

# Open Source Property

## Volume II

Stephen Clowney, James Grimmelmann, Michael Grynberg,  
Jeremy Sheff, and Rebecca Tushnet

This build edited by Charles Duan

2025 Edition

Last updated December 31, 2024



# Contents

## VOLUME I

<b>About This Book</b>	<b>xiii</b>
<b>I Beginnings</b>	<b>1</b>
<b>1 Theory of Property</b>	<b>3</b>
1.1 What Is Property? . . . . .	4
Hohfeld, <i>Fundamental Legal Conceptions</i> . . . . .	4
Merrill & Smith, <i>What Happened to Property</i> . . . . .	10
1.2 Why Have Property Law? . . . . .	14
1.3 Subject Matter . . . . .	18
<i>United States v. Turoff</i> . . . . .	20
<b>2 Intellectual Property</b>	<b>31</b>
2.1 Overview of Types . . . . .	32
2.2 Copyrights . . . . .	35
<i>Feist Publications, Inc. v. Rural Telephone Service Co.</i> . . . . .	35
2.3 Patents . . . . .	40
<i>Oil States v. Greene's Energy</i> . . . . .	41
2.4 Publicity Rights . . . . .	50
<i>White v. Samsung Electronics America, Inc.</i> . . . . .	50
<b>II Exclusion</b>	<b>63</b>
<b>3 The Right to Exclude</b>	<b>65</b>

	Blackstone, <i>Commentaries on the Laws of England</i> . . . . .	65
	<i>Jacque v. Steenberg Homes, Inc.</i> . . . . .	67
3.1	Terminology . . . . .	71
3.2	Limits . . . . .	73
	<i>Marsh v. Alabama</i> . . . . .	73
	<i>State of New Jersey v. Shack</i> . . . . .	79
3.3	Intellectual Property . . . . .	84
	<i>Campbell v. Acuff-Rose Music, Inc.</i> . . . . .	84
<b>4</b>	<b>Property Boundaries</b>	<b>95</b>
4.1	Land . . . . .	95
	<i>Walters v. Tucker</i> . . . . .	95
4.2	Airspace . . . . .	100
	<i>Hinman v. Pacific Air Transport</i> . . . . .	100
4.3	Radio Spectrum . . . . .	105
	<i>Tribune Co. v. Oak Leaves Broadcasting Station</i> . . . . .	105
4.4	Intellectual Property . . . . .	118
	<i>Steinberg v. Columbia Pictures Industries, Inc.</i> . . . . .	120
<b>III</b>	<b>Possession</b>	<b>131</b>
<b>5</b>	<b>Possession of Personal Property</b>	<b>133</b>
5.1	Finders . . . . .	134
	<i>Armory v. Delamirie</i> . . . . .	134
	Other Variations on <i>Armory</i> . . . . .	136
	<i>McAvoy v. Medina</i> . . . . .	139
5.2	Improvers . . . . .	142
	<i>Wetherbee v. Green</i> . . . . .	143
5.3	Bailments . . . . .	149
	<i>Allen v. Hyatt Regency-Nashville Hotel</i> . . . . .	149
<b>6</b>	<b>Adverse Possession</b>	<b>163</b>
6.1	Adverse Possession Rationales . . . . .	164
	<i>Tieu v. Morgan</i> . . . . .	166
6.2	“Hostility” and Intent . . . . .	177
	<i>Cahill v. Morrow</i> . . . . .	177
6.3	Finer Points of Adverse Possession Law . . . . .	186

6.4 Adversely Possessing Trademarks? . . . . .	189
<i>Freecycle Network v. Oey</i> . . . . .	189
<b>IV Transfers</b>	<b>193</b>
<b>7 Formalities</b>	<b>195</b>
7.1 Deeds . . . . .	196
Indiana Code . . . . .	197
<i>Loughran v. Kummer</i> . . . . .	198
7.2 Wills and Intestacy . . . . .	201
Fuller, <i>Consideration and Form</i> . . . . .	203
Langbein, <i>Substantial Compliance with the Wills Act</i> . .	204
<i>Stevens v. Casdorph</i> . . . . .	204
Maryland Code, Estates and Trusts . . . . .	209
7.3 Gifts . . . . .	210
<i>In re Estate of Evans</i> . . . . .	211
Gifts <i>Causa Mortis</i> . . . . .	218
<b>8 Protecting Buyers</b>	<b>223</b>
8.1 Good Faith Purchasers . . . . .	224
Uniform Commercial Code . . . . .	224
<i>Kotis v. Nowlin Jewelry, Inc.</i> . . . . .	225
Note on Negotiability . . . . .	231
8.2 Theft and Fraud . . . . .	235
<i>Harding v. Ja Laur</i> . . . . .	235
8.3 Warranties of Title . . . . .	238
New York Real Property Law . . . . .	238
<i>McMurray v. Housworth</i> . . . . .	240
8.4 Recordation . . . . .	245
<i>Argent Mortgage Co. v. Wachovia Bank N.A.</i> . . . . .	246
Recordation Statutes . . . . .	250
<b>V Operation of Law</b>	<b>253</b>
<b>9 Estates and Future Interests</b>	<b>255</b>
9.1 Concepts, Vocabulary, and Conventions . . . . .	259

9.2	Basic Estates and Future Interests . . . . .	260
9.2.1	The Fee Simple Absolute . . . . .	260
9.2.2	The Life Estate . . . . .	261
9.2.3	The Reversion . . . . .	261
9.2.4	The Remainder . . . . .	262
9.3	Working Out Problems . . . . .	263
9.4	Stepping Back . . . . .	267
<b>10</b>	<b>Issues with Estates</b>	<b>269</b>
10.1	Construing Ambiguous Grants . . . . .	269
	<i>In the Estate of Dalton Edward Craigen</i> . . . . .	269
10.2	Waste . . . . .	274
	<i>Jackson v. Brownson</i> . . . . .	275
	Note on Ameliorative Waste . . . . .	280
10.3	Controlling Future Uses . . . . .	281
	<i>Ford v. Allen</i> . . . . .	283
	<i>Wills v. Pierce</i> . . . . .	288
	<i>Smedley v. City of Waldron</i> . . . . .	291
<b>11</b>	<b>Security Interests</b>	<b>293</b>
11.1	Real Estate Mortgages . . . . .	294
11.2	Foreclosure Abuses . . . . .	299
	<i>Klem v. Washington Mutual Bank</i> . . . . .	301
11.3	Liens . . . . .	311
	<i>Williams v. Ford Motor Credit Co.</i> . . . . .	311
	<i>M&amp;I Western State Bank v. Wilson</i> . . . . .	317
<b>VI</b>	<b>Leases</b>	<b>327</b>
<b>12</b>	<b>Leases: Types and Lifecycle</b>	<b>329</b>
12.1	Types of Leasehold . . . . .	330
	<i>Effel v. Rosberg</i> . . . . .	333
12.2	Assigning and Subletting . . . . .	337
12.3	Abandonment . . . . .	343
	<i>Sommer v. Kridel</i> . . . . .	343
12.4	Eviction . . . . .	351
	<i>Berg v. Wiley</i> . . . . .	352

<b>13 Leases: Landlord Duties</b>	<b>361</b>
13.1 The Covenant of Quiet Enjoyment . . . . .	362
<i>Fidelity Mutual Life Insurance Co. v. Kaminsky</i> . . . . .	363
13.2 The Implied Warranty of Habitability . . . . .	369
<i>Hilder v. St. Peter</i> . . . . .	369
13.3 Retaliatory Eviction . . . . .	381
<i>Imperial Colliery Co. v. Fout</i> . . . . .	381
13.4 Wrapping Up . . . . .	386

## VOLUME II

<b>VII Simultaneous Owners</b>	<b>393</b>
<b>14 Concurrent Ownership</b>	<b>395</b>
14.1 Tenancy in Common . . . . .	395
14.1.1 Rights and Duties of Tenants in Common . . . . .	396
<i>Martin v. Martin</i> . . . . .	396
14.1.2 Partition . . . . .	405
<i>Delfino v. Vealencis</i> . . . . .	405
14.2 Joint Tenancy . . . . .	414
14.2.1 Creating a Joint Tenancy . . . . .	415
14.2.2 Severance of a Joint Tenancy . . . . .	416
<i>Harms v. Sprague</i> . . . . .	418
<b>15 Institutional Ownership</b>	<b>429</b>
15.1 Trusts . . . . .	430
Note on Trusts . . . . .	430
<i>Rothko v. Reis (In re Estate of Rothko)</i> . . . . .	431
15.2 Corporations . . . . .	440
The Corporation . . . . .	440
<i>Walkovszky v. Carlton</i> . . . . .	441
15.3 Family Ownership . . . . .	445
15.3.1 Tenancy by the Entirety . . . . .	446
<i>United States v. Craft</i> . . . . .	446
15.3.2 Community Property . . . . .	459

<b>16 Easements</b>	<b>463</b>
16.1 What Is an Easement? . . . . .	463
16.2 Express Easements . . . . .	465
16.3 Implied Easements . . . . .	466
16.3.1 Easement Implied by Existing Use . . . . .	466
16.3.2 Easements by Necessity . . . . .	469
<i>Thomas v. Primus</i> . . . . .	469
16.4 Prescriptive Easements . . . . .	475
<i>Felgenhauer v. Soni</i> . . . . .	475
16.5 Irrevocable Licenses . . . . .	480
<i>Richardson v. Franc</i> . . . . .	480
16.6 Transferring Easements . . . . .	487
16.7 Terminating Easements . . . . .	488
16.8 Negative Easements/Conservation Easements . . . . .	489
16.9 Public Use Rights . . . . .	489
<i>Lawrence v. Clark County</i> . . . . .	490
<i>Matthews v. Bay Head Imp. Ass'n</i> . . . . .	492
<b>VIII Conflicts</b>	<b>499</b>
<b>17 Allocation</b>	<b>501</b>
17.1 Animals . . . . .	501
<i>Pierson v. Post</i> . . . . .	501
<i>Ghen v. Rich</i> . . . . .	511
17.2 Baseballs . . . . .	515
<i>Popov v. Hayashi</i> . . . . .	515
17.3 Plays . . . . .	525
<i>Erickson v. Trinity Theatre, Inc.</i> . . . . .	526
17.4 Conquest . . . . .	530
<b>18 Conflicts Across Property Types</b>	<b>533</b>
18.1 Land Versus Chattels: Ratione Soli . . . . .	533
18.2 Land Versus Chattels: Fugitive Resources . . . . .	535
<i>Tyler v. Wilkinson</i> . . . . .	536
<i>Coffin v. Left Hand Ditch Co.</i> . . . . .	540
<i>Briggs v. Southwestern Energy Production Company</i> . . . . .	544
18.3 Intellectual Versus Tangible Property . . . . .	559

