning code, Ladue has in precise language defined the term family. It chose the definition which comports with the historical and traditional notions of family; namely, those people related by blood, marriage or adoption. That definition of family has been upheld in numerous Missouri decisions. See, e.g., *London v. Handicapped Facilities Board of St. Charles County*, 637 S.W.2d 212 (Mo. App. 1982) (group home not a “family” as used in restrictive covenant); *Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. App. 1977) (two unrelated males not a “family” as used in restrictive covenant); *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. App. 1967) (nuns not a “family” as used in a restrictive covenant).

Decisions from other state jurisdictions have addressed identical constitutional challenges to zoning ordinances similar to the ordinance in the instant case. The reviewing courts have upheld their respective ordinances on the ground that maintenance of a traditional family environment constitutes a reasonable basis for excluding uses that may impair the stability of that environment and erode the values associated with traditional family life.⁴

⁴See, e.g., *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974) (married couple, their two children and 10 foster children not a family under city’s ordinance); *Rademan v. City and County of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974) (two married couples living as a “communal family” not a family); *Town of Durham v. White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975) (student renters not a family); *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*, 32 Conn.Supp. 214, 347 A.2d 637 (1975) (nursing home employees living together not a family). See generally Annot., 12 A.L.R.

The essence of zoning is selection; and, if it is not invidious or discriminatory against those not selected, it is proper. There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family. Further, there is no state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.

The stated purpose of Ladue's zoning ordinance is the promotion of the health, safety, morals and general welfare in the city. Whether Ladue could have adopted less restrictive means to achieve these same goals is not a controlling factor in considering the constitutionality of the zoning ordinance. Rather, our focus is on whether there exists some reasonable basis for the means actually employed. In making such a determination, if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, we must defer to the legislative judgment. We find that Ladue has not acted arbitrarily in enacting its zoning ordinance which defines family as those related by blood, marriage or adoption. Given the fact that Ladue has so defined family, we defer to its legislative judgment.

The judgment of the trial court is affirmed.

Notes and Questions

25.30. Further background on the Supreme Court cases. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), was primarily concerned with the Village's attempts to exclude groups of unrelated college students from living together. The Supreme Court cited *Euclid* and similar cases in support of its holding that the legislature can decide what kinds of uses are detrimental to the peaceful

4th 238 (1985). A number of jurisdictions have found restrictive zoning ordinances invalid. See, e.g., *City of Des Plaines v. Trottner*, 34 Ill.2d 432, 216 N.E.2d 116 (1970) (ordinance with restrictive definition of family violates authority delegated by state legislature in the enabling statute); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 164 Cal. Rptr. 539, 610 P.2d 436 (1982) (zoning ordinance limiting the number of unrelated persons who could live together, but not related persons, did not further legislative goals); *Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984) (restrictive definition of family not rationally related to achieving township's goals).



Figure 25.13: Juan Monroy, Belle Terre, Sept. 7, 2014, CC-BY. Despite the gates at the entrance to the town, this is not a private gated community, at least not in formal legal terms.

and attractive character of the area:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Are college students nuisance-like? The *Belle Terre* Court said the ordinance in that case showed no animosity towards unmarried couples, as proven by its inclusion of two unmarried people in its definition of “family.” But what about an unmarried couple with children, as in *Ladue*?

25.31. Justice Marshall’s vigorous dissent in *Belle Terre* would have distinguished between “uses of land . . . , for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings,” which zoning authorities could validly regulate, and “who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried,” which he would have found they could not. Justice Mar-

shall invoked both the First Amendment freedom of association and the constitutional right to privacy:

The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.

The family ordinance only limited the density of homes occupied by unrelated people—thus, the crowding, noise, and other justifications offered were both overinclusive and underinclusive, in Justice Marshall's view. "While an extended family of a dozen or more might live in a small bungalow, three elderly and retired persons could not occupy the large manor house next door." A neutral ordinance regulating density, noise, etc. could accomplish all the town's goals. "The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically restrict population density and growth and their attendant environmental costs."

25.32. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Marshall joined the plurality opinion of the Court striking down East Cleveland's more limited definition of "family," over several dissents.¹¹ *Moore* involved an

¹¹The East Cleveland ordinance stated:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

- (a) Husband or wife of the nominal head of the household.
- (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
- (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
- (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child

extended dispute among the Justices about the nature and limits of “substantive due process,” which had also been used to protect the rights to contraception, abortion, home schooling of children, and other private choices. The question was whether the ordinary rational basis scrutiny of zoning would apply, or a higher standard reflecting the extent of the ordinance’s intrusion into family life.¹²

In that case, Inez Moore lived with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys were first cousins, rather than brothers; John came to live with his grandmother and the elder and younger Dale Moores after his mother’s death. This caused the household to violate East Cleveland’s family ordinance, resulting in criminal charges against Mrs. Moore. The Court distinguished *Belle Terre* by reasoning that East Cleveland “has chosen to regulate the occupancy of its housing by slicing deeply into the family itself.” Such “intrusive regulation of the family” was invalid. The City defended its goals with the same crowding and traffic justifications as *Belle Terre*, and additionally argued that the ordinance limited the burden on East Cleveland’s schools. The Court found that these legitimate goals were served “marginally, at best,” reiterating Justice Marshall’s points about overinclusiveness and underinclusiveness.

The doctrine of substantive due process, which protects fundamental rights against government intrusion, could not stop at the “first convenient, if arbitrary boundary—the boundary of the nuclear family.” There was a long tradition of “uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.” Justices Brennan and Marshall, in concurrence, specifically pointed out that the “nuclear family” was really the pattern of “white suburbia,” which could not impose its preference on others, and noted traditions among immigrants and African-Americans of living together in multigenerational arrangements as a matter of survival. The concurrence touted multigenerational families as stronger and more beneficial for children than isolated nuclear families. Ultimately, the plurality wrote, “the Constitution prevents East Cleveland from standardizing its children—and its

(e) A family may consist of one individual.

¹²This debate between Justices continues to the present day, notably in disputes over abortion and the rights of same-sex couples to be free from criminal prosecution and, more recently, to marry.

adults—by forcing all to live in certain narrowly defined family patterns.”

Justice Brennan’s concurrence also discussed the possibility of seeking a variance, and stated that “the very existence of the ‘escape hatch’ of the variance procedure only heightens the irrationality of the restrictive definition, since application of the ordinance then depends upon which family units the zoning authorities permit to reside together and whom the prosecuting authorities choose to prosecute.”

Justice Stewart, joined by then-Justice Rehnquist, would have upheld the ordinance, rejecting the theory that “that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated person.” The interests of a grandmother in living with her grandchildren were simply not sufficient, in the dissenters’ view, to justify invalidating a zoning ordinance. It was acceptable for a city to choose “the pattern of ‘white suburbia,’ even though that choice may reflect ‘cultural myopia’”—Justice Stewart pointed out that East Cleveland was at that time predominantly African-American, and that its city manager and city commission were African-American. If the city was required to include grandchildren, why not longtime friends? A line had to be drawn somewhere, and this one was rational, especially since the grandmother could seek a variance if the application of the ordinance to her wouldn’t further its goals.

25.33. Given this further detail about *Belle Terre* and *Moore*, do you think *Ladue v. Horn* reached the right conclusion? Consider PAUL BOUDREAUX, THE HOUSING BIAS: RETHINKING LAND USE LAWS FOR A DIVERSE NEW AMERICA (2011):

[Restrictive single family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing “land use.” Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid’s college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. . . . Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It’s an accepted exercise of the po-

lice power.

25.34. More recent events. Ladue's current (as of 2023) ordinance allows “[o]ne or more persons related by blood, marriage or legal adoption, or any number of persons so related plus one unrelated person, or two unrelated persons, occupying a dwelling unit as an individual housekeeping organization.” Is it constitutional to force an unmarried couple to leave if they each have a child from a prior relationship, or a married couple after they take foster children into their home? In 2006, a lesbian couple with a child was excluded from Ladue because of its family composition ordinance, and the same year an unmarried couple with two children was told they had to leave the home they'd bought in Black Jack, Missouri, another St. Louis suburb.¹³

The American Civil Liberties Union sued Black Jack. Discovery revealed that at least four other couples had been denied occupancy permits to live in Black Jack because they were unmarried and living with children, including a couple who were the parents of triplets. *Dispatch From Black Jack, MO*, L.A. TIMES A12 (May 21, 2006). Black Jack agreed to change its ordinance to settle the litigation. Its ordinance now defines family as:

1. An individual living as a single nonprofit housekeeping unit in a dwelling unit;
2. Two (2) or more persons related by blood, marriage, adoption or foster care relationship living together as a single nonprofit housekeeping unit in a dwelling unit;
3. A group of not more than three (3) persons who need not be related by blood, marriage, adoption or foster care relationship, living together as a single nonprofit housekeeping unit in a dwelling unit; or
4. Two (2) unrelated individuals having a child or children related by blood, adoption or foster care relationship to both such individu-

¹³See, e.g., Nancy Larson, *Gay Couples Keep Out!*, ADVOCATE 34 (Jul. 18, 2006) (discussing lesbian couple and daughter who were warned by real estate agents that Ladue would prevent them from living together); Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be . . . Booted From Black Jack*, ST. LOUIS POST-DISPATCH A1 (Feb. 22, 2006); Jack W. Greer, “Family” Crackdown Planned, *Unmarried Couples Face Citation From Attorney*, ST. LOUIS POST-DISPATCH A1 (July 21, 1994) (village attorney charged several unmarried couples with violating Wilbur Park family composition ordinance); Ann Scales Cobbs, *Couple Rebuffed by Jennings, Ferguson on Occupancy Permits*, ST. LOUIS POST-DISPATCH 8D (May 26, 1991) (Ferguson zoning law prevented unmarried couple from living with two of woman's relatives); Michael Tackett, *An Imperfect Family Circle Squares Off With Zoning Law*, CHICAGO TRIB. A1 (Nov. 9, 1986) (Ladue ordinance prevented unmarried couple from living together).

als, plus the biological, adopted or foster children of either such individual, living together as a single nonprofit housekeeping unit in a dwelling unit.

Now that the lesbian couple in Black Jack can legally marry, can Black Jack go back to requiring couples to be married if they want to live in Black Jack with their children?

25.35. Compare Ferguson's definition of family:

One or two adults and the children and/or grandchildren of such adults and not more than two (2) other adults who are both related to either of the other two, living together as a single housekeeping unit in a dwelling with single kitchen facilities provided that such occupancy does not exceed the maximum occupancy limits for such dwelling;

or a group of not more than three (3) unrelated persons living together by joint agreement occupying a single housekeeping unit with single kitchen facilities provided that such occupancy does not exceed the maximum occupancy limits for such dwelling.

For purposes of this definition, a related person shall include any relative within the fourth degree by consanguinity or affinity.

Under this definition, can two married couples live together with their children if one person in the first couple is a first cousin of one person in the second couple?

25.36. Finally, consider this handy guide put out by Columbia, Missouri, *What is a Family?* (archived July 15, 2015), <https://web.archive.org/web/20140715054932/> https://www.gocolumbiamo.com/community_development/neighborhoods/renting/documents/WhatIsAFamily.pdf:

What the code says: According to Chapter 29—Zoning of City Ordinance, the definition of Family is:

(1) An individual or married couple and the children thereof and no more than two (2) other persons related directly to the individual or married couple by blood or marriage, occupying a single housekeeping unit on a nonprofit basis. A family may include not more than one additional person, not related to the family by blood or marriage; or

An individual or married couple and their children +	No more than two people related to the individual or married couple by blood or marriage +	Not more than one additional unrelated person
Acceptable examples:		
Mr. & Mrs. Jones and their children Bobby and Katie +	Mrs. Jones' parents +	Jennifer Doe, a friend
Mrs. Thomas and her three children +	Her aunt and uncle +	Her cousin (although related, could be counted as one other unrelated person)
Mr. and Mrs. Rogers and their son +	Mr. Rogers' brother and his son	
Examples in violation of this code:		
Mr. & Mrs. Jones and their children Bobby and Katie +	Mrs. Jones' sister and brother-in-law and their three children	
<i>Why is this a violation?</i> The addition of Mrs. Jones sister and her family exceeds the two related people and one additional unrelated person.		
Bob Campbell +	Bob's two brothers +	Two unrelated roommates
<i>Why is this a violation?</i> The total number of occupants in this example is five. One unrelated roommate would need to move out to be in compliance in any zoning district.		
John Doe +	Three unrelated roommates	
<i>Why is this a violation?</i> It exceeds the three unrelated people allowed in R-1 zoning; it would be allowable in all other zoning districts.		
Jane Roberts +	Four unrelated roommates	
<i>Why is this a violation?</i> Four or more unrelated people are not allowed in any zoning district. If one roommate left it would be acceptable in all zoning districts except R-1; Jane and two roommates are acceptable in R-1.		

Table 25.1: Table of hypothetical examples from the Columbia, Mo., guide.

(2) a. . . In zoning districts R-1 . . . a group of not more than three (3) persons not related by blood or marriage, living together by joint agreement and occupying a single housekeeping unit on a nonprofit cost-sharing basis

b. In all other applicable zoning districts, a group of not more than four (4) persons not related by blood or marriage, living together by joint agreement and occupying a single housekeeping unit on a nonprofit cost-sharing basis.

Why it matters: When properties in the City of Columbia exceed our occupancy limits, it creates additional traffic, trash and noise and can harm quality of life for neighbors. This especially an issue when occupancy limits are exceeded in R-1 zoning districts. The City of Columbia will investigate properties suspected of over occupancy and may prosecute property owners and tenants in violation.

Breaking it down—some hypothetical examples [are given in Table 25.1.]

Suppose you were asked to write a family composition ordinance. How would you frame it?

25.37. **States' varying treatment of family composition rules.** A number of other states, either on federal or state constitutional grounds, have instead drawn the line at “single housekeeping units” or “functional families.” See, e.g., *Delta Charter T'ship v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (no rational basis to preclude four childhood friends from living together); *DiStefano v. Haxton*, 1994 WL 931006 (R.I. Super. 1994) (plaintiffs had a liberty interest in choosing their own living companions, and city provided no evidence that unrelated groups were more likely to be disruptive than those in related households: “It is a strange—and unconstitutional—ordinance indeed that would permit the Hatfields and the McCoys to live in a residential zone while barring four scholars from the University of Rhode Island from sharing an apartment on the same street.”); *Borough of Glassboro v. Vallorosi*, 535 A.2d 544 (N.J. Superior Ct. 1987) (overturning ordinance aimed at keeping college students from living together; mayor compared student residency to “toxic waste”).

Numerous municipalities have relaxed their family definitions even without a constitutional mandate, reflecting demographic facts. Ordinances that embrace all functional families often survive constitutional scrutiny. See, e.g.,

Stegman v. City of Ann Arbor, 540 N.W.2d 724 (Mich. Ct. App. 1995) (upholding a functional family ordinance against “a ragtag collection of college roommates” who wanted to live together); *Dinan v. Board of Zoning Appeals*, 595 A.2d 864 (Conn. 1991) (upholding single housekeeping unit ordinance because households with unrelated people “are less likely to develop the kind of friendly relationships with neighbors that abound in residential districts occupied by traditional families . . . they are not likely to have children who would become playmates of other children living in the area. Neighbors are not so likely to call upon them to borrow a cup of sugar, provide a ride to the store, mind the family pets, water the plants or perform any of the countless services that families, both traditional and nontraditional, provide to each other as a result of long-time acquaintance and mutual self interest.”).

The Court of Appeals of New York has been particularly protective of individual choice of living arrangements. See, e.g., *Group House of Port Washington v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978) (a house consisting of two surrogate parents and seven emotionally disturbed children was “the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose”); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240 (N.Y. 1985) (town could not exclude from its definition of family two unrelated people under 62, while allowing two related people 62 or over); *Baer v. Town of Brookhaven*, 537 N.E.2d 619 (N.Y. 1989) (town could not exclude five unrelated elderly women residing together under a definition of family providing that not more than 4 unrelated persons living and cooking together as a single housekeeping unit could constitute a family; state constitution precluded the town from limiting the size of a functionally equivalent family of unrelated persons but not the size of a traditional family); cf. *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989) (two gay men living together in a spousal-like arrangement could constitute a “family” within the context of the non-eviction provisions of the New York City Rent and Eviction regulations).

Many New York municipalities now presume that a group of individuals smaller than four is a functional family, and presume that a larger group is not but allow it to rebut that presumption. See, e.g., *Unification Theological Seminary v. City of Poughkeepsie*, 607 N.Y.S.2d 383 (N.Y. App. Div. 1994) (upholding this practice, where the ordinance provided that the zoning administrator should consider whether the group shares the entire house; lives and cooks together as a single housekeeping unit; shares expenses for food, rent, utilities or other household expenses; and is permanent and stable).

However, a number of states still follow *Belle Terre* when a jurisdiction’s fam-

ily composition ordinance is challenged. The litigated cases tend to be older, and even in the 1990s enforcement often drew incredulous media coverage, but there are a few recent cases upholding restrictive definitions of family. See, e.g., *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 145 So. 3d 320 (La. 2014) (upholding single-family ordinance that allowed (1) an unlimited number of related people or (2) no more than four unrelated people in a single housekeeping unit, if the owner occupied the premises); *State v. Champoux*, 566 N.W.2d 763 (Neb. 1997) (upholding family composition ordinance); *City of Brookings v. Winker*, 554 N.W.2d 827 (S.D. 1996) (same); *Doe v. City of Butler, Pennsylvania*, 892 F.2d 315 (3d Cir. 1989) (single family zoning ordinance that prevented six victims of domestic violence from living together in a shelter did not interfere with their right to associate with one another because associational rights do not extend to living with nonrelatives); *Carroll v. Washington Township Zoning Commission*, 408 N.E.2d 191 (Ohio 1980) (couple could not act as foster parents given single family zoning); *State v. Baker*, 405 A.2d 368 (N.J. 1979) (enforcing single family ordinance against couple, their three children, adult woman, and her three children even though they considered themselves an “extended family”); *Town of Durham v. White Enterprises, Inc.*, 348 A.2d 706 (N.H. 1975) (“The State has no particular interest in keeping together a group of unrelated persons. The State has a clear interest, however, in preserving the integrity of the biological or legal family.”).

Some jurisdictions have even tightened their definitions. See, e.g., Stephanie McCrummen, *Manassas Changes Definition of Family*, WASH. POST A1 (Dec. 28, 2005) (newly enacted Manassas, VA zoning law prevented couple from living with woman’s nephew; opponents attributed enactment to discrimination against immigrants); see generally Rigel C. Oliveri, *Single Family Zoning, Intimate Association, and the Right To Choose Household Companions*, FLA. L. REV. (2015); Adam Lubow, “. . . Not Related by Blood, Marriage, or Adoption”: A History of the Definition of “Family” in Zoning Law, 16 J. AFFORD. Hous. & COMM. DEV. LAW 144 (2007). In other instances, zoning authorities have focused on excluding groups of college students, not others. See, e.g., *Rosenberg v. City of Boston*, 2010 WL 2090956 (Mass. Land. Ct. 2010) (upholding the constitutionality of excluding only “five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution” from living together in a dwelling unit).

25.38. The Supreme Court, in *Obergefell v. Hodges*, rejected arguments that bans on same-sex marriage protected children, because of the numerous children living with same-sex couples whose interests were harmed by discrimi-

nation against their parents. Does the same rationale apply here to invalidate family composition ordinances, at least as applied to households with children?

25.39. As for college students, can measures to protect against the damage they do be achieved through other, less stereotypical means? Oliveri, *supra*, suggests that a jurisdiction's legitimate interests can be protected through density regulations, reasonable limits on the number of cars per location, criminal code enforcement against noise, and other code enforcement. She concludes: "Often, the real problem is absentee landlords, who fail to maintain their property because they know students are unlikely to complain. In that case, property maintenance codes should be rigorously enforced. If an over-abundance of rentals is the problem, then owner-occupancy requirements might be put in place that limit the percentage of houses in a particular neighborhoods that can be rented." Should a jurisdiction be forced to give up prophylactic measures in favor of case-by-case enforcement of this type?

25.40. **Occupancy permits.** Have you ever had to obtain an occupancy permit? Many Missouri cities and towns use occupancy permits to help enforce their family composition rules. In Ferguson, for example, an occupancy permit must be obtained, and a fee paid, every time the composition of a dwelling unit changes. Birth certificates for children, photo IDs for adults, and an inspection—with a separate \$40 fee—are also required with each change. The Department of Justice reported that this rule became a part of unfair treatment of poor African-Americans. For example, one woman who called the police for help with domestic violence was arrested for violating her occupancy permit because the call revealed the presence of a boyfriend on the premises; another was given a summons for the same reason. U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 81 (Mar. 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.¹⁴

25.41. **The Fair Housing Act and the Americans with Disabilities Act.** The

¹⁴The report also noted that "In 2013 alone, the court issued over 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations. Jail time would be considered far too harsh a penalty for the great majority of these code violations, yet Ferguson's municipal court routinely issues warrants for people to be arrested and incarcerated for failing to timely pay related fines and fees." In 2011, the Municipal Judge in Ferguson, responding to the City's instructions to increase revenue from the court, touted his treatment of fines for repeat offenders, "especially in regard to housing violations, [which] have increased substantially and will continue to be increased upon subsequent violations." Ferguson requires anyone cited for a housing violation to appear in court, whether or not they are contesting the charges; failure to appear risks additional fines and arrest warrants.

FHA and the ADA may also limit family composition rules, as applied to group homes for people with disabilities. Disability-related zoning litigation often involves residents of group homes, who routinely experience discrimination, either overt or simply through indifference, usually in the form of bans on group living arrangements. See, e.g., *Oxford House v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (finding that town's family composition ordinance discriminated against individuals recovering from drug or alcohol addition because of their handicap). While pure density regulations capping the number of occupants per dwelling are exempt from the FHA, family definitions are not pure density regulations and thus reasonable accommodations to them may be required. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

In order to deal with repeated FHA litigation around group homes, Missouri amended its zoning authorization statute, providing comprehensive definitions and limiting localities' power to exclude group homes:

For the purpose of any zoning law, ordinance or code, the classification single family dwelling or single family residence shall include any home in which eight or fewer unrelated mentally or physically handicapped persons reside, and may include two additional persons acting as house parents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons residing in the home. In the case of any such residential home for mentally or physically handicapped persons, the local zoning authority may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in an specific single family dwelling neighborhood.

Section 89.020.2. Does this adequately address problems of potential discrimination, including the obligation to provide reasonable accommodation?

Chapter 26

Restrictive Covenants

The historical antipathy of English law toward *negative easements*—the right of a landowner to *prevent* particular uses of *someone else's* land—made private ordering over conflicting land uses somewhat difficult. The basic problem is relatively easy to understand. Suppose Abigail pays her neighbor Beatrice \$1000 in exchange for a promise that Beatrice will use her land only for residential purposes, because Abigail does not want to live next door to a busy commercial or industrial facility. Suppose that Beatrice then begins to construct a factory on her land. Abigail could sue for breach of contract and obtain appropriate remedies—perhaps including injunctive relief barring Beatrice from building the factory.

But now suppose that instead of building a factory herself, Beatrice sells her land to Clara, who intends to build a factory on the land. Clara didn't promise Abigail anything, and Abigail gave Clara no consideration—they are not in privity of contract. We might therefore conclude that Abigail is out of luck: she cannot enforce a contract against someone who didn't agree to be bound by it. But if that is our conclusion, there is now a huge obstacle to Abigail and Beatrice ever reaching their agreement in the first place: how could Abigail ever trust that her consideration is worth paying if Beatrice can deprive Abigail of the benefit of the bargain by selling her (Beatrice's) land? More generally, if a promise to *refrain* from certain uses will not **run with the land**, can private parties ever effectively resolve their disputes over competing land uses by agreement?

Notwithstanding this concern, English courts were historically quite resistant to enforcing such restrictions against successors to the promisor's property interest. As you've already learned, only a very small number of negative easements were recognized. Furthermore, actions at law—seeking the rem-

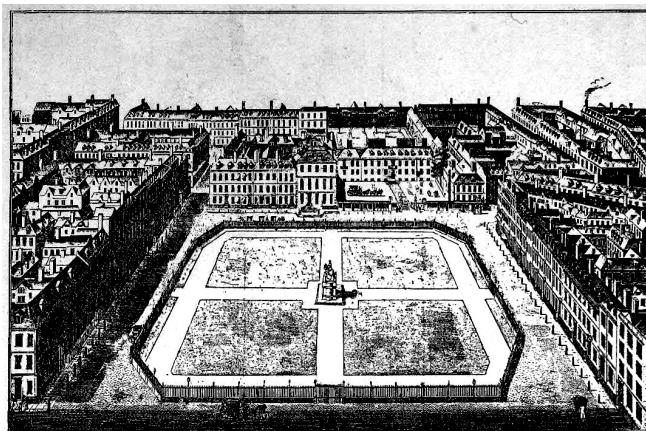


Figure 26.1: Leicester Square in the 18th Century. Source: JOHN HOLLINGSHEAD, THE STORY OF LEICESTER SQUARE 19 (1892), British Library Online, <http://access.bl.uk/item/pdf/lсидyv3c48bb3a>.

edy of money damages—for breach of a covenant restricting the use of land were available only in quite limited circumstances, in cases involving landlord-tenant relationships. Early American courts were more willing to enforce such covenants outside of the landlord-tenant context, but still required quite strict chains of privity of estate—voluntary transfers of title by written instruments—before they would enforce such covenants by an action for money damages. Of course, where the dispute is over competing uses of neighboring land, perhaps money damages are not the appropriate—or even the desired—remedy. And herein was the key to substantial liberalization of the enforcement of **restrictive covenants**. Eventually, landowners with an interest in enforcing such covenants found a workaround.

Tulk v. Moxhay
[1845] 47 Eng. Rep. 1345

This was a motion by way of appeal from the Master of the Rolls to dissolve an injunction.

In the month of July 1808, the Plaintiff was seised in fee-simple not only of the piece of ground which formed the open space or garden in Leicester Square, but also of several houses situated in that square.

By an indenture of release, dated the 15th of July 1808, and made between the Plaintiff, of the one part, and Charles Elms, of the other part, after reciting that the Plaintiff was seised of that piece of land in fee-simple, and had contracted to sell it to Elms, but not reciting that that contract was made subject to any condition, in consideration of £210, the Plaintiff conveyed to Elms, in fee-simple,

all that piece or parcel of land, commonly called Leicester Square Garden or pleasure-ground, with the equestrian statue then standing in the centre thereof, and the iron railings and stone-work round the garden, and all easements or ways, &c., to hold the same to Elms, his heirs and assigns for ever.*

And in that indenture there was contained a covenant by Elms, in the words following:—

And the said Charles Elms, for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said Charles Augustus Tulk, his heirs, executors, and administrators, in manner following—

- that is to say, that he, the said Charles Elms, his heirs and assigns, shall and will, from time to time, and at all times for ever hereafter, at his and their own proper costs and charges, keep and maintain the said piece or parcel of ground and square garden, and the iron railing round the same, in its present form, and in sufficient and proper repair as a square garden and pleasure-ground, in an open state, uncovered with any buildings, in a neat and ornamental order;
- and shall not nor will take down, nor permit or suffer to be taken down or defaced, at any time or times hereafter, the equestrian statue now standing or being in the centre of the said square garden, but shall and will continue and keep the same in its present situation, as it now is;

*This and the next quotation have been separately paragraphed and indented to improve readability. —Eds.

- and also, that it shall be lawful to and for the inhabitants of Leicester Square aforesaid, tenants of the said Charles Augustus Tulk, and of John Augustus Tulk, Esq., his father, their heirs and assigns, as well as the said Charles Augustus Tulk and John Augustus Tulk, their heirs and assigns, on payment of a reasonable rent for the same, to have keys (at their own expense), and the privilege of admission therewith annually, at any time or times, into the said square garden and pleasure-ground.

The bill then stated, that . . . the Defendant had become the owner of that piece of ground by Virtue of a title derived from Elms [through several successive conveyances]; and that he had formed a plan, or scheme for erecting certain lines of shops and buildings thereon; but that the Plaintiff objected to such scheme, as being contrary to the aforesaid covenant, and injurious to the Plaintiff's houses in the square; that the Defendant had, nevertheless, proceeded to cut down several of the trees and shrubs, and had pulled down part of the iron railing, and had erected a hoarding or boards across the said piece of ground.