<i>Impression Products, Inc. v. Lexmark International, Inc.</i>	559
<b>19 Nuisance</b>	<b>567</b>
19.1 The Problem of Nuisance Definition . . . . .	568
<i>Puritan Holding Co. v. Holloschitz</i> . . . . .	569
19.2 Adjudicating Nuisance . . . . .	573
<i>Sans v. Ramsey Golf &amp; Country Club, Inc.</i> . . . . .	573
Note on the Clarity of Rights and Coase . . . . .	581
19.3 Remedies . . . . .	585
Note on “Property Rules” and “Liability Rules” . . . . .	585
<i>Spur Industries, Inc. v. Del E. Webb Development Co.</i> . . . . .	588
<b>IX Covenants</b>	<b>597</b>
<b>20 Restrictive Covenants</b>	<b>599</b>
20.1 Introduction . . . . .	599
<i>Tulk v. Moxhay</i> . . . . .	600
20.2 Creation of an Enforceable Restrictive Covenant . . . . .	607
<i>Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank</i> . . . . .	608
Restatement (Third) of Property (Servitudes) . . . . .	615
20.3 Modification and Termination of Covenants . . . . .	617
<i>El Di, Inc. v. Town of Bethany Beach</i> . . . . .	617
<b>21 Common-Interest Communities</b>	<b>625</b>
21.1 Types . . . . .	626
21.1.1 Homeowners Associations . . . . .	626
21.1.2 Condominiums . . . . .	627
21.1.3 Cooperatives . . . . .	628
21.2 Rulemaking Authority . . . . .	630
<i>Hidden Harbour Estates, Inc. v. Norman</i> . . . . .	630
<i>Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.</i> .	634
21.3 Enforcement of Rules and Covenants . . . . .	642
<i>40 West 67th Street v. Pullman</i> . . . . .	642

<b>X Property and Society</b>	<b>653</b>
<b>22 Zoning</b>	<b>655</b>
22.1 Euclidean Zoning . . . . .	655
<i>Euclid v. Ambler Realty Co.</i> . . . . .	656
22.2 Nonconforming Uses . . . . .	664
<i>Hoffmann v. Kinealy</i> . . . . .	664
22.3 Variances . . . . .	673
<i>Matthew v. Smith</i> . . . . .	675
Fischel, The Evolution of Zoning Since the 1980s . . . . .	682
22.4 The Americans with Disabilities Act . . . . .	684
The ADA and City Governments: Common Problems .	684
<b>23 Fundamental Rights</b>	<b>687</b>
23.1 Redlining . . . . .	687
23.1.1 History . . . . .	687
23.1.2 Lasting Impact . . . . .	691
23.1.3 Overcoming the Legacy of Redlining . . . . .	694
23.2 Racially Restrictive Covenants . . . . .	697
<i>Shelley v. Kraemer</i> . . . . .	697
23.3 Family Status Zoning . . . . .	706
<i>City of Ladue v. Horn</i> . . . . .	706
<b>24 Takings</b>	<b>719</b>
24.1 What Qualifies as a Taking . . . . .	719
<i>Ruckelshaus v. Monsanto Co.</i> . . . . .	719
24.2 “Public Use” . . . . .	730
<i>Kelo v. City of New London, Conn.</i> . . . . .	730
24.3 Eminent Domain Operations . . . . .	739
24.4 Just Compensation . . . . .	739
24.5 Exactions . . . . .	741
<i>Dolan v. City of Tigard</i> . . . . .	742
<b>25 Regulatory Takings</b>	<b>753</b>
25.1 The <i>Penn Central</i> Test . . . . .	754
<i>Penn Central Transportation Co. v. City of New York</i> . .	754
25.2 “Wipeouts” . . . . .	763
<i>Lucas v. South Carolina Coastal Council</i> . . . . .	763

25.3 Physical Occupations . . . . .	774
<i>Cedar Point Nursery v. Hassid</i> . . . . .	775



## **Part VII**

# **Simultaneous Owners**



# Chapter 14

## Concurrent Ownership

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 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. 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?

This chapter will consider two contemporary forms of concurrent ownership: tenancy in common, and joint tenancy with rights of survivorship. Additional forms of concurrent ownership will be covered in the next chapter.

### 14.1 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.

### 14.1.1 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.** Can a "constructive ouster" occur without one of the cotenants explicitly barring another from possession? Though this question can arise in a variety of contexts (what if the property is physically too small for all the cotenants to live in?), a common one is separation or divorce of a couple. Should the

person moving out be considered “constructively ousted” and entitled to rent from the significant other retaining possession? *Compare Stylianopoulos v. Stylianopoulos*, 455 N.E.2d 477 (Mass. Ct. App. 1983) (yes), with *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D.N.J. 1986) (no). See also *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).

**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); Johnie 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.** A cotenant can adversely possess the share of another cotenant. But it is typically much more difficult to show the elements of adverse possession (which ones?), because the ordinary expectation is that each cotenant may possess the entire property. Compare *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"), with *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).

14.12. **Intangible assets.** *Erickson v. Trinity Theatre*, presented later in this book, discusses joint ownership of copyrights. ("Joint" here does not refer to joint tenancy; it is an unfortunately imprecise colloquialism in copyright law.) When you read that case, compare the rules of copyright ownership among multiple authors with the rules of tenancy in common here.

**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?

### 14.1.2 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,<sup>1</sup> of property owned 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 un-

---

<sup>1</sup>General 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 such sale as it deems necessary for the security of all persons having any interest in such land.”

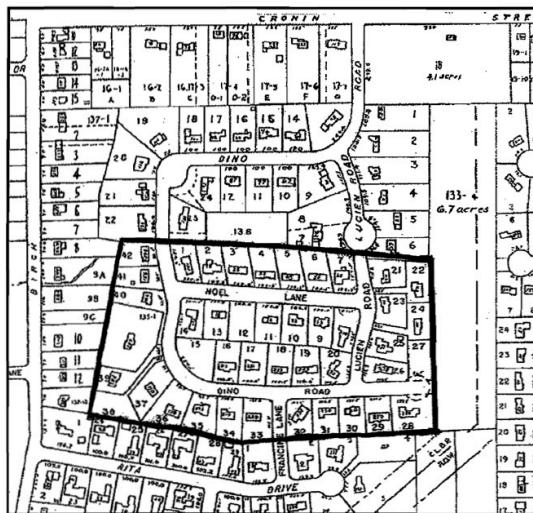


Figure 5-1  
Subdivision plot plan for the 20.5-acre parcel

**Figure 14.1:** Subdivision plot plan for the 20.5 acre parcel

divided 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.<sup>3</sup> 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 partition 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

<sup>3</sup>The 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.

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.<sup>7</sup> 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 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.

---

<sup>7</sup>If the physical partition results in unequal shares, a money award can be made from one tenant to another to equalize the shares.

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 partition 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 business<sup>13</sup> 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.

---

<sup>13</sup>It 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.**<sup>1</sup> 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 CARDOZO 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?

---

<sup>1</sup>This 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.”

**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 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, heterogenous 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 oweltiy 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.”

**14.18. Heirs’ property.** When a property owner dies without a will, the state intestacy laws often divide ownership across multiple relatives, giving each a share as a tenant in common. Over multiple generations of intestacy, ownership can become highly fractionated. This is unfortunately common for families lacking access to legal resources, or those struck by disaster (say, in New Orleans after Hurricane Katrina).

If this “heirs’ property” becomes 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.

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.

**14.19. 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 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).

**14.20. 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.

14.21. **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); Ronen 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?

## 14.2 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.<sup>2</sup>

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 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).

---

<sup>2</sup>Note 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.

### 14.2.1 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 contrary<sup>3</sup>):

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.

A conveyance “to Alice and Beth as joint tenants, and not as tenants in common,” will create a joint tenancy in most states. “Joint” alone, however, may not be enough insofar as it might indicate a colloquial sense of ownership together, rather than the particular legal device. *Compare Downing v. Downing*, 606 A.2d 208 (Md. 1992) (“to A and B as joint tenants” creates joint tenancy), with *Taylor v. Taylor*, 17 N.W.2d 745 (Mich. 1945) (“jointly,” absent further circumstantial evidence, does not suffice to create joint tenancy). Some states require a specific invocation of a right of

---

<sup>3</sup>At 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).

survivorship. See, e.g., *Hoover v. Smith*, 444 S.E.2d 546 (Va. 1994). But in other states, language like “as joint tenants with the right of survivorship” might create life estates in the supposedly joint tenants, with the remainder to the survivor after one dies. See *Hunter v. Hunter*, 320 S.W.2d 529 (Mo. 1959); *Snover v. Snover*, 502 N.W.2d 370 (Mich. Ct. App. 1993). 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” 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), for example, considered a deed from a mother conveying property to three children “jointly and severally, and unto their heirs, assigns and successors forever.” There was substantial evidence of intent to create a joint tenancy with right of survivorship: one of the children 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. Nevertheless, the court of appeals noted that the conveyance contained no express language indicating a right of survivorship, so the state’s default statutory policy, favoring tenancy in common absent express language to the contrary, overrode the mother’s intent.

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?

### 14.2.2 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 (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 character 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 ju-

risdictions 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**

14.22. 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?

14.23. 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?

14.24. 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).

14.25. 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?

**14.26. 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 Gulleedge*, 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; Helmholtz 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 Helmholtz 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). Helmholtz 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.

**14.27. 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 co-tenant 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).

14.28. **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?

14.29. **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.

14.30. **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/nondepositor 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 nondepositor—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 Abbie? 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.

**14.31. 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.



# Chapter 15

## Institutional Ownership

This book began with a premise that property is a relationship between people and (tangible or intangible) things. Most often, the relationship is direct—a person is the owner of a thing, enjoying property rights against the world. But that is not the only arrangement. People can also have indirect relationships with property, through a legally created entity. The people own and control an entity, and the entity owns and controls some property. But there is not necessarily transitivity: The people do not necessarily own or control the property.

In this chapter, we will explore three of these institutional arrangements of property ownership:

- First is the **trust**, an arrangement in which one person (or property-holding entity) holds property for the benefit of another.
- Second, there are a variety of business associations that have the power to hold property as an independent legal entity, such as partnerships, limited liability companies, and professional associations. A full treatment of these is a matter for a business associations course; here our focus will be on one type of association, the **corporation**.
- Third, marriage is an institution that can hold property. As we will see, property ownership within a marriage can have its own special rules, and in some respects can resemble corporate ownership.