The bill charged, that, at the time when the Defendant purchased the piece of ground, and also when he took possession thereof, and also when he committed the acts complained of, he had notice of the covenant.

The bill prayed, that the Defendant, and his agents and workmen, might be restrained from . . . doing or committing, or permitting or suffering to be done or committed, any waste, spoil, destruction, or nuisance to be in or upon the said piece of garden ground.

An *ex parte* injunction was obtained from the Master of the Rolls, and the Defendant . . . by his answer, stated, that the inhabitants of Leicester Square and of the Plaintiff's houses had entirely ceased to use this piece of ground as a garden and pleasure-ground, or to pay any sum for the privilege of admission; and that, for many years before the Defendant purchased it, it had been in a ruinous condition, and not in an ornamental state, but altogether out of repair; that Tulk never took any steps to enforce the covenant, or to have the site of the ground improved; that the square was no longer a quiet place of residence, but that a thoroughfare had lately been made through it from Long Acre to Piccadilly; that he proposed to open two footpaths diagonally across the square, putting up gates and fences; that he had not yet fixed on any plan for building on it; or as to

the ultimate use he should make of it; but he reserved by his answer the right to make all such use of the land as he might thereafter think fit, and lawfully could do; and he also submitted to the Court, that the covenant did not run with the land, and did not bind him as assignee.

The Defendant applied to the Master of the Rolls to dissolve the injunction, which his Lordship refused to do The effect of the injunction, as varied, was to restrain the Defendant, his workmen, &c., from converting or using the piece of ground and square garden in the bill mentioned, and the iron railing round the same, to or for any other purpose than as a square garden and pleasure-ground, in an open state, uncovered with buildings, until the hearing of this cause, or the further order of this Court.

The motion to dissolve the injunction was now renewed before the Lord Chancellor. . . .

The Lord Chancellor [Cottenham].

. . . It is not disputed that a party selling land may, by some means or other, provide that the party to whom he sells it shall conform to certain rules, which the parties may think proper to lay down as between themselves. They may so contract as to bind the party purchasing to deal with the land according to the stipulation between him and the vendor Here, then, upon the face of the instrument, and in a manner free from doubt . . . the owner of the houses sells and disposes of land adjoining to those houses with an express covenant on the part of the purchaser, his heirs and assigns, that there shall be no buildings erected upon that land. It is now contended, not that Elms, the vendee, could violate that contract—not that he could build immediately after he had covenanted not to build, or that this Court could have had any difficulty, if he had made that attempt, to prevent him from building—but that he might sell that piece of land as if it were not incumbered with that covenant; and that the person to whom he sold it might at once, without the risk of the interference of this Court, violate the covenant of the party from whom he purchased it.

Now, I do not apprehend that the jurisdiction of this Court is fettered by the question, whether the covenant runs with the land or not. The question is, whether a party taking property with a stipulation to use it in a particular manner—that stipulation being imposed on him by the vendor in such a manner as to be binding by the law and principles of this Court—will be permitted by this Court to use it in a way diametrically opposite to that which the party has stipulated for. . . . Of course, the party purchas-

ing the property, which is under such restriction, gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party, who takes property at a less price because it is subject to a restriction, should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this Court never would sanction any such course of proceeding; but, on the contrary, it has always acted upon this principle, that you, who have the property, are bound by the principles and law of this Court to submit to the contract you have entered into; and you will not be permitted to hand over that property, and give to your assignee or your vendee a higher title, with regard to interest as between yourself and your vendor, than you yourself possess.

That is quite unconnected with the doctrine of a covenant running with the land. . . . There is no question about the legal liability, which is best proved by this: that if there be a merely legal agreement, and no covenant—no question about the covenant running with the land—the party who takes the land takes it subject to the equity which the owner of the property has created: and if he takes it, subject to that equity, created by those through whom he has derived a title to it, is it not the rule of this Court, that the party, who has taken the property with knowledge of the equity, is liable to the equity? Is not this an equity attached to the property, by the party who is competent to bind the property? If a party enters into an agreement for a lease, and then sells the property which was to be demised, the purchaser of that property, with knowledge of the agreement, cannot set up his title against the party claiming the benefit of that contract; because, if there had been an equity attaching to the property in the owner, the owner is not permitted to give a better title to the purchaser with notice than he himself possesses. The other party is entitled to the benefit of the contract, and to have it exercised and carried into effect against the person who is in possession, unless that person can shew he purchased it without notice. Here there is a clear, distinct, and admitted equity in the vendor, as against Mr. Elms; and as to the party now sought to be affected by it, it is not in dispute that he took the land with notice of the covenant: indeed, it appears on the face of the instrument which is the foundation of his title. It seems to me to be the simplest case that a Court of Equity ever acted upon, that a purchaser cannot have a better title than

the party under whom he claims.

Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present Defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk.

. . . I think, therefore, that the Master of the Rolls is quite right . . . and that this motion must be refused, with costs.

Notes and Questions

26.1. Is the result in *Tulk* attributable to a difference in the willingness of courts of equity (as compared to courts of law) to find a covenant will “run with the land”? To the principle of *nemo dat*? To the rules regarding good faith purchasers? To something else?

26.2. Is the result in *Tulk* consistent with the principle of *numerus clausus*? With the common-law policy against restraints on alienation?

26.3. *Tulk v. Moxhay* represented a new opening for private ordering regarding competing land uses, which hinged on the distinction between law and equity. In the end, the equitable exception swallowed the legal rule against restrictive covenants running with land. As one court explained:

In the past, some courts . . . have distinguished between a “real covenant” that runs with the land and an “equitable covenant” (sometimes called an “equitable servitude” or “equitable restriction”) that runs with the land. Today however, the *Restatement [(Third), Property (Servitudes)]* sensibly explains:

[T]he differences between covenants that historically could be enforced at law and those enforceable in equity . . . have all but disappeared in modern law. Continuing use of the dual terminology of real covenant and equitable servitude is confusing because it suggests the continued existence of two separate servitude categories with important differences. In fact, however, in modern law there are no significant differences. Valid covenants, like other contracts and property interests, can be enforced and protected by both legal and equitable remedies as appropriate, without regard to the form of the transaction that created the servitude.

Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wash. App. 246, 253-54, 84 P.3d 295, 298-99 (2004) (footnotes omitted).

26.4. It is worth noting again that the THIRD RESTATEMENT, quoted in *Lake Limerick Country Club*, is somewhat unique in not simply restating the law but also pushing it in a particular direction. Many jurisdictions have yet to adopt its more modern approach on merging the various servitudes, or on other important issues. As always in property law, it is important to consult the relevant authorities in your jurisdiction in order to determine whether courts there still follow more traditional rules regarding the creation, enforcement, modification, and termination of restrictive covenants.

26.5. **Coase Revisited.** Which way do the equities really cut in *Tulk*? Lord Chancellor Cottenham concluded that it was unfair for Moxhay to deprive Tulk of the benefit of his bargain with Elms. Couldn't we just as easily say it is unfair for Tulk to interfere with Moxhay's use of the land he purchased? Indeed, given that English law courts of the time typically refused to hold that restrictive covenants would run with the land, doesn't Moxhay have the stronger equitable case? Wasn't it unreasonable for Tulk to expect he could obtain an enforceable covenant from Elms alone on behalf of Elms's "heirs, executors, administrators, and assigns"?

26.6. Put another way, isn't the problem here *reciprocal* in that the parties simply have incompatible land use preferences? Thus, when Lord Cottenham rhetorically asks, "Is not this an equity attached to the property, by the party who is competent to bind the property?" is he merely assuming the initial allocation of the relevant entitlement to the party that was there first? If so, is the application of a restrictive covenant to successors a circumstance in which the parties could effectively bargain to reach the efficient result?

26.7. Recall the dispute between Abigail, Beatrice, and Clara on page 1163. Does the principle of "first in time is first in right" provide any reason to privilege Abigail's preferred use of Clara's land over Clara's preferred use? Does the fact that Abigail and Beatrice reached their agreement *before* Clara became involved suggest that, as a matter of general property law principles, later comers will have to either abide by that agreement or obtain *both parties'* consent to abrogate it? Is such a rule necessary to protect Abigail's legitimate expectations with respect to the use and enjoyment of her own property?

26.8. More generally, are the arguments supporting the principle of priority in time persuasive when applied to land *use* conflicts (as opposed to disputes over *title* or *possession*)? Conversely, if we *do* allow agreements like the one Abigail and Beatrice to run with the land, are we giving past owners too much con-

trol over the ability of present and future owners to adapt their land uses to changing circumstances?

26.1 Creation of an Enforceable Restrictive Covenant

As courts became more amenable to the enforcement of restrictive covenants by and against successors to the property interests of the original covenanting parties, they developed a set of requirements for such covenants to run with the land. As one court described these requirements:

The prerequisites for a covenant to “run with the land” are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors-in-interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties.

Leighton v. Leonard, 589 P.2d 279, 281 (Ct. App. Wash. Div. 1 1978). A further requirement is that a restrictive covenant is enforceable only against parties who are on actual or constructive notice of it. See *id.* at 281-282; accord *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

The THIRD RESTATEMENT, following general trends in the caselaw, significantly relaxes this approach. Section 2.1 of the RESTATEMENT provides in relevant part:

- A servitude is created
- (1) if the owner of the property to be burdened
 - (a) enters into a contract or makes a conveyance intended to create a servitude that complies with . . . [the] Statute of Frauds . . . or . . . [a recognized e]xception to the Statute of Frauds . . . ; or

- (b) conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community; or
- (2) if the requirements for creation of a servitude by estoppel, implication, necessity, or prescription . . . are met

A few features of the RESTATEMENT approach are worth noting. The first is that the common law's requirement of "horizontal privity of estate"—that the covenant be created in an instrument that conveys some interest in real property between the original covenantor and the original covenantee¹—is eliminated. Under the RESTATEMENT view, a contract containing the covenant is sufficient to bind successors, even if it passes no other property interest, so long as the parties intended the covenant to run with the land. (Under this view, a covenant intended to bind successors is *itself* a sufficient interest in land.) Second, there is a deep connection between covenants that run with the land and "common-interest communities"—a property law institution that we will investigate further in Chapter 27. Third, the Restatement elsewhere treats the common law requirement of notice as essentially a matter for the recording system, making the unenforceability of covenants for want of notice subject to the same rules as any other property interest. See RESTATEMENT § 7.14.

Finally, the RESTATEMENT rejects, with heavy criticism, the common law requirement that a restrictive covenant "touch or concern" land. RESTATEMENT § 3.1 cmt. a. Nevertheless, many jurisdictions continue to apply touch-and-concern doctrine, sometimes explicitly declining to follow the Restatement approach. See Note, *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 942–45 (2009). It is worth comparing the two approaches.

¹Thus, at common law, if B promised to use her land only for residential purposes *in a deed from A to B*, A and B would be in horizontal privity of estate with one another. However, if A and B simply entered into a *contract* whereby A paid B a sum of money in exchange for B's promise to use her land only for residential purposes, they would not be in horizontal privity of estate—because no interest in real property passed under the contract.

***Neponsit Property Owners' Ass'n v. Emigrant Industrial
Savings Bank***
15 N.E.2d 793 (N.Y. 1938)

LEHMAN, Judge.

The plaintiff, as assignee of Neponsit Realty Company, has brought this action to foreclose a lien upon land which the defendant owns. The lien, it is alleged, arises from a covenant, condition or charge contained in a deed of conveyance of the land from Neponsit Realty Company to a predecessor in title of the defendant. The defendant purchased the land at a judicial sale. The referee's deed to the defendant and every deed in the defendant's chain of title since the conveyance of the land by Neponsit Realty Company purports to convey the property subject to the covenant, condition or charge contained in the original deed

Upon this appeal the defendant contends that the land which it owns is not subject to any lien or charge which the plaintiff may enforce. Its arguments are confined to serious questions of law. . . . On this appeal we may confine our consideration to the merits of these questions, and, in our statement of facts, we drew indiscriminately from the allegations of the complaint and the allegations of the answer.

It appears that in January, 1911, Neponsit Realty Company, as owner of a tract of land in Queens county, caused to be filed in the office of the clerk of the county a map of the land. The tract was developed for a strictly residential community, and Neponsit Realty Company conveyed lots in the tract to purchasers, describing such lots by reference to the filed map and to roads and streets shown thereon. In 1917, Neponsit Realty Company conveyed the land now owned by the defendant to Robert Oldner Deyer and his wife by deed which contained the covenant upon which the plaintiff's cause of action is based.

That covenant provides:

And the party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part further covenants that the property conveyed by this deed shall be subject to an annual charge in such an amount as will be fixed by the party of the first part, its successors and assigns, not, however exceeding in any year the sum of four (\$4.00) Dollars per lot 20x100 feet. The assigns of

the party of the first part may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph, and in case such association is organized the sums in this paragraph provided for shall be payable to such association. The party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part covenants that they will pay this charge to the party of the first part, its successors and assigns on the first day of May in each and every year, and further covenants that said charge shall on said date in each year become a lien on the land and shall continue to be such lien until fully paid. Such charge shall be payable to the party of the first part or its successors or assigns, and shall be devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part, its successors or assigns. And the party of the second part by the acceptance of this deed hereby expressly vests in the party of the first part, its successors and assigns, the right and power to bring all actions against the owner of the premises hereby conveyed or any part thereof for the collection of such charge and to enforce the aforesaid lien therefor.

These covenants shall run with the land and shall be construed as real covenants running with the land until January 31st, 1940, when they shall cease and determine.

Every subsequent deed of conveyance of the property in the defendant's chain of title, including the deed from the referee to the defendant, contained, as we have said, a provision that they were made subject to covenants and restrictions of former deeds of record.

There can be no doubt that Neponset Realty Company intended that the covenant should run with the land and should be enforceable by a property owners association against every owner of property in the residential tract which the realty company was then developing. The language of the covenant admits of no other construction. Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain le-

gal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) It must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant

The covenant in this case is intended to create a charge or obligation to pay a fixed sum of money to be "devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part [the grantor], its successors or assigns." It is an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant. Does such a covenant "touch" or "concern" the land? . . . In truth such a description or test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case." Clark, op. cit. p. 76.

Even though that be true, a determination by a court in one case upon particular facts will often serve to point the way to correct decision in other cases upon analogous facts. Such guideposts may not be disregarded. It has been often said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land. Such statements are based upon English decisions which hold in effect that only covenants, which compel the covenanter to submit to some *restriction on the use* of his property, touch or concern the land, and that the burden of a covenant which requires the covenanter to do an affirmative act, even on his own land, for the benefit of the owner of a "dominant" estate, does not run with his land. . . . [Nevertheless]ome promises to pay money have been enforced, as covenants running with the land, against subsequent holders of the land who took with notice of the covenant. . . . [T]hough it may be inexpedient and perhaps impossible to formulate a rigid test or definition which will be entirely satisfactory or which can be applied

mechanically in all cases, we should at least be able to state the problem and find a reasonable method of approach to it. It has been suggested that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. That method of approach has the merit of realism. The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?

Even though we accept that approach and test, it still remains true that whether a particular covenant is sufficiently connected with the use of land to run with the land, must be in many cases a question of degree. A promise to pay for something to be done in connection with the promisor's land does not differ essentially from a promise by the promisor to do the thing himself, and both promises constitute, in a substantial sense, a restriction upon the owner's right to use the land, and a burden upon the legal interest of the owner. On the other hand, a covenant to perform or pay for the performance of an affirmative act disconnected with the use of the land cannot ordinarily touch or concern the land in any substantial degree. Thus, unless we exalt technical form over substance, the distinction between covenants which run with land and covenants which are personal, must depend upon the effect of the covenant on the legal rights which otherwise would flow from ownership of land and which are connected with the land. The problem then is: Does the covenant in purpose and effect substantially alter these rights?

. . . Looking at the problem presented in this case . . . and stressing the intent and substantial effect of the covenant rather than its form, it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land. True, it calls for payment of a sum of money to be expended for "public purposes" upon land other than the land conveyed by Neponsit Realty Company to plaintiff's predecessor in title. By that conveyance the grantee, however, obtained not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract. For full enjoyment in common by the defendant and other property owners of these easements or

rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which "touch" or "concern" the land would be based on form and not on substance

. . . Another difficulty remains. Though between the grantor and the grantee there was privity of estate, the covenant provides that its benefit shall run to the assigns of the grantor who "may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph." The plaintiff has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners. Various definitions have been formulated of "privity of estate" in connection with covenants that run with the land, but none of such definitions seems to cover the relationship between the plaintiff and the defendant in this case. The plaintiff has not succeeded to the ownership of any property of the grantor. It does not appear that it ever had title to the streets or public places upon which charges which are payable to it must be expended. It does not appear that it owns any other property in the residential tract to which any easement or right of enjoyment in such property is appurtenant. It is created solely to act as the assignee of the benefit of the covenant, and it has no interest of its own in the enforcement of the covenant.

The arguments that under such circumstances the plaintiff has no right of action to enforce a covenant running with the land are all based upon a distinction between the corporate property owners association and the property owners for whose benefit the association has been formed. If that distinction may be ignored, then the basis of the arguments is destroyed. How far privity of estate in technical form is necessary to enforce in equity a restrictive covenant upon the use of land, presents an interesting question. Enforcement of such covenants rests upon equitable principles, and at times, at least, the violation "of the restrictive covenant may be restrained at the suit of one who owns property or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or of contract between the parties, or whether an action at

law were maintainable." *Chesebro v. Moers*, 233 N.Y. 75, 80, 134 N.E. 842, 843, 21 A.L.R. 1270. . . . We do not attempt . . . to formulate a definite rule as to when, or even whether, covenants in a deed will be enforced, upon equitable principles, against subsequent purchasers with notice, at the suit of a party without privity of contract or estate. There is no need to resort to such a rule if the courts may look behind the corporate form of the plaintiff.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners' Association, Inc., is acting as the agent or representative of the Neponsit property owners. As we have said in another case: when Neponsit Property Owners' Association, Inc., "was formed, the property owners were expected to, and have looked to that organization as the medium through which enjoyment of their common right might be preserved equally for all." *Matter of City of New York, Public Beach, Borough of Queens*, 269 N.Y. 64, 75, 199 N.E. 5, 9. Under the conditions thus presented we said: "It may be difficult, or even impossible to classify into recognized categories the nature of the interest of the membership corporation and its members in the land. The corporate entity cannot be disregarded, nor can the separate interests of the members of the corporation" (page 73, 199 N.E. page 8). Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant

Notes and Questions

26.9. Does the touch-and-concern requirement lessen the potential for conflict between the law of restrictive covenants and the common-law doctrines designed to preserve marketability of land, such as *numerus clausus* and

the rule against restraints on alienation?

26.10. As with easements, restrictive covenants may be implied in particular circumstances, and they may arise by estoppel. The most common context for such a covenant by implication is a common-scheme development, where purchasers acquire an interest in a parcel that is part of a community that appears to have commonly planned features—such as residential uses of particular size and density. Such purchasers may be charged with notice of an implied reciprocal covenant restricting their parcels to uses consistent with the common scheme or plan. See *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925); RESTATEMENT §§ 2.11 & illus. 7; § 2.14. Conversely, where the seller touts the benefits of such features to purchasers who buy in reliance on the seller's representations, the seller and his successors may be estopped from using the seller's retained land in a manner inconsistent with those uses. Indeed, such an estoppel may even serve as an acceptable substitute for the writing required under the Statute of Frauds. RESTATEMENT §§ 2.9-2.10.

26.11. A historical note in the THIRD RESTATEMENT explains:

At the beginning of the 20th century, four doctrines peculiar to servitudes law constrained landowners in the creation of servitudes: the horizontal-privity doctrine, the prohibition on creating benefits in gross, the prohibition on imposing affirmative burdens on fee owners, and the touch-or-concern doctrine. At the end of the century, little remains of those doctrines, which have gradually been displaced by doctrines that more specifically target the harms that may be caused by servitudes.

RESTATEMENT § 3.1, cmt. a. The touch-and-concern doctrine comes in for particular criticism in the RESTATEMENT, which attacks the doctrine's "vagueness, its obscurity, its intent-defeating character, and its growing redundancy." *Id.* § 3.2 cmt. b. Accordingly, the RESTATEMENT adopts a very different approach to the question of enforceability of restrictive covenants:

Restatement (Third) of Property (Servitudes)

§ 3.1 Validity of Servitudes: General Rule

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy.

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;
- (3) a servitude that imposes an unreasonable restraint on alienation . . . ;
- (4) a servitude that imposes an unreasonable restraint on trade or competition . . . ; and
- (5) a servitude that is unconscionable

Notes and Questions

26.12. Is the rationale of the touch-and-concern requirement discussed in *Neponsit* reflected in Section 3.1 of the RESTATEMENT? If not, are there other features of Section 3.1 that serve the common-law rules designed to ensure marketability of real property?

26.13. The RESTATEMENT's invalidation of servitudes that impose "an unreasonable restraint on alienation" draws further distinctions between "direct" and "indirect" restraints. "Direct" restraints—including overt prohibitions on lease or transfer, rights to withhold consent, options to purchase, and rights of first refusal—are valid if "reasonable," with reasonableness being determined "by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." RESTATEMENT § 3.4. An "indirect" restraint is any other restriction on use that might incidentally "limit[] the numbers of potential buyers or . . . reduc[e] the amount the owner might otherwise realize on a sale of the property," and such a covenant is valid unless it "lacks a rational justification." *Id.* § 3.5 & cmt. a.

26.14. In the late 2000s, as the financial crisis and the collapse of the housing market dealt crippling blows to the construction industry, one firm came up with what it thought was a clever solution that built on the same securitization model that powered the mortgage market in the run-up to the collapse. The firm, Freehold Capital Partners, advised real estate developers to insert a covenant in all the deeds to lots in their new housing subdivisions that would require the purchaser and their successors to pay a portion of the resale price to the developer on every subsequent transfer of the property. See Robbie Whelan, *Home-Resale Fees Under Attack*, WALL ST. J. (July 30, 2010), <http://www.wsj.com/articles/SB10001424052748703314904575399>

290511802382. The plan was to securitize these “private transfer fee” payments: sell off slices of the right to the income stream from the transfer fees, and use the sale price of the securities to finance the construction of the homes that would be encumbered by the private transfer fee covenants. The scheme as conceived would not necessarily require the developer to retain title to any real property in the developments bound by these covenants.

Realtors, title search agencies, legislators, and eventually the federal government mobilized against this business model. Many states passed statutes prohibiting or seriously restricting these private fee transfer covenants. See, e.g., TEX. PROP. CODE § 5.202 (effective June 17, 2011). As of March 16, 2012, the Federal agencies that repurchase or otherwise backstop many American residential mortgages will not deal in mortgages on properties encumbered by such covenants.

Was all this legislative and regulatory action necessary? Would Freehold Capital Partners’ private transfer fee covenants be enforceable under the common law of restrictive covenants as set forth in *Neponsit*? Under the RESTATEMENT?

26.15. What other types of covenants might offend public policy? And how far will public policy intrude on private ordering of property rights? Consider the following case.

Shelley v. Kraemer
334 U.S. 1 (1948)

Mr. Chief Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

. . . the said property is hereby restricted to the use and occu-

pancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

. . . On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

. . . Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress

passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

. . . It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has given specific recognition to the same principle.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary.

. . . But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 1883, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters

III.

. . . We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full

panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race

or color. . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Notes and Questions

26.16. Racially restrictive covenants were widespread in the United States in the first half of the twentieth century. See generally Michael Jones-Correia, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541 (2001). Indeed, just two decades prior to its decision in *Shelley*, in the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court had affirmed the enforcement of such a covenant (against the original covenantor) in the District of Columbia (on grounds that the Equal Protection Clause of the 14th Amendment was inapplicable to the federal government—a proposition the Court retreated from in *Bolling v. Sharpe*, 347 U.S. 497 (1954)). And, as discussed in Chapter 21.1, in the years leading up to *Shelley* it was federal government policy to encourage mortgage lenders to insist on the inclusion of racially restrictive covenants in the deeds to homes that were to serve as collateral for federally-insured loans.

Note that three justices recused themselves from consideration of *Shelley*. Justice John Paul Stevens, in his memoir, surmises that they had to do so because they owned homes burdened (and, in the view of many white Americans of the day, benefited) by racially restrictive covenants. JUSTICE JOHN PAUL

STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 69 (2011).

26.17. Does *Shelley* provide useful guidance on what types of privately agreed restrictions will be enforced and what types will go unenforced on constitutional or public policy grounds? Does the Restatement do any better?

26.18. Like racism, racially restrictive covenants have not gone away. Though unenforceable in court, they remain in the chain of title of much residential real estate today, and linger in historical title records. Several universities and public interest organizations have undertaken the work of identifying these lingering covenants in the hopes of removing them from title records. Examples include the University of Minnesota's Mapping Prejudice project (<https://www.mappingprejudice.org/>), the University of Washington's Seattle Civil Rights & Labor History Project (<https://depts.washington.edu/civilr/covenants.htm>), and Prologue DC's Mapping Segregation project (<https://www.mappingsegregationdc.org/>).

In the wake of white supremacist violence in Charlottesville, Virginia, in August of 2017, Charlottesville resident and legal commentator Dahlia Lithwick recounted:

Our lawyer once told us, when we purchased our home in Charlottesville, that the house to this day carries a racially restrictive covenant. No blacks, no Jews. That covenant is illegal and unenforceable. And so I have a house in Charlottesville that could once have been taken from me by the force of law.

Dahlia Lithwick, *They Will Not Replace Us*, SLATE (Aug. 13, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/08/dahlia_lithwick_on_the_nazis_in_charlottesville.html. The white supremacists had descended on Charlottesville as a show of force centered on an equestrian statue of Confederate general Robert E. Lee, which the city had voted to remove. Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>. In recent years, the law's treatment of racially restrictive covenants has come to take on some of the features of the culture war over the removal of Jim-Crow-era monuments to the Confederacy.

As we will see in the next section, removing a restrictive covenant from a chain of title can be quite difficult. In recent years, as attention has been drawn to the perpetuation of unenforceable racially restrictive covenants in title records, a number of states have enacted laws to make it easier—and in some cases mandatory—to file replacement deeds and other title documents with

such covenants removed or stricken. See, e.g., CAL. GOV'T CODE § 12956.2; CAL. CIV. CODE § 4225; MD. CODE ANN., REAL PROP. §§ 3-112, 11B-113.3; MINN. STAT. § 507.18; NEV. REV. STAT. § 111.237(3); VA. CODE ANN. § 36-96.6. Note that under such statutes, the original instrument containing the covenant is not *removed* from the title records; the new document is simply *added* to the record with a reference to the location of the original, while the index is amended to point to the modified instrument rather than (or in addition to) the original instrument.

In the absence of such statutory intervention, however, it can be a challenge to remove racially restrictive language from title documents, even though—and perhaps even because—such language is unenforceable. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), a suit seeking to compel county recorders in Ohio to “stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents” had been dismissed for lack of standing. In an opinion by Judge Boggs, the Court of Appeals affirmed the dismissal, explaining:

In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason’s feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason’s discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.

901 F.3d at 757 (footnote omitted). In a concurrence, Judge Clay agreed that the plaintiff had not adequately pleaded a particularized injury, but held open the possibility that he *could* do so:

Justice may require us to repudiate or revise elements of our “living history” if those elements—whether they be public records, flags, or statutes—are shown to encourage or perpetuate discrimination or the badges and incidents of slavery; indeed, racial epithets that were once accepted as commonplace have

not been preserved, and they have sometimes been stricken from our modern vernacular. We apply an even stricter standard where, as here, the government is the source of, or has ratified, language that has the purpose or effect of encouraging racial animus. We need not erase our history in order to disarm its harmful legacy, but victims of invidious discrimination who have suffered particularized injury as a result of the application of historical language should be able to seek redress, consistent with the context and the factual circumstances of their cases.