As you read, pay close attention to the structure of relationships. Be diligent about tracking legal entities and their relationships with people and property, and be careful not to mix them up. You will be rewarded with a new set of powerful tools for arranging ownership and affairs.

## 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 Alywin 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, because 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 distributions 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 wrong 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:<sup>\*</sup>

- 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 agree-

---

<sup>\*</sup>The list formatting has been added to improve readability. —Eds.

ment 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 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.
- ....

In seeking a reversal, it is urged that an improper legal standard was applied in voiding the estate contracts of May, 1970 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.<sup>2</sup> [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. . . . 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.

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

---

<sup>2</sup>In 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.

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<sup>t</sup> 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 increases 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 expense 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



**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.”

\$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. In *Eyerman v. Mercantile Trust Co.*, a court 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

### The Corporation\*

In HOLGER SPAMANN & JENS FRANKENREITER, CORPORATIONS (3d ed. 2023), [link](#)

Formally speaking, a corporation is nothing but an *abstraction* to which we assign rights and duties. It exists independently of humans in the sense that it has indefinite life, and its assets and obligations are legally separate from those of any humans involved in its founding or administration. . . .

Of course, being an abstraction rather than a real person, the corporation cannot exercise its rights, discharge its duties, or consume its profits by itself. Human beings must act on its behalf and ultimately consume its profits, if any. . . . The basic *default governance* is simple: (common) shareholders elect the board of directors, which formally manages the corporation, mostly by appointing the chief executive officer and other top management, who in turn act on behalf of the corporation in day-to-day matters. As to consuming the profits, the board may decide to distribute available funds to shareholders—or not. . . .

To make this more concrete, think of your local pizza store. Perhaps it is called “Olivia’s Pizza,” and Olivia indeed runs the place. You might think that Olivia is the “owner” of the store. In all likelihood, however, the formal “owner” of the pizza place—or rather the contracting party on the relevant contracts—is actually a corporation. The corporation might be called “Olivia’s Pizza Place Inc.” or “XYZ Corp.” for that matter. XYZ Corp. might be (a) the lessee under any lease contract for the store building or other leased items, (b) the employer of any employees, (c) the owner of any real estate or chattel such as the pizza oven or the store sign, and (d) the contracting party with the payment system operator (so your payment for the pizza might show up under “XYZ Corp.” on your credit card statement). . . .

---

\*This content has been made available under a Creative Commons Attribution-Noncommercial-Sharealike 3.0 Unported license, [link](#). Citations have been removed, and other alterations are indicated. —Eds.

One benefit of incorporating can be convenience in contracting in certain transactions. If Olivia ever wanted to sell the pizza place after incorporating, she would just sell the corporation—a single asset (or to be more precise, all her shares in the corporation, still just one collection of a uniform asset). By contrast, as a single owner, she would have to transfer all the assets individually.

Another convenience is that incorporating changes the default rule from unlimited liability to **limited liability**. The default rule for corporations is that shareholders, directors, and corporate officers are not liable for corporate debts (but they do stand to lose any assets they invested in the corporation as shareholders: hence the expression “limited liability” rather than “no liability”). By contrast, the default rule for single owners is the same as that for any other individual debt: full liability except for protection under the bankruptcy code. . . .

Another benefit is **entity shielding**. Entity shielding refers to a liability barrier in the opposite direction: Olivia’s personal creditors cannot demand payment or seize any assets from XYZ Corp. The personal creditors can only seize Olivia’s shares in XYZ Corp. Entity shielding is extremely useful because it allows those interacting with XYZ Corp. to focus their attention on the pizza store’s assets and financial prospects, and not worry about Olivia’s other businesses. Imagine for example that Olivia also runs a construction business in a different city. Without entity shielding, creditors from the construction business might seize assets of the pizza store, and vice versa. As a consequence, the two businesses’ financial health could not be assessed independently of each other. By contrast, with entity shielding, a bank making a loan to develop the pizza store need only assess the financial prospects of the pizza store, i.e., XYZ Corp. And if the construction business does fail, XYZ Corp. can nevertheless continue business as usual.

### *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 sharehold-

ers 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.

## 15.3 Family Ownership

The institution of marriage is another legal vehicle for property ownership. A married couple can hold property in two special forms that unmarried couples cannot: in **tenancy by the entirety**, and as **community property**. Each of these special forms offers distinct benefits, rules, and consequences.

As with other forms of concurrent ownership, you should be able to identify the formation requirements, the powers and duties of the co-tenants, and the rules for dissolution of these marital property structures. Indeed, typically marital property is included in the same chapter as tenancy in common and joint tenancy. But there are also similarities to corporate ownership and trusts—see if you can find them.

One additional thought to consider: these forms of property are limited to married people. Is it fair that the special features and benefits of tenancy by the entirety and community property are limited in this way? And can you creatively devise structures that enable unmarried people to own property with the same, or at least similar, features and benefits?

### 15.3.1 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 order to understand these rights, the tenancy by the entirety must first be placed in some context. . . .

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. . . .

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.

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 authorizing 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 decide 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*, *supra* (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.<sup>5</sup> . . . With such rights subject to lien, the taxpayer’s interest has “ripen[ed] into a present

---

<sup>5</sup>Even 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 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;

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 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 prop-

---

options; the taxpayer’s interest in an employee benefit plan or individual retirement account).

erty 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**

15.13. *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?

15.14. **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).

15.15. **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, discussed in the unit on Mortgages.

15.16. **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).

15.17. **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).

15.18. **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 pen-

sions and other benefits, which became more important as those types of assets became more significant throughout the twentieth century.

### 15.3.2 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.

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.

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.

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.

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,<sup>1</sup> 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 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 CARDozo L. REV. 1925 (2009) (arguing that marital property rules, particularly in community property states, create perverse incentives toward divorce).

---

<sup>1</sup>In the absence of agreement to the contrary or deliberate misappropriation of community property by one spouse.



# Chapter 16

## Easements

### 16.1 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.<sup>1</sup> A **negative easement** prohibits the owner of the servient

---

<sup>1</sup>If 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 à prendre* or

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.<sup>2</sup> As a matter of history, however, easement law developed as a distinct set of doctrines, and this chapter gives them separate treatment.<sup>3</sup>

---

**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.

<sup>2</sup>A 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 a later chapter.

<sup>3</sup>Moreover, 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 RESTATE-**

## 16.2 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); *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 476-77 (1972) (describing the traditional reservation rule as “clearly an inappropriate feudal shackle today”). 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).

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.

---

MENT 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.

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?

## 16.3 Implied Easements

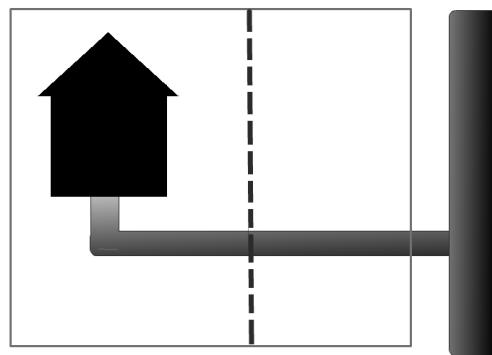
Easements may come into being without explicit agreements. They may arise from equitable enforcement of implied agreements or references to maps or boundary references in conveyances. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.13. In this section, we focus on two forms of implied easements: An **easement implied by existing use** and an **easement by necessity**. Both such easements commonly arise as a byproduct of land transactions.

### 16.3.1 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 16.1.

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



**Figure 16.1:** A divided parcel of land with a sewer line running through both lots.

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 transerrer.

*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

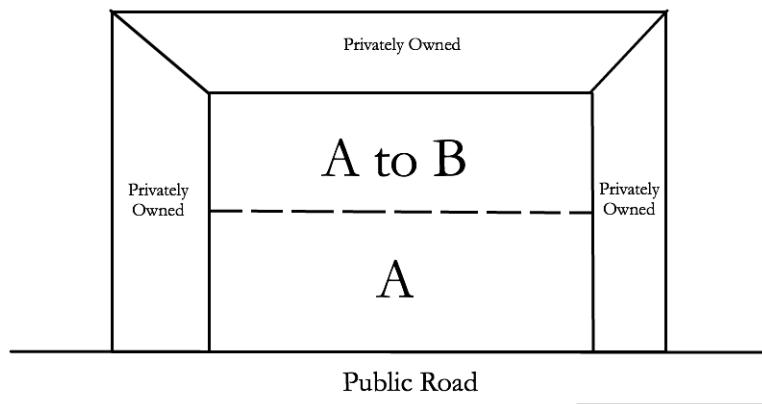
**16.1. Common Ownership.** Are easements implied by prior existing use fair to owners of subdivided land? Why shouldn't we require purchasers of subdivided lots to "get it in writing"—that is, to bargain for easements to obvious and necessary amenities when accepting a parcel carved out from a larger 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 grantees, 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 grantees. *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.”).

**16.2. 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).

**16.3. What is apparent?** Should home purchasers be expected to investigate the state of utility lines upon making a purchase? The RESTatement (THIRD) OF



**Figure 16.2:** A “landlocked” parcel of land.

PROPERTY (SERVITUDES) reports that most cases to 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?

### 16.3.2 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 16.2.

***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 ease-

ment 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.<sup>1</sup> 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.

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

---

<sup>1</sup>The 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.

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.<sup>2</sup>

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

---

<sup>2</sup>The 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.

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 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

16.4. 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).

16.5. *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.”).

16.6. 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.”).

16.7. 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).

## 16.4 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 Felgenhausers' 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 Felgenhauers 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 Felgenhauers sold their restaurant business, but not the real property, to James and Ann Enloe. The Enloes leased the property from the Felgenhauers. 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

16.8. **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.*

16.9. 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?

16.10. **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



**Figure 16.3:** Image by Bryan Costales, used under a Creative Commons Attribution 4.0 International license.

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).

*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), [link](#) (“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.’ ”).

## 16.5 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)

#### **RUVOLLO, 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 15-10-15-11, 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 uninterrupted 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**

16.11. 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?

16.12. Is landscaping important enough to justify the intrusion into property ownership interests? What do you think would have happened had the appellants won?

16.13. 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?