Id. at 758 (Clay, J. concurring). The debate between these two opinions—over the nature and gravity of the harms caused by the persistence of racist symbols, the appropriate response to those harms, and the nature of our obligations to preserve historical memory—is strikingly (and probably intentionally) similar to the debate over the removal of Confederate monuments. Is this debate helpful in determining what to do about title records? Are the issues presented by title records the same as those presented by statues of Confederate generals? If not, how do they differ?

26.19. Precisely because they remain in the chain of title for many parcels of real property, these types of discriminatory covenants still occasionally lead to disputes, particularly where residents continue to believe they are a good idea. For example, the Long Island, NY village of Yaphank, founded in the 1930s as “Camp Siegfried,” owes its origin to the expression of Nazi sympathies. This German-American community started as a summer camp for would-be Hitler Youth, and was financed by the German-American Bund party (a pro-Nazi organization). See Nicholas Casey, *Buyers’ Rule in L.I. Town Is Relic of Its Nazi Past*, N.Y. TIMES, Oct. 20, 2015, at A1, <https://nyti.ms/2ktUqEW>. The land comprising village’s residential subdivision of about 50 homes is actually owned by the “German American Settlement League, Inc.” whose bylaws restricted residency to League members, and restricted League membership “primarily” to people “of German extraction.” Yaphank residents owned, and could sell, the structures on their lots, but in order to take possession the buyer needed a lease to the underlying land, which the League controlled.

In 2015, the nonprofit advocacy organization Long Island Housing Services sued the German American Settlement League on behalf of two homeowners (both of German extraction) who were having difficulty selling their home subject to the restrictions. In 2016, the plaintiffs secured a settlement in which the League agreed to remove the racial restrictions from its bylaws and to com-

ply with fair housing laws. LIHS's complaint is available here, <https://storage.courtlistener.com/recap/gov.uscourts.nyed.376778.1.0.pdf> and the settlement is available here, <https://storage.courtlistener.com/recap/gov.uscourts.nyed.376778/gov.uscourts.nyed.376778.12.0.pdf>.

26.2 Modification and Termination of Covenants

Restrictive covenants, like easements, can be modified or terminated in many ways. The Restatement mostly does not draw a distinction between these two types of servitudes with respect to modification or termination, meaning that the grounds for termination discussed in Chapter 13.5—merger, agreement, abandonment, etc.—apply with equal force to restrictive covenants. Note, however, that where a covenant benefits and burdens multiple lots simultaneously (as in *Neponsit*), these grounds for termination will be inordinately more difficult to satisfy, simply because more parties must give their consent or acquiescence and thus any one of them could effectively veto the covenant's termination.

One basis for modification or termination that is perhaps more likely to arise with respect to restrictive covenants than it is for easements is that conditions of the land have changed to such an extent that continued enforcement is inappropriate. This is particularly so where the restrictive covenants are part of a common scheme or plan for a community—precisely the circumstance in which other means of termination are likely to be difficult. In such a community, what types of changes to “facts on the ground” should justify terminating the covenants shaping the community’s land uses?

El Di, Inc. v. Town of Bethany Beach
477 A.2d 1066 (Del. 1984)

HERRMANN, Chief Justice for the majority:

This is an appeal from a permanent injunction granted by the Court of Chancery upon the petition of the plaintiffs, The Town of Bethany Beach, et al., prohibiting the defendant, El Di, Inc. (“El Di”) from selling alcoholic beverages at Holiday House, a restaurant in Bethany Beach owned and operated by El Di.

I.

The pertinent facts are as follows:

El Di purchased the Holiday House in 1969. In December 1981, El Di filed an application with the State Alcoholic Beverage Control Commission (the "Commission") for a license to sell alcoholic beverages at the Holiday House. On April 15, 1982, finding "public need and convenience," the Commission granted the Holiday House an on-premises license. The sale of alcoholic beverages at Holiday House began within 10 days of the Commission's approval. Plaintiffs subsequently filed suit to permanently enjoin the sale of alcoholic beverages under the license.

On appeal it is undisputed that the chain of title for the Holiday House lot included restrictive covenants prohibiting both the sale of alcoholic beverages on the property and nonresidential construction.¹ The same restriction was placed on property in Bethany Beach as early as 1900 and 1901 when the area was first under development.

As originally conceived, Bethany Beach was to be a quiet beach community. The site was selected at the end of the nineteenth-century by the Christian Missionary Society of Washington, D.C. In 1900, the Bethany Beach Improvement Company ("BBIC") was formed. The BBIC purchased lands, laid out a development and began selling lots. To insure the quiet character of the community, the BBIC placed restrictive covenants on many plots, prohibiting the sale of alcohol and restricting construction to residential cottages. Of the original 180 acre development, however, approximately 1/3 was unrestricted.

The Town of Bethany Beach was officially incorporated in 1909. The municipal limits consisted of 750 acres including the original BBIC land (hereafter the original or "old-Town"), but expanded far beyond the 180 acre BBIC development. The expanded acreage of the newly incorporated Town, combined with the unrestricted plots in the original Town, left only

¹The restrictive covenant stated:

"This covenant is made expressly subject to and upon the following conditions: viz; That no intoxicating liquors shall ever be sold on the said lot, that no other than dwelling or cottage shall be erected thereon and but one to each lot, which must be of full size according to the said plan . . . a breach of which said conditions, or any of them, shall cause said lot to revert to and become again the property of the grantor, his heirs and assigns; and upon such breach of said conditions or restrictions, the same may be restrained or enjoined in equity by the grantor, his heirs or assigns, or by any co-lot owner in said plan or other party injured by such breach."

15 percent of the new Town subject to the restrictive covenants.

Despite the restriction prohibiting commercial building ("no other than a dwelling or cottage shall be erected . . . "), commercial development began in the 1920's on property subject to the covenants. This development included numerous inns, restaurants, drug stores, a bank, motels, a town hall, shops selling various items including food, clothing, gifts and novelties and other commercial businesses. Of the 34 commercial buildings presently within the Town limits, 29 are located in the old-Town originally developed by BBIC. Today, Bethany Beach has a permanent population of some 330 residents. In the summer months the population increases to approximately 10,000 people within the corporate limits and to some 48,000 people within a 4 mile radius. In 1952, the Town enacted a zoning ordinance which established a central commercial district designated C-1 located in the old-Town section. Holiday House is located in this district.

Since El Di purchased Holiday House in 1969, patrons have been permitted to carry their own alcoholic beverages with them into the restaurant to consume with their meals. This "brown-bagging" practice occurred at Holiday House prior to El Di's ownership and at other restaurants in the Town. El Di applied for a license to sell liquor at Holiday House in response to the increased number of customers who were engaging in "brown-bagging" and in the belief that the license would permit restaurant management to control excessive use of alcohol and use by minors. Prior to the time El Di sought a license, alcoholic beverages had been and continue to be readily available for sale at nearby licensed establishments including: one restaurant $\frac{1}{2}$ mile outside the Town limits, 3 restaurants within a 4 mile radius of the Town, and a package store some 200-300 yards from the Holiday House.

The Trial Court granted a stay pending the outcome of this appeal.

II.

In granting plaintiffs' motion for a permanent injunction, the Court of Chancery rejected defendant's argument that changed conditions in Bethany Beach rendered the restrictive covenants unreasonable and therefore unenforceable. The Chancery Court found that although the evidence showed a considerable growth since 1900 in both population and the number of buildings in Bethany Beach, "the basic nature of Bethany Beach as a quiet, family oriented resort has not changed." The Court also found

that there had been development of commercial activity since 1900, but that this "activity is limited to a small area of Bethany Beach and consists mainly of activities for the convenience and patronage of the residents of Bethany Beach."

The Trial Court also rejected defendant's contention that plaintiffs' acquiescence and abandonment rendered the covenants unenforceable. In this connection, the Court concluded that the practice of "brown-bagging" was not a sale of alcoholic beverages and that, therefore, any failure to enforce the restriction as against the practice did not constitute abandonment or waiver of the restriction.

III.

We find that the Trial Court erred in holding that the change of conditions was insufficient to negate the restrictive covenant.

A court will not enforce a restrictive covenant where a fundamental change has occurred in the intended character of the neighborhood that renders the benefits underlying imposition of the restrictions incapable of enjoyment. Review of all the facts and circumstances convinces us that the change, since 1901, in the character of that area of the old-Town section now zoned C-1 is so substantial as to justify modification of the deed restriction. We need not determine a change in character of the entire restricted area in order to assess the continued applicability of the covenant to a portion thereof.

It is uncontradicted that one of the purposes underlying the covenant prohibiting the sale of intoxicating liquors was to maintain a quiet, residential atmosphere in the restricted area. Each of the additional covenants reinforces this objective, including the covenant restricting construction to residential dwellings. The covenants read as a whole evince an intention on the part of the grantor to maintain the residential, seaside character of the community.

But time has not left Bethany Beach the same community its grantors envisioned in 1901. The Town has changed from a church-affiliated residential community to a summer resort visited annually by thousands of tourists. Nowhere is the resultant change in character more evident than in the C-1 section of the old-Town. Plaintiffs argue that this is a relative change only and that there is sufficient evidence to support the Trial Court's findings that the residential character of the community has been maintained and that the covenants continue to benefit the other lot own-

ers. We cannot agree.

In 1909, the 180 acre restricted old-Town section became part of a 750 acre incorporated municipality. Even prior to the Town's incorporation, the BBIC deeded out lots free of the restrictive covenants. After incorporation and partly due to the unrestricted lots deeded out by the BBIC, 85 percent of the land area within the Town was not subject to the restrictions. Significantly, nonresidential uses quickly appeared in the restricted area and today the old-Town section contains almost all of the commercial businesses within the entire Town.

The change in conditions is also reflected in the Town's decision in 1952 to zone restricted property, including the lot on which the Holiday House is located, specifically for commercial use. Although a change in zoning is not dispositive as against a private covenant, it is additional evidence of changed community conditions.

Time has relaxed not only the strictly residential character of the area, but the pattern of alcohol use and consumption as well. The practice of "brown-bagging" has continued unchallenged for at least twenty years at commercial establishments located on restricted property in the Town. On appeal, plaintiffs rely on the Trial Court finding that the "brown-bagging" practice is irrelevant as evidence of waiver inasmuch as the practice does not involve the sale of intoxicating liquors prohibited by the covenant. We find the "brown-bagging" practice evidence of a significant change in conditions in the community since its inception at the turn of the century. Such consumption of alcohol in public places is now generally tolerated by owners of similarly restricted lots. The license issued to the Holiday House establishment permits the El Di management to better control the availability and consumption of intoxicating liquors on its premises. In view of both the ready availability of alcoholic beverages in the area surrounding the Holiday House and the long-tolerated and increasing use of "brown-bagging" enforcement of the restrictive covenant at this time would only serve to subvert the public interest in the control of the availability and consumption of alcoholic liquors.

. . . In view of the change in conditions in the C-1 district of Bethany Beach, we find it unreasonable and inequitable now to enforce the restrictive covenant. To permit unlimited "brown-bagging" but to prohibit licensed sales of alcoholic liquor, under the circumstances of this case, is inconsistent with any reasonable application of the restriction and contrary to public policy.

We emphasize that our judgment is confined to the area of the old-Town section zoned C-1. The restrictions in the neighboring residential area are unaffected by the conclusion we reach herein.

Reversed.

CHRISTIE, Justice, with whom MOORE, Justice, joins, dissenting:

I respectfully disagree with the majority.

I think the evidence supports the conclusion of the Chancellor, as finder of fact, that the basic nature of the community of Bethany Beach has not changed in such a way as to invalidate those restrictions which have continued to protect this community through the years as it has grown. Although some of the restrictions have been ignored and a portion of the community is now used for limited commercial purposes, the evidence shows that Bethany Beach remains a quiet, family-oriented resort where no liquor is sold. I think the conditions of the community are still consistent with the enforcement of a restrictive covenant forbidding the sale of intoxicating beverages.

In my opinion, the toleration of the practice of "brown bagging" does not constitute the abandonment of a longstanding restriction against the sale of alcoholic beverages. The restriction against sales has, in fact, remained intact for more than eighty years and any violations thereof have been short-lived. The fact that alcoholic beverages may be purchased right outside the town is not inconsistent with my view that the quiet-town atmosphere in this small area has not broken down, and that it can and should be preserved. Those who choose to buy land subject to the restrictions should be required to continue to abide by the restrictions.

I think the only real beneficiaries of the failure of the courts to enforce the restrictions would be those who plan to benefit commercially.

I also question the propriety of the issuance of a liquor license for the sale of liquor on property which is subject to a specific restrictive covenant against such sales.

I think that restrictive covenants play a vital part in the preservation of neighborhood schemes all over the State, and that a much more complete breakdown of the neighborhood scheme should be required before a court declares that a restriction has become unenforceable.

I would affirm the Chancellor.

Notes and Questions

26.20. Several types of events may constitute “changed conditions” sufficient to at least trigger an inquiry whether a covenant ought still to be enforceable. Typical examples include condemnation of the burdened parcel through the power of eminent domain (typically bringing with it dedication to some purpose outside the scope of the covenant); zoning or rezoning (which may make the land incapable of legal use within the scope of the covenant); and nearby redevelopment that otherwise frustrates the purpose of the covenant.

26.21. The rule of *El Di* would hold covenants unenforceable for changed conditions if those conditions “render[] the benefits underlying imposition of the restrictions incapable of enjoyment.” Do residents really derive *no* benefit from a limit on the available venues for the sale of alcoholic beverages in their family vacation town? Does anyone else derive a benefit from such limits? If so, are they the kind of benefits that are enforceable as a matter of the law of servitudes?

26.22. There are subtle differences in the framing of the test courts apply under the doctrine of changed conditions, particularly in the context of the covenants governing a common-interest community. As the THIRD RESTATEMENT puts it:

The test for finding changed conditions sufficient to warrant termination of reciprocal-subdivision servitudes is often said to be whether there has been such a radical change in conditions since creation of the servitudes that perpetuation of the servitude would be of no substantial benefit to the dominant estate. However, the test is not whether the servitude retains value, but whether it can continue to serve the purposes for which it was created.

RESTATEMENT § 7.10, cmt. c. Do you think the difference between these two tests is likely to make a difference in the resolution of disputes? Which (if either) did the court apply in *El Di*? If *El Di* had applied the other test, would the outcome have been any different?

26.23. Does the mere fact of the disagreement between the majority and the dissent in *El Di* have any implications for the soundness of the doctrine of changed conditions? If reasonable minds can differ as to whether a covenant can still serve its purpose or still provides some benefit to the dominant owner, might that in itself be a reason to continue enforcing the parties’ private agree-

ment? How does the answer to this question relate to the public policy limits on enforceability of restrictive covenants? On the danger of dead-hand control discussed in the notes following *Tulk v. Moxhay*?

Chapter 27

Common-Interest Communities

As you have already seen, one prevalent application of restrictive covenants is in real estate development schemes that purport to subject many disparately held parcels within a community to a common scheme or plan. Neponsit and Bethany Beach are both communities that were initially developed under such a common scheme. Like zoning ordinances, the restrictive covenants that burden privately owned land within such developments may serve to quite comprehensively regulate the uses of land by members of the community.

Indeed, one major American city—Houston—relies largely (though not exclusively) on restrictive covenants to do the work that most other municipalities achieve by zoning. When zoning swept the nation in the 1920s, Houston was a growing, libertarian city, and sometimes-overheated rhetoric led Houstonians to reject zoning as communistic government interference with liberty. Later attempts to introduce zoning also failed due to the persistence of anti-zoning movements. See Barry J. Kaplan, *Urban Development, Economic Growth, and Personal Liberty: The Rhetoric of the Houston Anti-Zoning Movements, 1947-1962*, 84 SW. HIST. Q. 133 (1980); see also JOEL KOTKIN, OPPORTUNITY URBANISM (Oct. 2014), https://urbanreforminstitute.org/wp-content/uploads/2016/10/Kotkin-Opportunity-Urbanism_2014.pdf (positing Houston's freedom and prosperity as the result of lack of zoning). The absence of zoning doesn't mean that land use in Houston is unregulated—the city code imposes minimum lot size and parking restrictions that have made the city the most sprawling American metropolis, and the most heavily dependent on privately-owned automobiles for transportation. But more detailed restrictions are often the work of private covenants.

Private covenants are common in Houston, replicating many of the stan-

dard functions of zoning, particularly separation of uses. Houston encourages covenant creation by allowing their creation by a majority vote of subdivision residents. Houstonians separate homes from businesses through restrictive covenants that specify the appropriate use for each lot in a subdivision, and enable every lot owner individually to sue. This regime works most effectively in wealthy neighborhoods. Houston's city code, unlike that of most American cities, also allows the city attorney to sue to enforce restrictive covenants. The city may seek civil penalties of up to \$1000 per day for a violation, and the city prioritizes enforcement of use restrictions, rather than other covenants such as aesthetic rules. In essence, the city has recreated "single use zoning" as covenant enforcement.

Both within and outside of Houston, such uses of restrictive covenants may allow—like the covenants in *Neponsit*—for centralized *private* authority to administer and enforce the covenants through a corporation or association constituted from among the property owners in the community. This kind of collective governance of land uses via restrictive covenants is what the Third Restatement refers to as a **common-interest community**. There are three primary types of common-interest community in the United States: the **homeowners association** (or "HOA"), the **condominium** (or "condo"), and the **co-operative** (or "co-op"). State statutes provide for the creation of these legal entities. According to the Community Associations Institute—an international research, education, and advocacy nonprofit organization that promotes and supports common-interest communities—there were over 330,000 common-interest communities in the United States in 2014, encompassing 26.7 million housing units and 66.7 million residents. See CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2014, at 1 (2014), https://foundation.caionline.org/wp-content/uploads/2017/07/CAI_2014_StatsReview_WEB.pdf.

27.1 Types

27.1.1 Homeowners Associations

The homeowners association is the most common type of common-interest community in the United States—over half of all common interest communities in the United States are HOAs. See *id.* In an HOA, the creation of community-wide restrictive covenants typically happens at the planning stage: a real estate developer plans out a subdivision of a contiguous parcel of undeveloped or un-

derdeveloped land, and files with the local clerk or register of deeds a **subdivision plat** mapping out a survey of the separate lots of the planned community and a **declaration of covenants, conditions, and restrictions (“CC&Rs”)** to bind each of those lots as restrictive covenants. When the subdivided lots are initially sold, the developer writes the same covenants into the deed to every lot, either explicitly or incorporating the CC&Rs of the declaration by reference. The CC&Rs will typically delegate enforcement to a homeowners association—a legal entity that is incorporated or otherwise created for the purpose of managing the common-interest community (as with the property owners’ association in *Neponsit*). The association’s membership is comprised of all owners of real property in the subdivision. These members are entitled to elect a board of managers to act on behalf of the association, though votes are usually not equally distributed to all residents; typically votes are allocated according to some proxy for property value, such as lot size.

The association itself may hold title to real property in common areas of the subdivision—such as private roads, parks and other recreational facilities, and common utilities. It may also contract on behalf of the community for common services, such as professional security guards. But its main function is to administer, modify as necessary, and enforce the restrictive covenants that bind the real property in the subdivision. This includes the collection of HOA dues—such as the fees that were at issue in *Neponsit*—that go toward the maintenance of the subdivision and other expenses incurred by the association (for example, professional fees for attorneys, accountants, etc.). The association is typically also empowered to levy special assessments against property owners in the subdivision as it deems necessary. See RESTATEMENT, § 6.5. The authority of the association to act is governed both by the CC&Rs and by a set of bylaws—like the bylaws of any other corporation—that set forth in detail what actions the managers may take according to what procedures, what actions require a vote of all members of the association, and whether there is any supermajority requirement for certain actions. As we will see, the association may also enact regulations regarding use and maintenance of privately owned property in the subdivision that go beyond the CC&Rs.

27.1.2 Condominiums

A **condominium** is very similar to a homeowners association, except it typically covers either a single multi-unit structure or several structures compris-

ing attached residences on a single contiguous lot. Like a homeowners association, a condominium is established by filing with the appropriate public official a **condominium declaration**, which like the homeowners association declaration will contain the CC&Rs that will govern the condominium, and will provide for a condominium association to administer the CC&Rs and otherwise act on behalf of the community. State statutes typically impose a bit more regulation on condominiums than on subdivision HOAs, sometimes setting forth substantive rules limiting the powers of condominium associations or subjecting them to certain procedural requirements. But condominium associations typically have the same types of powers as HOAs, including the power to assess dues and special assessments from individual owner/members.

One important distinction between condominiums and homeowners associations has to do with how title to property is held in each. In a condominium, each unit owner holds title to their individual unit in fee simple, but the individual unit owners collectively own all common areas of the condominium property (hallways, common outdoor spaces, lobbies, recreation areas, etc.) as tenants in common. State statutes prohibit condominium owners from seeking partition of these commonly owned spaces. As with voting rights in the condominium association, each owner's fractional share in this tenancy in common is typically determined by some proxy for the value of the owner's particular unit, such as square footage.

27.1.3 Cooperatives

By far the least common form of common-interest community is the **cooperative**. In a cooperative, title to all real property in the community (typically an apartment building) is held by a cooperative corporation, whose shareholders are the residents of individual units. As with the other common-interest communities, the number of shares each individual unit owner holds is typically proportional to some proxy for the value of their residence—such as square footage. Each resident's shares are “appurtenant” (i.e., connected) to a **proprietary lease** for a particular unit—a lease whose term is tied to the resident's ownership of their shares in the cooperative. Co-op owners therefore have a dual relationship with their common-interest community: they are formally tenants, but at the same time they are shareholders of the (corporate) landlord. The proprietary lease typically plays the role that CC&Rs serve in HOAs and condominiums: it contains the covenants restricting residents' use of their own unit

and any common spaces, and in lieu of rent it obliges residents to pay maintenance fees—which typically represent a fractional share of both operating expenses and carrying costs of the entire property (such as mortgage payments and property taxes).

The board of directors of a cooperative corporation typically wields significant power over the property and its residents. In addition to administering and enforcing the terms of the proprietary lease and managing the property on behalf of all the residents, co-op boards are typically empowered to create and enforce additional rules to govern the community via their own by-laws and, sometimes, separate and potentially quite intrusive “house rules.” Beyond this, the governing documents of most co-operatives reserve to the board a right to withhold consent to any transfer of shares in the corporation (and, thus, of the proprietary lease to any unit in the cooperative). Absent violation of the anti-discrimination laws, boards are generally free to arbitrarily withhold such consent. One justification for this power is that residents of a co-operative depend on one another for the financial stability of their homes: a shareholder who fails to pay maintenance on time could threaten not only themselves but the entire community with foreclosure of a mortgage or a tax lien, and the board therefore has an interest in screening new shareholders for financial wherewithal and reliability. But another theory justifying such power is that a cooperative is, as its name implies, a form of collective governance of an intimate residential community, which limits the appropriate degree of outside legal interference. As the New York Court of Appeals put it: “there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders’ meetings, their management problems and responsibilities and their homes.” *Weisner v. 791 Park Ave. Corp.*, 160 N.E.2d 720, 724 (N.Y. 1959).

Cooperatives exist almost exclusively in New York City, where they account for the majority of owner-occupied apartments in Manhattan. Given the tremendous power co-operative boards can exercise over admission of new shareholders, it is perhaps unsurprising that co-ops constitute the form of ownership for many of the city’s most exclusive residential apartment buildings. Tom Wolfe famously profiled these co-ops in the heady days of the 1980s bull market:

These so-called Good Buildings are forty-two cooperative apartment houses built more than half a century ago. Thirty-seven of them are located in a small wedge of Manhattan’s Up-

per East Side known as the Triangle[,] . . . an area defined by Fifty-seventh Street from Sutton Place to Fifth Avenue on the south, Fifth [Avenue] to Ninety-eighth Street on the west, and a diagonal back down to Sutton on the east The term Good Building was originally uttered sotto voce. Before the First World War it was code for “restricted to Protestants of northern European stock” Today Good certainly doesn’t mean democratic, but it does pertain to attributes that are at least more broadly available than Protestant grandparents: namely, decorous demeanor, dignified behavior, business and social connections, and sheer wealth. In short, bourgeois respectability. The co-op boards want quiet, conservatively dressed families, although not with too many children. Children tie up the elevators and make noise in the lobby The boards raise and lower their financial requirements, as well as their social requirements, with the temperature of the market The first requirement is that the buyer be able to pay for the apartment in cash The second, in many buildings, is that he not be dependent on his job or profession to pay for his monthly maintenance fees and keep up appearances The prospects and their families are also expected to drop by the building for “cocktails,” which is an inspection of dress and deportment The stiffest known financial requirements are at a Good Building on Park Avenue in the seventies, where the board asks that a purchaser of an apartment demonstrate a net worth of at least \$30 million.*

Tom Wolfe, *Proper Places*, ESQUIRE (June 1985), at 194, 196-200.

27.2 Rulemaking Authority

As noted above, the governing documents of a common-interest community can significantly regulate the lives of its residents, and the governing bodies of the community are usually empowered to impose additional regulations. How expansive is this rulemaking authority?

*This would be over \$66 million in 2015 dollars. —Eds.

Hidden Harbour Estates, Inc. v. Norman
309 So. 2d 180 (Fla. Dist. Ct. App. 1975)

DOWNEY, Judge.

The question presented on this appeal is whether the board of directors of a condominium association may adopt a rule or regulation prohibiting the use of alcoholic beverages in certain areas of the common elements of the condominium.

Appellant is the condominium association formed, pursuant to a Declaration of Condominium, to operate a 202 unit condominium known as Hidden Harbour. Article 3.3(f) of appellant's articles of incorporation provides, *inter alia*, that the association shall have the power "to make and amend reasonable rules and regulations respecting the use of the condominium property." A similar provision is contained in the Declaration of Condominium.

Among the common elements of the condominium is a club house used for social occasions. Pursuant to the association's rule making power the directors of the association adopted a rule prohibiting the use of alcoholic beverages in the club house and adjacent areas. Appellees, as the owners of one condominium unit, objected to the rule, which incidentally had been approved by the condominium owners voting by a margin of 2 to 1 (126 to 63). Being dissatisfied with the association's action, appellees brought this injunction suit to prohibit the enforcement of the rule. After a trial on the merits at which appellees showed there had been no untoward incidents occurring in the club house during social events when alcoholic beverages were consumed, the trial court granted a permanent injunction against enforcement of said rule. The trial court was of the view that rules and regulations adopted in pursuance of the management and operation of the condominium "must have some reasonable relationship to the protection of life, property or the general welfare of the residents of the condominium in order for it to be valid and enforceable." In its final judgment the trial court further held that any resident of the condominium might engage in any lawful action in the club house or on any common condominium property unless such action was engaged in or carried on in such a manner as to constitute a nuisance.

With all due respect to the veteran trial judge, we disagree. It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit

owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed.

Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. Of course, this means that each case must be considered upon the peculiar facts and circumstances thereto appertaining.

Finally, restrictions on the use of alcoholic beverages are widespread throughout both governmental and private sectors; there is nothing unreasonable or unusual about a group of people electing to prohibit their use in commonly owned areas.

Accordingly, the judgment appealed from is reversed and the cause is remanded with directions to enter judgment for the appellant.

Notes and Questions

27.1. What is the difference between the standard applied by the trial judge and that applied by the Court of Appeal in *Norman*? Don't both merely require rules promulgated by an association to be "reasonable"?

27.2. The Hidden Harbour development was back before the Florida District Court of Appeal six years later over a different dispute involving a resident's private well. In *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. Dist. Ct. App. 1981), the court opined:

There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of re-

strictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. Thus, although case law has applied the word "reasonable" to determine whether such restrictions are valid, this is not the appropriate test

The rule to be applied in the second category of cases, however, is different. In those cases where a use restriction is not mandated by the declaration of condominium *per se*, but is instead created by the board of directors of the condominium association, the rule of reasonableness comes into vogue. The requirement of "reasonableness" in these instances is designed to somewhat fetter the discretion of the board of directors. By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. In cases like the present one where the decision to allow a particular use is within the discretion of the board, the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual unit owners.

The Restatement draws the same distinction between the standard for validity of covenants set forth in the CC&Rs of a declaration and the standard for validity of rules enacted by the governing body of a common-interest community. Thus, restrictions in a condominium declaration are valid—even if unreasonable—unless they are illegal, unconstitutional, or against public policy, RESTATEMENT

§ 3.1, while house rules and their enforcement are subject to a reasonableness standard, RESTATEMENT § 6.7 & Reporter's Note.