**16.14. Assigning licenses.** *Richardson* affirms a trial court's determination of an "irrevocable parol license for both respondents, and respondents' successors-in-interest." Is the benefit of a license assignable to others along with the underlying land, like an easement appurtenant? The authorities pretty uniformly say no: "an irrevocable license is a nontransferable personal interest." JON W. BRUCE ET AL., THE LAW OF EASEMENTS AND LICENSES IN LAND § 11:9 (2024) (citing *Blackburn v. Lefebvre*, 976 So. 2d 482, 493-94 (Ala. Civ. App. 2007); *Shearer v. Hodnette*, 674 So. 2d 548, 551 (Ala. Civ. App. 1995)); RESTATEMENT (FIRST) OF PROPERTY § 517, cmt. a (2024) ("Privileges of use constituting licenses often arise out of relations that are highly personal. Where they do so arise they are commonly intended to constitute privileges personal to the licensee alone."). Even the very section of the treatise that *Richardson* itself cites states, "The privilege conferred by a license is personal to the licensee and cannot be inherited, conveyed, or assigned" under California law. HARRY D. MILLER ET AL., MILLER & STARR CALIFORNIA REAL ESTATE § 15:2 (4th ed. 2023).

Is *Richardson* inconsistent with its own authorities? It is possible that the court thought this license unusual and thus assignable, but the opinion offers no reasoning along these lines. A better explanation is that the Francs' attorney simply didn't make the point. In relevant part, the Francs' appellate brief levies three arguments against the scope of the irrevocable license: (1) that the license should have a time limit, (2) that the license "took fee title" away from the Francs, and (3) that it was unclear how much new planting was allowed under the license. Opening Brief of Appellants Greg and Terrie Franc at 37-40, *Richardson v. Franc*, 182 Cal. Rptr. 3d 853 (Cal. App. July 25, 2013) (No. A137815). The brief did not specifically argue that licenses were personal and not transferable, and so the appellate court may not have had occasion to question that aspect of the judgment.

## 16.6 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.

## 16.7 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 tenement 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 dis-

covered by reasonable inspection or inquiry.” RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 7.14 (2000).

## 16.8 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.

## 16.9 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, 14 S.Ct. 548, 38 L.Ed. 331 (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 situations

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

16.15. 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.

16.16. 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?

16.17. **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.”).

16.18. **Politics!** Do not overlook the role of the political process in questions of beach access. Following the *Gion* ruling noted above, the California legislature

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*?

16.19. **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).

16.20. **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 purposes. 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).

16.21. 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 ENVTL. 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 limiting the independence of newly emancipated African-American farmers. Saw-

ers, *supra*, at 681-84; R. Ben Brown, *Free Men and Free Pigs: Closing the Southern Range and the American Property Tradition*, 108 RADICAL HISTORY REVIEW 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.”).



# **Part VIII**

# **Conflicts**



# Chapter 17

## Allocation

So far we have looked at the rights that property owners have against the world, and considered the wide spectrum of ways in which ownership can be shared or divided. The next few chapters turn to a new category of problems: conflicts between property owners, and how the law resolves those conflicts.

Four such conflicts are explored. This chapter deals with conflicts of initial acquisition—when two people claim to have gained ownership over the same resource. Next, we consider conflicts between different classes of property—when real property rights clash with personal property, or intellectual property clashes with tangible property. We then turn to the problem of nuisance—when one property owner's use interferes with another's. The common question to ask across these chapters: How do courts decide which property right must yield to the other, and why? Finally, we'll round out the discussion of property-versus-property conflicts with a mechanism for property owners to negotiate out private resolutions, called covenants.

### 17.1 Animals

#### *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,



**Figure 17.1:** Source: R.S. SURTEES, HAWBUCK GRANGE 197 (1885), British Library, [link](#).

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 circumstances 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,

---

\* 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.

‡ This citation, and the following citation to *Salk.*, both refer to the case of *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 11 East 574 (Q.B. 1707). —Eds.

from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.<sup>§</sup>

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 court thus constituted, the skin and carcass of poor *reynard*<sup>¶</sup> 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 correc-

---

<sup>§</sup> Translation: "by reason of the soil." —Eds.

<sup>¶</sup> 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.

tion 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*,”<sup>||</sup> and although “*de mortuis nil nisi bonum*,”<sup>\*\*</sup> 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*,”<sup>††</sup> 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 to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*,<sup>‡‡</sup> 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,

<sup>||</sup> Translation: “enemy of the human race.” —Eds.

<sup>\*\*</sup> Translation: “Of the dead say nothing but good.” —Eds.

<sup>††</sup> Translation: “Under frigid Jove” (*i.e.*, under a cold sky). —Eds.

<sup>‡‡</sup> 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.

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 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

**17.1. What the Fox?** *Pierson* is perhaps the most celebrated case in American property law, and scholars have delighted in debating its history and theory. Among other things, research has shown that the case's presentation of the facts is incomplete and likely misleading.

Lodowick Post and Jesse Pierson were young men of well-to-do families. The Piersons were local farmers and longtime residents of the Southampton area where the case took place, and the Posts were more recent newcomers who had made their fortune in business (Lodowick's father Nathan Post may have been a whaling ship captain). Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. 735, 744–45 (2007). Fox hunting was typically seen by upper-class New Yorkers as a leisure sport, the agricultural New Englanders would have treated foxes as dangerous vermin who stole farmers' chickens. See Bethany Berger, *It's Not About the Fox: The Untold Story of Pierson v. Post*, 55 DUKE L.J. 1089, 1131–33 (2006); Angela Fernandez, *The Lost Record of Pierson v. Post, the Famous Fox Case*, 27 LAW & HIST. REV. 149, 166 (2009); McDowell, *supra*, at 764. Southampton, at the eastern end of Long Island and closer to Connecticut than New York City, was "thus on a boundary, of sorts," between these cultural and professional difference.

The case report describes the land on which the fox was found as "wild and uninhabited, unpossessed and waste." But it may have been a community-owned pasture in which the Piersons had an ownership share. See Berger, *supra*, at 1120–21. In any event, the fox was found not far from Pierson's house, suggesting that Pierson may have killed the fox to protect his chickens. See Fernandez, *supra*, at 167–68. Pierson was not himself hunting, but saw the fox run down a well and clubbed it to death. See *id.* at 166. Post arrived and demanded the body of the fox, to which Pierson apparently responded, "it may be you was going to kill him, but you did not kill him. I was going to kill him and did kill him." *Id.* (quoting H.P. Hedges, *Pierson vs. Post*, SAG-HARBOR EXPRESS, Oct. 24, 1895, at 1).

Despite serious flaws in litigation procedure, the New York Supreme Court plainly saw the case as an opportunity to develop the law, and waited for over two years to issue an opinion. See *id.* at 172–75. As one scholar notes, the opinions' citation to Roman and civil law rather than Blackstone and common law suggests the court's desire to reject English law after the American Revolution. See Berger, *supra*, at 1135–36. Furthermore, the judges' backgrounds may have played a role in their conceptions of property: The Livingston family was one of the largest landowners

in New York state, renting their property to thousands of tenant farmers; Tompkins' parents were tenant farmers who rented land. See *id.* at 1138–39.

What of this informs your understanding of the outcome of the case? The New England–New York cultural divide? The different interests of farmers and leisure hunters with respect to foxes? The title ownership of the land? English versus American norms? Something else? And is this case really about the initial allocation of property, as most textbooks suggest? See *id.* at 1142; Joseph William Singer, *Starting Property*, 46 St. Louis U. L.J. 565, 569–70 (2002) (“*Pierson* is not about the means of initial acquisition but rather concerns social relationships.”).

17.2. **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

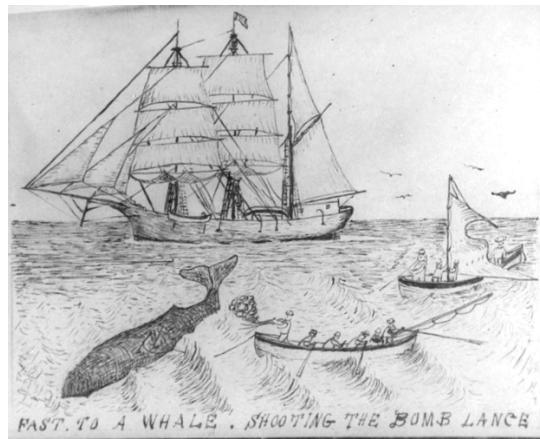
violence among rival claimants? Does it encourage would-be claimants to expend resources on protecting themselves *against other* would-be claimants, instead of on more productive pursuits? When weighing these incentives in the aggregate, is the rule *efficient*? That is, does it extract the greatest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

17.3. **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, under the traditional English doctrine that “all the land in the kingdom is supposed to be holden, mediately or immediately, of the king” who confers title (and titles, like Duke or Count) on supporters. 2 BLACKSTONE, *COMMEN-TARIES* \*59.)



**Figure 17.2:** Source: “Fast to a whale, shooting the bomb lance.” New Bedford Free Public Library. *Digital Commonwealth, link.*

- Perhaps ownership should be determined by lot, at random.

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?

17.4. Recall the first type of justification we discussed in Note 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 an action to recover the value of a fin-back whale. Ghen, the plaintiff,\* lives in Provincetown and Rich, the defendant, in Wellfleet.

---

\*In the original case, the action is called a “libel,” the plaintiff Ghen the “libellant,” and the defendant Rich the “respondent.” For simplicity, these terms have been modernized and the parties’ names used, without indication. —Eds.

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. . . . 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 whale] 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. Ghen has been engaged in this business for ten years past. On the morning of April 9, 1880 . . . he shot and instantly killed with a bomb-lance the whale in question. . . . [Ellis found it.] Instead of sending word to Provincetown, as is customary, Ellis advertised the whale for sale at auction, and sold it to Rich . . . . Neither Rich nor Ellis knew the whale had been killed by Ghen, 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.

Ghen claims title to the whale under this usage. Rich insists that this usage is invalid.

[The court reviewed several cases on conflicts over whale ownership, in which the party who first harpooned the whale was awarded ownership.]

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. . . . 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 [some of the cases reviewed]. 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 Ghen. . . .

### Notes and Questions

**17.5. 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*?

**17.6. 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. Bully-

gar'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?

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



**Figure 17.3:** Source: *Up For Grabs* (Crooked Hook Productions 2004)

## 17.2   Baseballs

### *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 money<sup>1</sup> and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

---

<sup>1</sup>It has been suggested that the ball might sell for something in excess of \$1,000,000.

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.

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.<sup>23</sup> 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.”<sup>24</sup>

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.<sup>25</sup> 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.<sup>27</sup> Moreover, such efforts

---

<sup>23</sup>Literally.

<sup>24</sup>This definition is hereinafter referred to as Gray’s Rule.

<sup>25</sup>*Pierson v. Post*, 3 Caines R. (N.Y.1805).

<sup>27</sup>The 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 animals<sup>29</sup> 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.

---

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 (1981).

<sup>29</sup> . . . *Ghen v. Rich* 8 F. 159 (D.Mass.1881); *Pierson v. Post* 3 Caines R. (N.Y.1805) . . . .

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 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.<sup>34</sup>

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.

---

<sup>34</sup>Professor 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.

... Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a 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 Helmholtz 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 17.4:** Source: Raphael, Judgment of Solomon. Vatican Museums.

### Notes and Questions

**17.8. 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.<sup>1</sup>

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 competing claimants to a single, indivisible resource to behave under a rule that requires them to share

<sup>1</sup>In 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*?

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 17.2 on page 509 are implicated by these questions?

17.9. **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, *Pier-  
son 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?

17.10. **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—it 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?

17.11. **Postscript.** Recall Question 17.7 on page 514, 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.<sup>2</sup> This turned out to be . . . ill advised.

---

<sup>2</sup>Jay Posner, *Possessing 73rd HR ball first made his life a hassle, then movie*, SAN DIEGO UNION-TRIBUNE (June 14, 2005), [link](#)

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Mr. Triano claimed that Popov still owed him attorney's fees in the amount of \$473,500.<sup>6</sup> Alex Popov eventually filed for bankruptcy,<sup>7</sup> but not before suing his attorney for malpractice and fraud.<sup>8</sup> 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 another<sup>9</sup>—though one suspects Mr. Triano may have some difficulty collecting the award. (There is a lesson here for lawyers, not just litigants.)

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*.

**17.12. 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

---

<sup>3</sup>Ira Berkow, *73rd Home Run Ball Sells for \$450,000*, N.Y. TIMES (June 26, 2003), [link](#).

<sup>4</sup>Gwen Knapp, *Finally, in Bonds ball case, someone shows some class*, S.F. CHRON. (Dec. 30, 2003) at A1, [link](#).

<sup>5</sup>In re Martin Triano, Case No. CPF 03 503194, Temporary Restraining Order, June 26, 2003 (Cal. Super. Ct. San. Francisco Cty.).

<sup>6</sup>*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), [link](#).

<sup>7</sup>Bankruptcy Petition #: 05-32929 (N.D. Cal. Sept. 6, 2005).

<sup>8</sup>Popov v. Triano, Case No. CGC 04 427956, Complaint, Jan. 12, 2004 (Cal. Super. Ct. San. Francisco Cty.).

<sup>9</sup>In 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).

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.<sup>10</sup>

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?

**17.13. 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* rules or considerations that govern the initial allocation of rights in chattels? Either way, how should we justify our rule(s)?

## 17.3 Plays

Just as with land, there can be multiple owners of intellectual property rights. The copyright laws contemplate a *joint work* that is “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. “The authors of a joint work

---

<sup>10</sup>James Barron, *At the Stadium, Possession Is Some Tents of the Law*, N.Y. TIMES (Sept. 24, 2008) at B3, [link](#).

are coowners of copyright in the work,” § 201(a), and they each have “an undivided, independent right to use the work, subject only to a duty of accounting for profits to other co-owners.” *U.S. ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997) (quoting H.R. REP. No. 94-1476, at 121 (1976)). Similarly, a patented invention may be “made by two or more persons jointly,” 35 U.S.C. § 116(a), and “each of the joint owners of a patent” may exploit the invention “without the consent of and without accounting to the others,” in the absence of an agreement otherwise, § 262.<sup>11</sup>

So who counts as a joint author or inventor? Given the power of any joint intellectual property owner to use and license the work, this question can have tremendous ramifications. The answers are not always expected and often debatable. As you read these materials, think about the last big group project you did—who did what work and who received what credit—and see if the legal rules line up with your intuitions.

### ***Erickson v. Trinity Theatre, Inc.***

13 F.3d 1061 (7th Cir. 1994)

#### **RIPPLE, Circuit Judge.**

The plaintiff Karen Erickson . . . was one of the founders of a theatre company in Evanston, Illinois, that ultimately became known as Trinity Theatre [the defendant]. Between 1981 and January 1991, Ms. Erickson served Trinity in various capacities: as playwright, artistic director, actress, play director, business manager, and member of the board of directors. This suit revolves around Ms. Erickson’s role as playwright.

[Erickson wrote three plays, in collaboration with the Trinity actors. Here is the court’s description of one such collaboration over a play *Much Ado About Shakespeare*:]

*Much Ado* is a compilation of scenes and sonnets from William Shakespeare and other writers of his time. Ms. Erickson revised this work from an earlier script entitled *Sounds and Sweet Aires*. Michael Osborne, a Trinity actor, testified that Ms. Erickson compiled *Much Ado* in 1988 and that many decisions about what was to be included were made during rehearsals. Osborne identified two portions of the copyrighted script that resulted from his suggestions: a passage to *Macbeth* and the introduction to the play. The

---

<sup>11</sup>Notice the use of “joint owners” here. This does *not* refer to joint tenancy in the formal sense; the terminology is unfortunately domain-specific.

editing of the text, Osborne continued, was accomplished largely by consensus; however, when a consensus could not be had, Ms. Erickson made the final decisions. Osborne further testified that he understood at the time that the play was being created for Trinity and not for Ms. Erickson. Ms. Erickson does not dispute the process described by Osborne, but characterizes it differently. She perceived the process only as actors making suggestions for her script.

[After Erickson left the company, Trinity continued performing her plays. Erickson sued for copyright infringement. Trinity's defense was that, by virtue of its actors' collaboration with Erickson in writing the plays, they were joint authors and so Trinity was a joint owner of the copyrights.]

We now turn to the issue of whether any of the material in question is a "joint work." In a joint work, the joint authors hold undivided interests in a work, despite any differences in each author's contribution. Each author as co-owner has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. Thus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit. . . .

[The court first held that, in order for a copyrighted work to be a joint work, each author must "intend that their respective contributions be merged into a unitary whole."]

Even if two or more persons collaborate with the intent to create a unitary work, the product will be considered a "joint work" only if the collaborators can be considered "authors." Courts have applied two tests to evaluate the contributions of authors claiming joint authorship status: Professor Nimmer's de minimis test and Professor Goldstein's copyrightable subject matter ("copyrightability") test. The de minimis and copyrightability tests differ in one fundamental respect. The de minimis test requires that only the combined product of joint efforts must be copyrightable. By contrast, Professor Goldstein's copyrightability test requires that each author's contribution be copyrightable. We evaluate each of these tests in turn. . . .

[Nimmer's] position has not found support in the courts. The lack of support in all likelihood stems from one of several weaknesses in Professor Nimmer's approach. First, Professor Nimmer's test is not consistent with one of the Act's premises: ideas and concepts standing alone should not receive protection. Because the creative process necessarily involves the

development of existing concepts into new forms, any restriction on the free exchange of ideas stifles creativity to some extent. Restrictions on an author's use of existing ideas in a work, such as the threat that accepting suggestions from another party might jeopardize the author's sole entitlement to a copyright, would hinder creativity. Second, contribution of an idea is an exceedingly ambiguous concept. Professor Nimmer provides little guidance to courts or parties regarding when a contribution rises to the level of joint authorship except to state that the contribution must be "more than a word or a line." . . .

[Goldstein's test] has been adopted, in some form, by a majority of courts that have considered the issue. According to Professor Goldstein, "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." . . . We agree that the language of the [Copyright] Act supports the adoption of a copyrightability requirement. Section 101 of the Act defines a "joint work" as a "work prepared by two or more *authors*" (emphasis added). To qualify as an author, one must supply more than mere direction or ideas. An author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. . . .

The copyrightable subject matter test does not suffer from the same infirmities as Professor Nimmer's de minimis test. The copyrightability test advances creativity in science and art by allowing for the unhindered exchange of ideas, and protects authorship rights in a consistent and predictable manner. It excludes contributions such as ideas which are not protected under the Copyright Act. This test also enables parties to predict whether their contributions to a work will entitle them to copyright protection as a joint author. Compared to the uncertain exercise of divining whether a contribution is more than de minimis, reliance on the copyrightability of an author's proposed contribution yields relatively certain answers. The copyrightability standard allows contributors to avoid post-contribution disputes concerning authorship, and to protect themselves by contract if it appears that they would not enjoy the benefits accorded to authors of joint works under the Act.

[Applying the test laid out above, the court found that there might be a dispute over intent to create a joint work. It did not need to resolve that dispute, because:]

In order for the plays to be joint works under the Act, Trinity also must show that actors' contributions to Ms. Erickson's work could have been independently copyrighted. Trinity cannot establish this requirement for any of the above works. The actors, on the whole, could not identify specific contributions that they had made to Ms. Erickson's works. Even when Michael Osborne was able to do so, the contributions that he identified were not independently copyrightable. Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights. Consequently, Trinity cannot establish the two necessary elements of the copyrightability test and its claims must fail.

### **Notes and Questions**

17.14. Patent law similarly limits joint inventorship. A joint inventor is one who "contributes to the conception of the claimed invention"—roughly speaking, someone who helps to form the structural or functional idea of the invention. *E.g., Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1359 (Fed. Cir. 2004). One who merely explains the state of the art is not a joint inventor; nor is a person who only contributes to "reduction to practice," roughly taking the idea of the invention (from one who conceived it) and making an operational product out of it.

In *Burroughs Wellcome Co. v. Barr Laboratories, Inc.*, scientists at pharmaceutical company Burroughs Wellcome identified a handful of chemicals they thought might be useful for treating the HIV virus, and asked scientists at the National Institutes of Health to test them. When the NIH scientists found one of the candidate chemicals (AZT) to be effective, the company applied for a patent on it. 40 F.3d 1223, 1226 (Fed. Cir. 1994). Held: the NIH scientists were not joint inventors, because they merely tested a chemical that Burroughs Wellcome had conceived—even though the company scientists had no idea which chemical would work and NIH's scientists did the experimental work.

Do the results in these cases seem fair to you? Would Erickson have written her plays without the Trinity actors' help, or would Burroughs Wellcome have discovered AZT as an HIV treatment without NIH? Who deserves rights in the resulting commercial value?

17.15. In many communities, there are strong norms of who is considered an “author.” These norms often do not align with intellectual property law definitions. In scientific research, for example, principal investigators of laboratories are often named as “authors” on research papers even if they do not write a single sentence; the scientists who do data analysis often are named as well even though, as we saw in *Feist*, factual data is not copyrightable matter.

Should community norms and collaborators’ intentions matter more than formal rules laid out by courts unfamiliar with those norms and intentions? On this question, compare with judicial treatment of parties’ intentions for concurrent ownership in land.