Does this distinction make sense? The court in *Basso* notes that "house rules," unlike CC&Rs, may be adopted *after* a resident acquires their property and thus without the notice that recording of the declaration provides before a resident invests in the community.¹ Does that distinction justify the diverging standards for validity? Is such a justification consistent with the reasoning of *Norman*?

27.3. Not all jurisdictions follow the distinction drawn by *Basso* and the RESTATEMENT. Consider the following case.

Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.

878 P.2d 1275 (Cal. 1994)

KENNARD, Justice.

A homeowner in a 530-unit condominium complex sued to prevent the homeowners association from enforcing a restriction against keeping cats, dogs, and other animals in the condominium development. The owner asserted that the restriction, which was contained in the project's declaration recorded by the condominium project's developer, was "unreasonable" as applied to her because she kept her three cats indoors and because her cats were "noiseless" and "created no nuisance." Agreeing with the premise underlying the owner's complaint, the Court of Appeal concluded that the homeowners association could enforce the restriction only upon proof that plaintiff's cats would be likely to interfere with the right of other homeowners "to the peaceful and quiet enjoyment of their property."

Those of us who have cats or dogs can attest to their wonderful companionship and affection. Not surprisingly, studies have confirmed this effect.... But the issue before us is not whether in the abstract pets can have a beneficial effect on humans. Rather, the narrow issue here is whether a pet restriction that is contained in the recorded declaration of a condominium complex is enforceable against the challenge of a homeowner. As we shall explain, the Legislature, in Civil Code section 1354, has required that courts enforce the covenants, conditions and restrictions contained

¹Typically, either under state law or by a declaration's own terms (or both), the CC&Rs in a declaration may only be amended by a supermajority vote of all members of the association.

in the recorded declaration of a common interest development “unless unreasonable.”

Because a stable and predictable living environment is crucial to the success of condominiums and other common interest residential developments, and because recorded use restrictions are a primary means of ensuring this stability and predictability, the Legislature in section 1354 has afforded such restrictions a presumption of validity and has required of challengers that they demonstrate the restriction’s “unreasonableness” by the deferential standard applicable to equitable servitudes. Under this standard established by the Legislature, enforcement of a restriction does not depend upon the conduct of a particular condominium owner. Rather, the restriction must be uniformly enforced in the condominium development to which it was intended to apply unless the plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner. Here, the Court of Appeal did not apply this standard in deciding that plaintiff had stated a claim for declaratory relief. Accordingly, we reverse the judgment of the Court of Appeal and remand for further proceedings consistent with the views expressed in this opinion.

I

Lakeside Village is a large condominium development in Culver City, Los Angeles County. It consists of 530 units spread throughout 12 separate 3-story buildings. The residents share common lobbies and hallways, in addition to laundry and trash facilities.

The Lakeside Village project is subject to certain covenants, conditions and restrictions (hereafter CC & R's) that were included in the developer's declaration recorded with the Los Angeles County Recorder on April 17, 1978, at the inception of the development project. Ownership of a unit includes membership in the project's homeowners association, the Lakeside Village Condominium Association (hereafter Association), the body that enforces the project's CC & R's, including the pet restriction, which provides in relevant part: “No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit.”³

In January 1988, plaintiff Natore Nahrstedt purchased a Lakeside Village condominium and moved in with her three cats. When the Associa-

³The CC & R's permit residents to keep “domestic fish and birds.”

tion learned of the cats' presence, it demanded their removal and assessed fines against Nahrstedt for each successive month that she remained in violation of the condominium project's pet restriction.

Nahrstedt then brought this lawsuit against the Association, its officers, and two of its employees, asking the trial court to invalidate the assessments, to enjoin future assessments, to award damages for violation of her privacy when the Association "peered" into her condominium unit, to award damages for infliction of emotional distress, and to declare the pet restriction "unreasonable" as applied to indoor cats (such as hers) that are not allowed free run of the project's common areas. Nahrstedt also alleged she did not know of the pet restriction when she bought her condominium. . . .

The Association demurred to the complaint. In its supporting points and authorities, the Association argued that the pet restriction furthers the collective "health, happiness and peace of mind" of persons living in close proximity within the Lakeside Village condominium development, and therefore is reasonable as a matter of law. The trial court sustained the demurrer as to each cause of action and dismissed Nahrstedt's complaint. Nahrstedt appealed.

A divided Court of Appeal reversed the trial court's judgment of dismissal. . . . On the Association's petition, we granted review to decide when a condominium owner can prevent enforcement of a use restriction that the project's developer has included in the recorded declaration of CC & R's. . . .

II

Today, condominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as "common interest" developments. . . . Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement. . . . The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on—or prohibit altogether—the keeping of pets.

Restrictions on property use are not the only characteristic of common

interest ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. Because of its considerable power in managing and regulating a common interest development, the governing board of an owners association must guard against the potential for the abuse of that power. As Professor Natelson observes, owners associations "can be a powerful force for good or for ill" in their members' lives. Therefore, anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts "the risk that the power may be used in a way that benefits the commonality but harms the individual." Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.

Thus, subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development. . . .

Notwithstanding the limitations on personal autonomy that are inherent in the concept of shared ownership of residential property, common interest developments have increased in popularity in recent years, in part because they generally provide a more affordable alternative to ownership of a single-family home

. . . When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability? In California, as we explained at the outset, our Legislature has made common interest development use restrictions contained in a project's recorded declaration "*enforceable . . . unless unreasonable.*" (§ 1354, subd. (a), italics added.) . . . In other words, such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

This interpretation of section 1354 is consistent with the views of legal commentators as well as judicial decisions in other jurisdictions that have

applied a presumption of validity to the recorded land use restrictions of a common interest development. As these authorities point out, and as we discussed previously, recorded CC & R's are the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development. . . . When courts accord a presumption of validity to all such recorded use restrictions and measure them against deferential standards of equitable servitude law, it discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC & R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions.

How courts enforce recorded use restrictions affects not only those who have made their homes in planned developments, but also the owners associations charged with the fiduciary obligation to enforce those restrictions. When courts treat recorded use restrictions as presumptively valid, and place on the challenger the burden of proving the restriction "unreasonable" under the deferential standards applicable to equitable servitudes, associations can proceed to enforce reasonable restrictive covenants without fear that their actions will embroil them in costly and prolonged legal proceedings. Of course, when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly.

There is an additional beneficiary of legal rules that are protective of recorded use restrictions: the judicial system. Fewer lawsuits challenging such restrictions will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating such restrictions are clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individual residents in condominiums and other shared-ownership developments.

. . . Refusing to enforce the CC & R's contained in a recorded declaration, or enforcing them only after protracted litigation that would require justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development. It would frustrate owners who had purchased their units in reliance on

the CC & R's. It would put the owners and the homeowners association in the difficult and divisive position of deciding whether particular CC & R's should be applied to a particular owner. Here, for example, deciding whether a particular animal is "confined to an owner's unit and create[s] no noise, odor, or nuisance" is a fact-intensive determination that can only be made by examining in detail the behavior of the particular animal and the behavior of the particular owner. Homeowners associations are ill-equipped to make such investigations, and any decision they might make in a particular case could be divisive or subject to claims of partiality.

Enforcing the CC & R's contained in a recorded declaration only after protracted case-by-case litigation would impose substantial litigation costs on the owners through their homeowners association, which would have to defend not only against owners contesting the application of the CC & R's to them, but also against owners contesting any case-by-case exceptions the homeowners association might make. In short, it is difficult to imagine what could more disrupt the harmony of a common interest development. . . .

Under the holding we adopt today, the reasonableness or unreasonableness of a condominium use restriction that the Legislature has made subject to section 1354 is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole. As we have explained, when, as here, a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development *unless* the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy.

Accordingly, here Nahrstedt could prevent enforcement of the Lakeside Village pet restriction by proving that the restriction is arbitrary, that it is substantially more burdensome than beneficial to the affected properties, or that it violates a fundamental public policy. For the reasons set forth below, Nahrstedt's complaint fails to adequately allege any of these three grounds of unreasonableness.

We conclude, as a matter of law, that the recorded pet restriction of the Lakeside Village condominium development prohibiting cats or dogs but allowing some other pets is not arbitrary, but is rationally related to

health, sanitation and noise concerns legitimately held by residents of a high-density condominium project such as Lakeside Village, which includes 530 units in 12 separate 3-story buildings.

Nahrstedt's complaint alleges no facts that could possibly support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable and should not be enforced. Also, the complaint's allegations center on Nahrstedt and her cats (that she keeps them inside her condominium unit and that they do not bother her neighbors), without any reference to the effect on the condominium development as a whole, thus rendering the allegations legally insufficient to overcome section 1354's presumption of the restriction's validity

LUCAS, C.J., and MOSK, BAXTER, GEORGE and WERDEGAR, JJ., concur.

ARABIAN, Justice, dissenting.

"There are two means of refuge from the misery of life: music and cats."¹

I respectfully dissent. While technical merit may commend the majority's analysis, its application to the facts presented reflects a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency. In my view, the resolution of this case well illustrates the conventional wisdom, and fundamental truth, of the Spanish proverb, "It is better to be a mouse in a cat's mouth than a man in a lawyer's hands."

As explained below, I find the provision known as the "pet restriction" contained in the covenants, conditions, and restrictions (CC & R's) governing the Lakeside Village project patently arbitrary and unreasonable within the meaning of Civil Code section 1354. Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals. Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract. It certainly does not promote "health, happiness [or] peace of mind" commensurate with its tariff on the quality of life for those who value the companionship of animals. Worse, it contributes to the fraying of our social fabric.

¹Albert Schweitzer.

. . . Generically stated, plaintiff challenges this restriction to the extent it precludes not only her but anyone else living in Lakeside Village from enjoying the substantial pleasures of pet ownership while affording no discernible benefit to other unit owners if the animals are maintained without any detriment to the latter's quiet enjoyment of their own space and the common areas. In essence, she avers that when pets are kept out of sight, do not make noise, do not generate odors, and do not otherwise create a nuisance, reasonable expectations as to the quality of life within the condominium project are not impaired. At the same time, taking into consideration the well-established and long-standing historical and cultural relationship between human beings and their pets and the value they impart[,] enforcement of the restriction significantly and unduly burdens the use of land for those deprived of their companionship. Considered from this perspective, I find plaintiff's complaint states a cause of action for declaratory relief.

. . . Our true task in this turmoil is to strike a balance between the governing rights accorded a condominium association and the individual freedom of its members Pet ownership substantially enhances the quality of life for those who desire it. When others are not only undisturbed by, but *completely unaware of*, the presence of pets being enjoyed by their neighbors, the balance of benefit and burden is rendered disproportionate and unreasonable, rebutting any presumption of validity

I would affirm the judgment of the Court of Appeal.

Notes and Questions

27.4. A few years after *Nahrstedt* was decided, the California legislature later enacted a statute providing that common-interest community governing documents cannot prohibit the keeping of "at least one pet." CAL. CIV. CODE § 4715.

27.5. Did Natore Nahrstedt lose because the pet restriction is reasonable in general, because the restriction is reasonable as applied to indoor cats, or because the fines levied by the board were a reasonable means of enforcing the restriction?

27.6. Is the reasonableness standard applied in *Nahrstedt* the same standard applied by the court in *Norman* and *Basso*? If not, how do the standards differ? How does the reasonableness standard of *Nahrstedt* differ from the standard Florida applies to CC&Rs?

27.3 Enforcement of Rules and Covenants by Common-Interest Communities

What happens if a resident of a common interest community breaches a covenant? How can the governing body of the community—the HOA managers, the condo board, or the co-op board—enforce the rules laid down in the restrictive covenants against breaching community members? *Neponsit* provides one answer: the breach of a covenant to pay money—such as dues and assessments—will serve as an equitable lien on the breaching resident's property in the community. This lien could be foreclosed, or more commonly the threat of foreclosure and the encumbrance of the lien can be used to leverage payment if and when the resident ever tries to sell her home. The governing body could also sue to recover unpaid sums, but because this involves significant additional expense it is typically an unattractive option reserved as a last resort.

But what about covenants that restrict use of property in the community—or rules that govern the conduct of residents on the community's property? The Restatement suggests that the governing bodies of common-interest communities enjoy wide latitude to enforce the restrictions in governing documents. Section 6.8 provides: "In addition to seeking court enforcement, the association may adopt reasonable rules and procedures to encourage compliance and deter violations, including the imposition of fines, penalties, late fees, and the withdrawal of privileges to use common recreational and social facilities." Typically the governing documents will empower the association or board to levy fines against residents for their breach of such rules of conduct or use. Those fines, like unpaid dues or assessments, can also become an equitable lien on the resident's property if state law and/or the declaration so provide.

How should we assess the "reasonableness" of any particular enforcement action? And how searching a review should courts take of such actions if and when they are challenged by aggrieved members of the common-interest community?

40 West 67th Street v. Pullman
790 N.E.2d 1174 (N.Y. 2003)

ROSENBLATT, J.

In *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 554

N.Y.S.2d 807, 553 N.E.2d 1317 [1990] we held that the business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations. In the case before us, defendant is a shareholder-tenant in the plaintiff cooperative building. The relationship between defendant and the cooperative, including the conditions under which a shareholder's tenancy may be terminated, is governed by the shareholder's lease agreement. The cooperative terminated defendant's tenancy in accordance with a provision in the lease that authorized it to do so based on a tenant's "objectionable" conduct

I.

Plaintiff cooperative owns the building located at 40 West 67th Street in Manhattan, which contains 38 apartments. In 1998, defendant bought into the cooperative and acquired 80 shares of stock appurtenant to his proprietary lease for apartment 7B.

Soon after moving in, defendant engaged in a course of behavior that, in the view of the cooperative, began as demanding, grew increasingly disruptive and ultimately became intolerable. After several points of friction between defendant and the cooperative,¹ defendant started complaining about his elderly upstairs neighbors, a retired college professor and his wife who had occupied apartment 8B for over two decades. In a stream of vituperative letters to the cooperative—16 letters in the month of October 1999 alone—he accused the couple of playing their television set and stereo at high volumes late into the night, and claimed they were running a loud and illegal bookbinding business in their apartment. Defendant further charged that the couple stored toxic chemicals in their apartment for use in their "dangerous and illegal" business. Upon investigation, the cooperative's Board determined that the couple did not possess a television set or stereo and that there was no evidence of a bookbinding business or any other commercial enterprise in their apartment.