17.16. What about non-human creators? Can they hold title to intellectual property? This question has become especially prominent recently in view of creative and inventive works generated by artificial intelligence. In the famous “monkey selfie” case, the Ninth Circuit relied on a textual interpretation of the Copyright Act to conclude that only humans can maintain rights under copyright law. See *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018). Nevertheless, there has been increasing pressure to clarify rights of ownership in intellectual property from AI-generated works.

What do you think should happen? What would need to change in the law, in order to grant ownership of intellectual property (or property generally) to non-human creators? Alternatively, who should own the rights to an AI-generated invention or creative work? The person who typed the prompt? The computer scientists? The creators of the training data? No one?

## 17.4 Conquest

A classic property law case, not included in this book, is *Johnson v. McIntosh*, in which the two parties held competing titles to the same land, one obtained from the U.S. government and the other from the American Indian nations. 21 U.S. (8 Wheat.) 240 (1823).<sup>12</sup> Chief Justice John Marshall, writing for the Supreme Court, held in favor of the government-obtained title on the grounds that, by conquest of the American Indians, the United States held superior title to the land.

---

<sup>12</sup>You will often see the case styled as “*Johnson v. M’Intosh*.” This is incorrect: The apostrophe should face the other direction (*M’Intosh*), such that it looks like a small superscript letter c. See Michael G. Collins, *M’Culloch and the Turned Comma*, 12 GREEN BAG 2D 265 (2009).

A system of land ownership founded on violent conquest seems arbitrary and unjustifiable today. Indeed, 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.

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 protect-

ing freedom of contract and private property (the so-called “*Lochner era*”<sup>13</sup>)—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.

What about patenting of indigenous technologies? See Winona LaDuke, *Rice-keepers: A Struggle to Protect Biodiversity and a Native American Way of Life*, ORION MAG., July–Aug. 2007, [link](#).

---

<sup>13</sup>*Lochner v. New York*, 198 U.S. 45 (1905).

# Chapter 18

## Conflicts Across Property Types

### 18.1 Land Versus Chattels: *Ratione Soli*

*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,<sup>1</sup> 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

---

<sup>1</sup>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 17.9 on page 523, *supra*.)

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 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 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?

## 18.2 Land Versus Chattels: Fugitive Resources

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. Lawyers typically reason about novel cases by analogy to past cases in the same general doctrinal field. 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 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

**18.1. 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 Re-alignment 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*?

**18.2. 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 administrative 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), [link](#).

**18.3. 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, 15 S. Ct. 245, 247, 39 L.Ed. 304 (1895).<sup>1</sup> 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 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 Produc-*

---

<sup>1</sup>The 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.

*tion, link* (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' prop-

erty 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 Marcellus 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 conver-

sion, 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 ref-

erencing 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, 66 S. Ct. at 1065. 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**

**18.4. 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 Briggses 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 Briggses' 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.)

**18.5. I Drink Your Milkshake.**<sup>2</sup> *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?

**18.6. 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 18.1 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?

---

<sup>2</sup>THERE WILL BE BLOOD (Paramount Vantage/Miramax Films 2007).



**Figure 18.1:** Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, [link](#).

**18.7. 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 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 herdsmen, . . . 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 pri-

vate 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).

**18.8. 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), [link](#).

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*, [link](#). 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), [link](#).

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.

18.9. **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 discussed these ideas with respect to the public trust doctrine in our unit on Easements.

Given the practical problems of allocation raised by efforts to privatize resources, 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 skepti-

cal of the argument that the tragedy of the commons must affect all resources, in all societies, at all times.

18.10. 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?

## 18.3 Intellectual Versus Tangible Property

### *Impression Products, Inc. v. Lexmark International, Inc.*

137 S.Ct. 1523 (2017)

**Chief Justice ROBERTS delivered the opinion of the Court.**

A United States patent entitles the patent holder (the “patentee”), for a period of 20 years, to “exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States.” Whoever engages in one of these acts “without authority” from the patentee may face liability for patent infringement.

When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to “exhaust.” The purchaser and all subsequent owners are free to use

or resell the product just like any other item of personal property, without fear of an infringement lawsuit.

[The question in this case is] whether a patentee that sells an item under an express restriction on the purchaser's right to reuse or resell the product may enforce that restriction through an infringement lawsuit.\*

## I

The underlying dispute in this case is about laser printers—or, more specifically, the cartridges that contain the powdery substance, known as toner, that laser printers use to make an image appear on paper. Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and around the globe. It owns a number of patents that cover components of those cartridges and the manner in which they are used.

When toner cartridges run out of toner they can be refilled and used again. This creates an opportunity for other companies—known as remanufacturers—to acquire empty Lexmark cartridges from purchasers in the United States and abroad, refill them with toner, and then resell them at a lower price than the new ones Lexmark puts on the shelves.

Not blind to this business problem, Lexmark structures its sales in a way that encourages customers to return spent cartridges. It gives purchasers two options: One is to buy a toner cartridge at full price, with no strings attached. The other is to buy a cartridge at roughly 20-percent off through Lexmark's "Return Program." A customer who buys through the Return Program still owns the cartridge but, in exchange for the lower price, signs a contract agreeing to use it only once and to refrain from transferring the empty cartridge to anyone but Lexmark. To enforce this single-use/no-resale restriction, Lexmark installs a microchip on each Return Program cartridge that prevents reuse once the toner in the cartridge runs out.

Lexmark's strategy just spurred remanufacturers to get more creative. Many kept acquiring empty Return Program cartridges and developed methods to counteract the effect of the microchips. With that technological obstacle out of the way, there was little to prevent the remanufacturers from using the Return Program cartridges in their resale business. After all, Lexmark's contractual single-use/no-resale agreements were with the

---

\*The case considered a second question regarding sales outside the United States, not reproduced here. —Eds.

initial customers, not with downstream purchasers like the remanufacturers.

Lexmark, however, was not so ready to concede that its plan had been foiled. In 2010, it sued a number of remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. One group consists of Return Program cartridges that Lexmark sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, the remanufacturers infringed the Lexmark patents when they refurbished and resold them. The other group consists of all toner cartridges that Lexmark sold abroad and that remanufacturers imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so the remanufacturers ran afoul of its patent rights by doing just that.

Eventually, the lawsuit was whittled down to one defendant, Impression Products, and one defense: that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired abroad. [The district court held that Lexmark's patent rights were exhausted; the Federal Circuit reversed.]

We granted certiorari to consider the Federal Circuit's decisions . . . and now reverse.

## II

### A

We conclude that Lexmark exhausted its patent rights in [the Return Program] cartridges the moment it sold them. The single-use/no-resale restrictions in Lexmark's contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.

The Patent Act grants patentees the "right to exclude others from making, using, offering for sale, or selling [their] invention[s]." For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude. See *Bloomer v. McQuewan*, 14 How. 539, 14 L.Ed. 532 (1853). The limit functions automatically: When a patentee chooses to sell an item, that product "is no longer within the limits of the monopoly" and instead becomes the "private, individual property" of the purchaser, with the rights

and benefits that come along with ownership. A patentee is free to set the price and negotiate contracts with purchasers, but may not, “*by virtue of his patent*, control the use or disposition” of the product after ownership passes to the purchaser. The sale “terminates all patent rights to that item.”

This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act “promote[s] the progress of science and the useful arts by granting to [inventors] a limited monopoly” that allows them to “secure the financial rewards” for their inventions. But once a patentee sells an item, it has “enjoyed all the rights secured” by that limited monopoly. Because “the purpose of the patent law is fulfilled . . . when the patentee has received his reward for the use of his invention,” that law furnishes “no basis for restraining the use and enjoyment of the thing sold.”

We have explained in the context of copyright law that exhaustion has “an impeccable historic pedigree,” tracing its lineage back to the “common law’s refusal to permit restraints on the alienation of chattels.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013). As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction “is void, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man.” 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628); see J. Gray, *Restraints on the Alienation of Property* § 27, p. 18 (2d ed. 1895) (“A condition or conditional limitation on alienation attached to a transfer of the entire interest in personality is as void as if attached to a fee simple in land”).

This venerable principle is not, as the Federal Circuit dismissively viewed it, merely “one common-law jurisdiction’s general judicial policy at one time toward anti-alienation restrictions.” Congress enacted and has repeatedly revised the Patent Act against the backdrop of the hostility toward restraints on alienation. That enmity is reflected in the exhaustion doctrine. The patent laws do not include the right to “restrain[] . . . further alienation” after an initial sale; such conditions have been “hateful to the law from Lord Coke’s day to ours” and are “obnoxious to the public interest.” *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501 (1917). “The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.”

But an illustration never hurts. Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as

those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem.

This Court accordingly has long held that, even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that product. . . . Our recent decision in *Quanta Computer, Inc. v. LG Electronics, Inc.* settled the matter. In that case, a technology company—with authorization from the patentee—sold microprocessors under contracts requiring purchasers to use those processors with other parts that the company manufactured. One buyer disregarded the restriction, and the patentee sued for infringement. Without so much as mentioning the lawfulness of the contract, we held that the patentee could not bring an infringement suit because the “authorized sale . . . took its products outside the scope of the patent monopoly.” 553 U.S., at 638.

Turning to the case at hand, we conclude that this well-settled line of precedent allows for only one answer: Lexmark cannot bring a patent infringement suit against Impression Products to enforce the single-use/no-resale provision accompanying its Return Program cartridges. Once sold, the Return Program cartridges passed outside of the patent monopoly, and whatever rights Lexmark retained are a matter of the contracts with its purchasers, not the patent law.

## B

The Federal Circuit reached a different result largely because it got off on the wrong foot. The “exhaustion doctrine,” the court believed, “must be understood as an interpretation of” the infringement statute, which prohibits anyone from using or selling a patented article “without authority” from the patentee. Exhaustion reflects a default rule that a patentee’s decision to sell an item “presumptively grant[s] ‘authority’ to the purchaser

to use it and resell it.” But, the Federal Circuit explained, the patentee does not have to hand over the full “bundle of rights” every time. If the patentee expressly withholds a stick from the bundle—perhaps by restricting the purchaser’s resale rights—the buyer never acquires that withheld authority, and the patentee may continue to enforce its right to exclude that practice under the patent laws.

The misstep in this logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is instead a limit on “the scope of the *patentee’s rights*.” The right to use, sell, or import an item exists independently of the Patent Act. What a patent adds—and grants exclusively to the patentee—is a limited right to prevent others from engaging in those practices. Exhaustion extinguishes that exclusionary power. As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.

In sum, patent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.

### **Notes and Questions**

18.11. Initially, consider Lexmark’s business model that gave rise to this case. Lexmark discounts its printers heavily, sometimes selling them at or below cost. It then marks up the prices of consumable supplies like toner and ink, recovering any losses on the printer and making the company’s profits. This is known as the “razor and blades business model” (sell the razor handles cheaply, and then mark up the blades), and companies use it for a wide variety of products. (Single-serve coffee pods are another classic example.)

This business model is why Lexmark pursued the toner refills so vigorously. Competitors can supply the consumable parts at much cheaper prices, because the original manufacturer is overpricing those parts as part of the business model. But if consumers buy from those competitors, then the original manufacturer never recovers the initial loss. So the razor and blades model depends on some mechanism of exclusion—some property right, perhaps—that keeps competitors out.

Why use this business model? Couldn't Lexmark just charge more for the printers?

18.12. What else might post-sale restrictions be used for, besides preventing resale or repair? In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, the patent holder held patents on movie projectors, and imposed a condition on theaters that they only use licensed projectors on the patent holder's terms. See 243 U.S. 502, 506–07 (1917). The patent holder, a licensing firm created and run by Thomas Edison, wielded extraordinary power over the motion picture industry during the early 1900s, unilaterally deciding what films would be made, which actors would be promoted, and which theaters would be allowed to operate. See Ralph Cassady, Jr., *Monopoly in Motion Picture Production and Distribution: 1908–1915*, 32 S. CAL. L. REV. 325 (1959).

Should a patent's right to exclude entail this level of industry control?

18.13. *Impression* does not just pit two types of property against each other—it pits two specific rights of property against each other. The toner cartridge owner enjoys a right to alienate to a refiller or anyone else. Lexmark, on the other hand, enjoys a right to subdivide its patent interest, in the same way that a landlord can lease one room of a house and retain the rest of it.

The Court holds that the right to alienate a chattel overrides the right to subdivide a patent. Do you agree? Can you think of a basis for prioritizing one right over the other? One point to consider: The right to subdivide is not absolute, as the *numerus clausus* principle and menu of estates in land demonstrate. But neither is the right to alienate—regulations such as drug approval can prohibit sales of products.

18.14. Patents are far from the only vehicle for imposing post-sale restraints on consumer goods. Copyright holders have sought to use their copyrights to prevent resale of books or to enforce minimum retail prices. The Supreme Court held such copyright-based restraints unenforceable, in a case about resale of used textbooks. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013). Other statutes, including the Digital Millennium Copyright Act and the Computer Fraud and Abuse Act, have been used to restrict consumers from reselling their purchased goods or using those goods in ways contrary to the manufacturers' wishes. See generally AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY (2016); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

18.15. If you were representing Lexmark, how would you advise the company to proceed after this decision? Can you come up with another legal arrangement

that prevents refilling? Look back through the property materials you've learned so far.

# Chapter 19

## 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 cotenants) 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.

## 19.1 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

**19.1. Whose House Was It Anyway?** The nuisance house in question, 265 West 93rd Street, was one of three row houses built in 1897–1898 by architect Alexander M. Welch and developers William W. and Thomas M. Hall. The townhouses were advertised as “the most attractive, medium sized, moderate priced Private Houses ever offered.” Tom Miller, *The Alexander and Augusta Boehm House—263 West 93rd Street, DAYTONIAN MANHATTAN* (Dec. 2023), [link](#); *265 West 93rd Street, LANDMARK W.* (last visited Mar. 22, 2024), [link](#). When Dorothy Holloschitz came into ownership of the house is uncertain, but according to the New York City property records, the house was sold at auction a year after the judgment, for \$39,000. It was later converted to a four-unit co-op. Unit 4 sold in 2016 for \$1.8 million.

For some reactions to the decision, see Max H. Seigel, *Owner of Rundown House Liable for Decay of Area*, N.Y. TIMES, Sept. 11, 1975, at 45, [link](#).

**19.2.** How much should it matter that the defendant independently violated a local regulation?

**19.3.** 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?

**19.4. 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.”).

19.5. 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), [link](#). 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), [link](#).

19.6. **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).

## 19.2 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 accidens*).

### *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

- 19.7. Why does *Sans* conclude that the "conflicting equities" favor the plaintiff?
- 19.8. **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 enjoyment 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).

19.9. **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.”<sup>1</sup>

19.10. **“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

---

<sup>1</sup>The 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.

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.

19.11. **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 powerline 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. 1982) (allowing nuisance claim by owner of a solar heated home to proceed).

19.12. **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.<sup>2</sup> “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.”).

19.13. **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 Prob-*

---

<sup>2</sup>The 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.

*lém 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 (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.<sup>3</sup> 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*.<sup>4</sup> 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 repre-

---

<sup>3</sup>To 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.

<sup>4</sup>The term “Coase Theorem” to describe Coase’s insight is generally ascribed to George Stigler.

sentation 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 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), [link](#).

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. As we discussed in earlier chapters, 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 le-

gal 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).

## 19.3 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.

### 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.<sup>5</sup> 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. 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

---

<sup>5</sup>And some entitlements, as the authors discuss, are inalienable.

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)

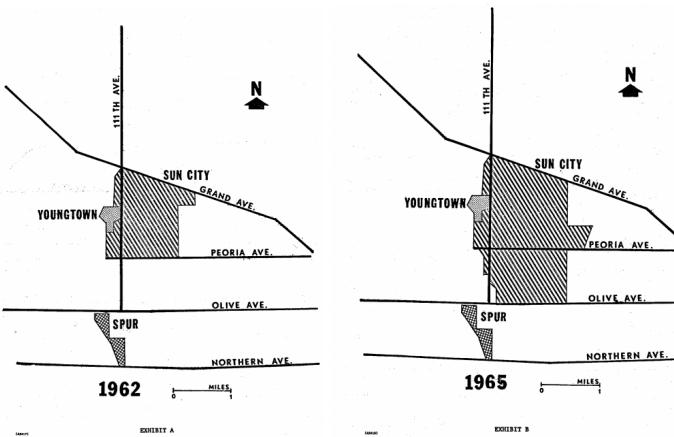
**CAMERON, Vice Chief Justice.**

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb 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 19.1].

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



**Figure 19.1:** Exhibits A and B to *Spur Industries*.

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 enjoinable 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**

19.14. 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?

19.15. **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 alleges a “special injury” specific to the plaintiff and not shared by the public at large.

19.16. 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.



# **Part IX**

## **Covenants**



# Chapter 20

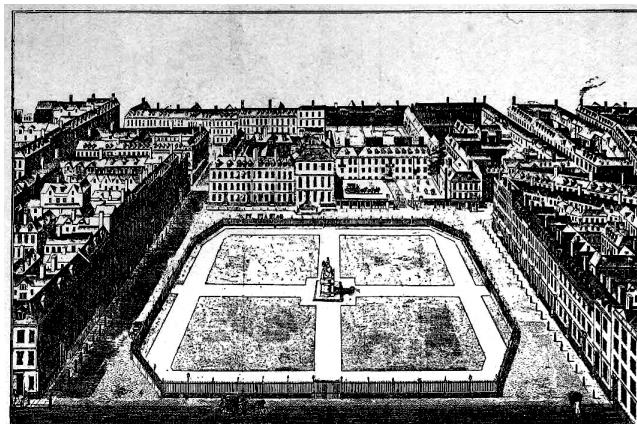
## Restrictive Covenants

### 20.1 Introduction

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.



**Figure 20.1:** Leicester Square in the 18th Century. Source: JOHN HOLLINGSHEAD, THE STORY OF LEICESTER SQUARE 19 (1892), British Library Online, [link](#).

As you've already learned, only a very small number of negative easements were recognized. Furthermore, actions at law—seeking the remedy 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; 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 purchasing 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

20.1. 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?

20.2. Is the result in *Tulk* consistent with the principle of *numerus clausus*? With the common-law policy against restraints on alienation?

20.3. *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).

20.4. 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.

20.5. **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"?

20.6. 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?

20.7. Recall the dispute between Abigail, Beatrice, and Clara on page 599. 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?

20.8. 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 control over the ability of present and future owners to adapt their land uses to changing circumstances?

## 20.2 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 covenantee<sup>1</sup>—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 a later chapter. 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.

***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

---

<sup>1</sup>Thus, 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.

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 Neponsit 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 legal 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 grantees 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 s]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 bene-

fit 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 representa-

tive 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

20.9. 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?

20.10. 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.

20.11. 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

20.12. 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?

20.13. 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.

20.14. 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), [link](#). 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?

20.15. What other types of covenants might offend public policy? And how far will public policy intrude on private ordering of property rights? Keep this question in mind for when we read *Shelley v. Kraemer*.

## 20.3 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 our unit on Easements—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.<sup>1</sup> 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

---

<sup>1</sup>The 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."

(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 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 owners. 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**

20.16. 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.

20.17. 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?

20.18. 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?

20.19. 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 agreement? 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 21

## 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), [link](#) (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 standard 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 **cooperative** (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), *link*.

## 21.1 Types

### 21.1.1 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 underdeveloped 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.

## 21.1.2 Condominiums

A **condominium** is very similar to a homeowners association, except it typically covers either a single multi-unit structure or several structures comprising 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 condo-

minimum 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.

### 21.1.3 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 enforc-

ing 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 Upper 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.

## 21.2 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?

### ***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.

---

\*This would be over \$66 million in 2015 dollars. —Eds.

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**

21.1. 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"?

21.2. 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 restrictions 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 in-

vests in the community.<sup>1</sup> Does that distinction justify the diverging standards for validity? Is such a justification consistent with the reasoning of *Norman*?

21.3. 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 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

---

<sup>1</sup>Typically, 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.

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), live-stock, reptiles or poultry shall be kept in any unit."<sup>3</sup>

In January 1988, plaintiff Natre Nahrstedt purchased a Lakeside Village condominium and moved in with her three cats. When the Association 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,

---

<sup>3</sup>The CC & R's permit residents to keep "domestic fish and birds."

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 devel-

opment, 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 cre-

ate[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."<sup>1</sup>

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.

. . . 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 dis-

---

<sup>1</sup>Albert Schweitzer.

cernible 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**

21.4. 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.

21.5. 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?

21.6. 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?

## 21.3 Enforcement of Rules and Covenants

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? *Neponset* 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, de-

fendant 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,<sup>1</sup> 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.<sup>2</sup> Following the altercation, defendant distributed flyers to the cooperative residents in which he referred to the professor, by name, as a potential "psychopath in our midst" and accused him of cutting defendant's telephone lines. In another flyer, defendant de-

---

<sup>1</sup>Initially, 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.