Hostilities escalated, resulting in a physical altercation between defendant and the retired professor.² Following the altercation, defendant distributed flyers to the cooperative residents in which he referred to the

¹Initially, defendant sought changes in the building services, such as the installation of video surveillance, 24-hour door service and replacement of the lobby mailboxes. After investigation, the Board deemed these proposed changes inadvisable or infeasible.

²Defendant brought charges against the professor which resulted in the professor's arrest. Eventually, the charges were adjourned in contemplation of dismissal.

professor, by name, as a potential “psychopath in our midst” and accused him of cutting defendant’s telephone lines. In another flyer, defendant described the professor’s wife and the wife of the Board president as having close “intimate personal relations.” Defendant also claimed that the previous occupants of his apartment revealed that the upstairs couple have “historically made excessive noise.” The former occupants, however, submitted an affidavit that denied making any complaints about noise from the upstairs apartment and proclaimed that defendant’s assertions to the contrary were “completely false.”

Furthermore, defendant made alterations to his apartment without Board approval, had construction work performed on the weekend in violation of house rules, and would not respond to Board requests to correct these conditions or to allow a mutual inspection of his apartment and the upstairs apartment belonging to the elderly couple. Finally, defendant commenced four lawsuits against the upstairs couple, the president of the cooperative and the cooperative management, and tried to commence three more.

In reaction to defendant’s behavior, the cooperative called a special meeting pursuant to article III (First) (f) of the lease agreement, which provides for termination of the tenancy if the cooperative by a two-thirds vote determines that “because of objectionable conduct on the part of the Lessee . . . the tenancy of the Lessee is undesirable.”³ The cooperative informed the shareholders that the purpose of the meeting was to determine whether defendant “engaged in repeated actions inimical to cooperative living and objectionable to the Corporation and its stockholders that make his continued tenancy undesirable.”

Timely notice of the meeting was sent to all shareholders in the cooperative, including defendant. At the ensuing meeting, held in June 2000, owners of more than 75% of the outstanding shares in the cooperative were present. Defendant chose not attend. By a vote of 2,048 shares to 0, the shareholders in attendance passed a resolution declaring defendant’s conduct “objectionable” and directing the Board to terminate his

³The full provision authorizes termination “if at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of that part of its capital stock which is then owned by Lessees under proprietary leases then in force, at a meeting of such stockholders duly called to take action on the subject, that because of objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, the tenancy of the Lessee is undesirable.”

proprietary lease and cancel his shares. The resolution contained the findings upon which the shareholders concluded that defendant's behavior was inimical to cooperative living. Pursuant to the resolution, the Board sent defendant a notice of termination requiring him to vacate his apartment by August 31, 2000. Ignoring the notice, defendant remained in the apartment, prompting the cooperative to bring this suit for possession and ejectment, a declaratory judgment cancelling defendant's stock, and a money judgment for use and occupancy, along with attorneys' fees and costs

II. The *Levandusky* Business Judgment Rule

The heart of this dispute is the parties' disagreement over the proper standard of review to be applied when a cooperative exercises its agreed-upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct. In the agreement establishing the rights and duties of the parties, the cooperative reserved to itself the authority to determine whether a member's conduct was objectionable and to terminate the tenancy on that basis. The cooperative argues that its decision to do so should be reviewed in accordance with *Levandusky*'s business judgment rule. Defendant contends that the business judgment rule has no application under these circumstances and that RPAPL [Real Property Actions and Proceedings Law] 711 requires a court to make its own evaluation of the Board's conduct based on a judicial standard of reasonableness.

Levandusky established a standard of review analogous to the corporate business judgment rule for a shareholder-tenant challenge to a decision of a residential cooperative corporation. The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. The rule has been long recognized in New York. In *Levandusky*, the cooperative board issued a stop work order for a shareholder-tenant's renovations that violated the proprietary lease. The shareholder-tenant brought a CPLR article 78 proceeding to set aside the stop work order. The Court upheld the Board's action, and concluded that the business judgment rule "best balances the individual and collective interests at stake" in the residential cooperative setting (*Levandusky*, 75 N.Y.2d at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination

“[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith” (*id.* at 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317). In adopting this rule, we recognized that a cooperative board’s broad powers could lead to abuse through arbitrary or malicious decisionmaking, unlawful discrimination or the like. However, we also aimed to avoid impairing “the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit” (*id.* at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317). The Court concluded that the business judgment rule best balances these competing interests and also noted that the limited judicial review afforded by the rule protects the cooperative’s decisions against “undue court involvement and judicial second-guessing” (*id.* at 540, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Although we applied the business judgment rule in *Levandusky*, we did not attempt to fix its boundaries, recognizing that this corporate concept may not necessarily comport with every situation encountered by a cooperative and its shareholder-tenants. Defendant argues that when it comes to terminations, the business judgment rule conflicts with RPAPL 711(1) and is therefore inoperative.⁵ We see no such conflict. In the realm of cooperative governance and in the lease provision before us, the cooperative’s determination as to the tenant’s objectionable behavior stands as competent evidence necessary to sustain the cooperative’s determination. If that were not so, the contract provision for termination of the lease-to which defendant agreed-would be meaningless.

We reject the cooperative’s argument that RPAPL 711(1) is irrelevant to these proceedings, but conclude that the business judgment rule may be applied consistently with the statute. Procedurally, the business judgment standard will be applied across the cases, but the manner in which it presents itself varies with the form of the lawsuit. *Levandusky*, for example, was framed as a CPLR article 78 proceeding, but we applied the business judgment rule as a concurrent form of “rationality” and “reasonable-

⁵RPAPL 711(1), in pertinent part, states: “A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable.”

ness" to determine whether the decision was "arbitrary and capricious" pursuant to CPLR 7803(3).

Similarly, the procedural vehicle driving this case is RPAPL 711(1), which requires "competent evidence" to show that a tenant is objectionable. Thus, in this context, the competent evidence that is the basis for the shareholder vote will be reviewed under the business judgment rule, which means courts will normally defer to that vote and the shareholders' stated findings as competent evidence that the tenant is indeed objectionable under the statute. As we stated in *Levandusky*, a single standard of review for cooperatives is preferable, and "we see no purpose in allowing the form of the action to dictate the substance of the standard by which the legitimacy of corporate action is to be measured" (*id.* at 541, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Despite this deferential standard, there are instances when courts should undertake review of board decisions. To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith.

III.

A. The Cooperative's Scope of Authority

Pursuant to its bylaws, the cooperative was authorized (through its Board) to adopt a form of proprietary lease to be used for all shareholder-tenants. Based on this authorization, defendant and other members of the cooperative voluntarily entered into lease agreements containing the termination provision before us. The cooperative does not contend that it has the power to terminate the lease absent the termination provision. Indeed, it recognizes, correctly, that if there were no such provision, termination could proceed only pursuant to RPAPL 711(1).

The cooperative unfailingly followed the procedures contained in the lease when acting to terminate defendant's tenancy. In accordance with the bylaws, the Board called a special meeting, and notified all shareholder-tenants of its time, place and purpose. Defendant thus had notice and the opportunity to be heard. In accordance with the agreement, the cooperative acted on a supermajority vote after properly fashioning the issue and the question to be addressed by resolution. The resolution specified the basis for the action, setting forth a list of specific findings as

to defendant's objectionable behavior. By not appearing or presenting evidence personally or by counsel, defendant failed to challenge the findings and has not otherwise satisfied us that the Board has in any way acted ultra vires. In all, defendant has failed to demonstrate that the cooperative acted outside the scope of its authority in terminating the tenancy.

B. Furthering the Corporate Purpose

Levandusky also recognizes that the business judgment rule prohibits judicial inquiry into Board actions that, presupposing good faith, are taken in legitimate furtherance of corporate purposes. Specifically, there must be a legitimate relationship between the Board's action and the welfare of the cooperative. Here, by the unanimous vote of everyone present at the meeting, the cooperative resoundingly expressed its collective will, directing the Board to terminate defendant's tenancy after finding that his behavior was more than its shareholders could bear. The Board was under a fiduciary duty to further the collective interests of the cooperative. By terminating the tenancy, the Board's action thus bore an obvious and legitimate relation to the cooperative's avowed ends.

There is, however, an additional dimension to corporate purpose that *Levandusky* contemplates, notably, the legitimacy of purpose—a feature closely related to good faith. Put differently, all the shareholders of a cooperative may agree on an objective, and the Board may pursue that objective zealously, but that does not necessarily mean the objective is lawful or legitimate. Defendant, however, has not shown that the Board's purpose was anything other than furthering the over-all welfare of a cooperative that found it could no longer abide defendant's behavior.

C. Good Faith, in the Exercise of Honest Judgment

Finally, defendant has not shown the slightest indication of any bad faith, arbitrariness, favoritism, discrimination or malice on the cooperative's part, and the record reveals none. Though defendant contends that he raised sufficient facts in this regard, we agree with the Appellate Division majority that defendant has provided no factual support for his conclusory assertions that he was evicted based upon illegal or impermissible considerations. Moreover, as the Appellate Division noted, the cooperative emphasized that upon the sale of the apartment it "will 'turn over [to the defendant] all proceeds after deduction of unpaid use and occupancy, costs of sale and litigation expenses incurred in this dispute.'" Defendant

does not contend otherwise.

Levandusky cautions that the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decisionmaking or favoritism. We reaffirm that admonition and stress that those types of abuses are incompatible with good faith and the exercise of honest judgment. While deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations. We note that since *Levandusky* was decided, the lower courts have in most instances deferred to the business judgment of cooperative boards but in a number of cases have withheld deference in the face of evidence that the board acted illegitimately.⁸

The very concept of cooperative living entails a voluntary, shared control over rules, maintenance and the composition of the community. Indeed, as we observed in *Levandusky*, a shareholder-tenant voluntarily agrees to submit to the authority of a cooperative board, and consequently the board “may significantly restrict the bundle of rights a property owner normally enjoys” (75 N.Y.2d at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317). When dealing, however, with termination, courts must exercise a heightened vigilance in examining whether the board’s action meets the *Levandusky* test

Notes and Questions

27.7. For further background on this dispute, including quotes from David Pullman himself, see Dan Barry, *Sleepless and Litigious in 7B: A Co-op War Ends*

⁸See e.g. *Abrons Found. v. 29 E. 64th St. Corp.*, 297 A.D.2d 258, 746 N.Y.S.2d 482 [1st Dept. 2002] [tenant raised genuine issues of material fact as to whether board acted in bad faith in imposing sublet fee meant solely to impact one tenant]; *Greenberg v. Board of Mgrs. of Parkridge Condominiums*, 294 A.D.2d 467, 742 N.Y.S.2d 560 [2d Dept. 2002] [affirming injunction against board because it acted outside scope of authority in prohibiting tenant from erecting a succah on balcony]; *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 690 N.Y.S.2d 220 [1st Dept. 1999] [business judgment rule does not protect cooperative board from its own breach of contract]; *Matter of Vacca v Board of Mgrs. of Primrose Lane Condominium*, 251 A.D.2d 674, 676 N.Y.S.2d 188 [2d Dept. 1998] [board acted in bad faith in prohibiting tenant from displaying religious statue in yard]; *Johar v. 82-04 Lefferts Tenants Corp.*, 234 A.D.2d 516, 651 N.Y.S.2d 914 [2d Dept. 1996] [board vote amending bylaws to declare plaintiff tenant ineligible to sit on cooperative board not shielded by business judgment rule]. While we do not undertake to address the correctness of the rulings in all of these cases, we list them as illustrative.

in Court, N.Y. TIMES (June 7, 2003), <https://nyti.ms/2leMd9c>.

27.8. What aspect of the Court of Appeals' analysis constitutes "heightened vigilance"?

27.9. The RESTATEMENT does not adopt the business judgment rule for review of board actions, instead applying a "reasonableness" standard. The Reporter's comments suggest that the reasonableness of an enforcement action will depend on any number of factors, including its proportionality to the resident's offensive conduct (e.g., no \$1,000 fines for a single instance of failing to sort an aluminum can for recycling), the logical relationship between the offensive conduct and the remedy (e.g., no revocation of parking privileges for breach of a pet restriction), and whether the resident was provided with sufficient notice and opportunity to respond to the managers' complaint before any enforcement action was taken. See RESTATEMENT § 6.8 & cmt. b. Elsewhere the RESTATEMENT states that board members and officers have duties of care, prudence, and fairness toward members of the community. *Id.* § 6.13 & cmt. b. Is the RESTATEMENT position consistent with *Pullman*? If not, how does it differ?

27.10. The Court of Appeals did not consider the question whether the provision in Pullman's proprietary lease allowing the cooperative to kick him out on grounds that he was "objectionable" should be enforceable as a general matter. If it had, what do you think would have been the result? Does it matter which standard—reasonableness or the more permissive standard applicable to CC&Rs—applies? Which do you think ought to apply to the covenants in the proprietary leases of a cooperative?

27.11. Say you live in a residential neighborhood unencumbered by any restrictive covenants. Could you and your neighbors come together and decide to sell an unfriendly neighbor's house over his objection? If not, what additional facts make it possible for the residents of 40 West 67th Street (a Tudor-style luxury pre-war apartment building half a tree-lined block from Central Park) to vote Pullman out of the apartment he bought in their building?

27.12. Common-interest communities are sometimes likened to miniature private governments. (Recall Norman's description of condominium owners as "a little democratic sub society.") The analogy holds up somewhat: they hold elections, the elected leaders can pass rules that all are bound to follow; they can assess fines for breaking the rules; they can levy the equivalent of taxes to fund common services. There are, of course, important differences—not least failure to adhere to the principle of one-person-one-vote. But *Pullman* suggests another distinction: could any government officer or entity in the United States do to one of its citizens what Pullman's neighbors did to him? If not, what are the

limits on government authority that would prevent such action, and what are the justifications for those limits? Do these justifications carry less force in the context of the enforcement of servitudes by the managers of a common-interest community?