<sup>2</sup>Defendant brought charges against the professor which resulted in the professor's arrest. Eventually, the charges were adjourned in contemplation of dismissal.

scribed 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."<sup>3</sup> 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 proprietary lease and cancel his shares. The resolution contained the findings upon

---

<sup>3</sup>The 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."

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 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.<sup>5</sup> 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 "reasonableness"

---

<sup>5</sup>RPAPL 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."

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 ba-

sis 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.<sup>8</sup>

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 . . . .

---

<sup>8</sup>See 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.

### Notes and Questions

21.7. 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 in Court*, N.Y. TIMES (June 7, 2003), *link*.

21.8. What aspect of the Court of Appeals' analysis constitutes "heightened vigilance"?

21.9. 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?

21.10. 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?

21.11. 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?

21.12. 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?



# **Part X**

# **Property and Society**



# Chapter 22

## 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.

### 22.1 Euclidean Zoning

**Euclidean zoning**, so called based on the following case, concerns zoning regulations limiting the uses to which land may be put. (Another type of zoning, aesthetic zoning, relates to the appearance of buildings and structures; it is discussed in the original *Open Source Property* module on zoning but not in this book.)

***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. . . .

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 opinion lists the permissible uses for each of the districts in detail. It is sufficient for our purposes that the use districts form a spectrum from low-density residential (U-1) to heavy industry (U-6). The height and area districts imposed requirements on the height of buildings and square footage of lots, respectively.]

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 purposes, 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 . . . .

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 are developing, which require additional restrictions in respect of the use and occupation of private lands in urban communities.\* Regulations that are now uniformly sustained probably would have been rejected as arbitrary and oppressive even a half century ago.. 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

---

\* Many of the opinion's sentences are extraordinarily long, and have been edited down substantially here. Consult the original before quoting anything. —Eds.

of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. . . .

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 [on building height and construction] 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. . . .

[The real estate owner argued that Cleveland's industrial development was spreading into suburbs like Euclid, which would increase property values. So Euclid's zoning ordinances prohibiting industrial uses meant that the owner would not enjoy those property value increases.] 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 authorities, 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 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, 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 upon the broad ground that the mere existence and threatened enforcement of the ordinance constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence. 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.

### **Notes and Questions**

**22.1. 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), [link](#), 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.<sup>1</sup>

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.

**22.2. 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

---

<sup>1</sup>Only 55% of housing units have sidewalks, and the percentage is lower for over-65 homeowners.

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, [link](#).

22.3. **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 land-marking 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, [link](#).

**22.4. 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, [link](#).

## 22.2 Nonconforming Uses

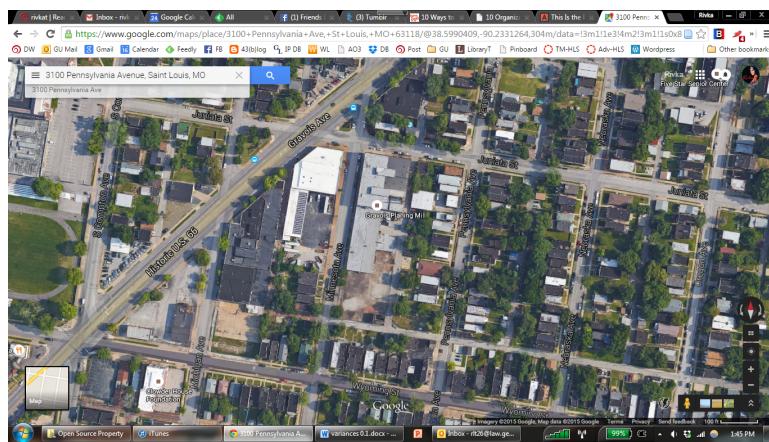
When zoning first began, there were a number of existing uses that would be prohibited by the new regimes. Zoning authorities expected these to die out naturally, but in fact, they often persisted for decades, in part because they often had local monopolies—a nonconforming use might be the only gas station 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?

***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. Dennis (herein called relators), the owners of two adjoining lots (frequently



**Figure 22.1:** Google Earth image, 2015, with contested block in center

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 nonconforming 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 en-

act . . . 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 non-conforming 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 incli-

nation 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

22.5. 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?

22.6. 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).

22.7. **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.

22.8. 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?

22.9. **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 noncom-

pliant businesses to come into compliance.<sup>2</sup> 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 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.

22.10. 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?

22.11. **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).

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").

---

<sup>2</sup>Ed. 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).

What should be the result when a city issues a permit in error, and the developer relies on the permit to start building? *Compare Parkview Associates v. City of New York*, 519 N.E.2d 1372 (N.Y. 1988), with *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).

**22.12. 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."

After failing to stop Rose under the county's nuisance ordinance, in 1999 the county enacted a 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?

## 22.3 Variances

*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 increase 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.



**Figure 22.2:** 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)*, [link](#).

***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, jurisdictions such as Missouri that follow the New York model rather than the Standard Act 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**

22.13. Was this a use variance or an area variance?

22.14. 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.

22.15. Although the standard of review is supposed to be deferential, reversals of zoning board decisions are not uncommon. See, e.g., *Housing Authority v. Board 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 building 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").

22.16. **Mistakes.** Is a good faith mistake a self-inflicted hardship? The answer is usually yes. See, e.g., *Wehrle v. Cassor*, 708 SW 2d 788 (Mo. Ct. App. 1986) (board erred in granting variance where violation, and hardship involved in curing violation, resulted from builders' measurement errors).

22.17. **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) (no). 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?

22.18. **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 side yard. 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).

22.19. **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\****

In PROPERTY IN LAND AND OTHER RESOURCES 259 (Daniel H. Cole & Elinor Ostrom eds., 2012)

An observation about zoning boards that might be useful to scholars is that visiting the site in question is essential. Site visits can change the views of the case enormously. An applicant may show charming pictures of his antique-car hobby and seek a variance only to park some storage trailers. A visit might reveal that he actually harbors a private junkyard. Local knowledge is important because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. One early and well-known critique is the article by Dukeminier and Stapleton (1962). A more recent study was conducted by an attorney who statistically 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 was that variances are disproportionately granted if abutters do not object (Kent 1993; Ellickson and Been 2000). To which most board members would say, “Who knows better whether the variance will have an adverse effect?” The practice of granting variances if abutters do not object illustrates the recurrence of an early, grassroots approach to land use regulation, which required nonconforming uses to obtain permission of local property owners. It was struck down as unlawful delegation of the police power in several early cases, such as *Eubank v. City of Richmond*,

---

\* 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.

226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Kent (1993) 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 worry much about selection bias either. Kent also accurately reported that during the period he examined, the New Hampshire Supreme Court overturned the decisions of all ten towns whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, the decision in *Simplex v. Newington*, 145 N.H. 727 (2001), 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. Although the articles critical of boards mention the possibility that variances will degrade 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 (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 trade-offs 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 inclined to promote a political agenda. Favoritism and score settling can influence 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. This makes a big difference that critics of boards need to take into account.

## 22.4 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.<sup>3</sup> 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, [link](#) (last updated Feb. 24, 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.

---

<sup>3</sup>The 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), [link](#).



**Figure 22.3:** Figure from *The ADA and City Governments*.

City zoning policies were changed to permit [the business in Figure 22.3] 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**

22.20. 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), [link](#).) 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.

22.21. 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?

# Chapter 23

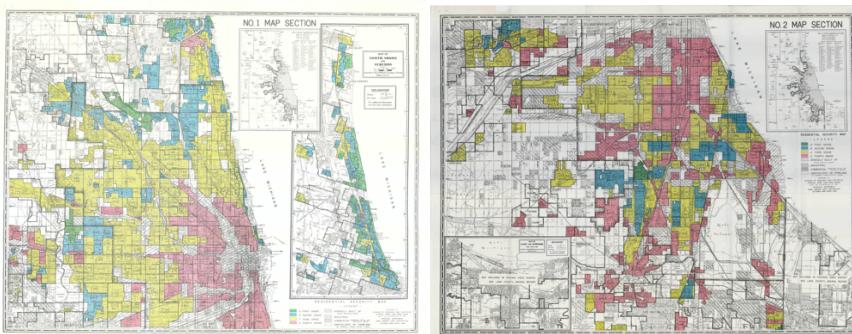
## Fundamental Rights

### 23.1 Redlining

#### 23.1.1 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 this phenomenon, taking the name from 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



**Figure 23.1:** HOLC maps of Chicago.

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 23.1.

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), [link](#).

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. Race-based real estate appraisal predated HOLC, as seen in one leading textbook teaching that “racial heritage and tendencies seem to be of paramount importance” to land values. 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 under-

writing 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), *link*.

With respect to the latter, the agency instructed its valuators to investigate "whether or not incompatible racial and social groups are present," on the theory that a "change in social or racial occupancy generally leads to instability and a reduction in values." *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."<sup>1</sup> 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

---

<sup>1</sup>In the mid-20th century, real estate speculators developed a practice of stoking fears of non-white 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

that entire block black.” JACKSON, CRABGRASS FRONTIER, *supra*, at 208–09. FHA’s theory of race and home values led it to 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).<sup>2</sup>

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 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. Rsr. Bank of Chi. Working Paper Series, No. WP 2017-12, Feb. 2019), *link*. 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.*

### 23.1.2 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

---

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.

<sup>2</sup>*Shelley v. Kraemer*, later in this chapter, held these racially restrictive covenants unconstitutional.

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), [link](#). Interactive maps comparing HOLC zones to racial demographic data are presented in Ryan Best & Elena Mejía, *The Lasting Legacy of Redlining*, FIVE-THIRTYEIGHT (Feb. 9, 2022), [link](#).

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).

**23.1. 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 UNDERCLASS (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 as-

sume 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.

**23.2. 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 showed that large systematic discriminatory effects can emerge from even mild racial preferences, such as the desire not to be the minority in one’s neighborhood: “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.” Simulations based on Schelling’s model demonstrate this emergent behavior, which you can try for yourself at: Vi Hart & Nicky Case, *Parable of the Polygons* (last updated Nov. 7, 2022), [link](#). (This simulation also suggests that cultivating widespread homeowner preferences *against* racial homogeneity may be one tool to promote desegregation).

**23.3. 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 of-

fices, 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 nonwhite 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 [link](#). 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.

### 23.1.3 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?

**23.4. 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 seg-

regated 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 our unit on Allocation, 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. An article by Ta-Nehisi Coates 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 [link](#).

**23.5. 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 non-white 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? See Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349 (2017) (arguing it should be

unlawful); *cf. Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530–31 (7th Cir. 1990) (real estate brokers who follow clients’ instructions to consider race in housing search do not violate the Fair Housing Act, because the Act protects buyers from discrimination, not neighborhoods from segregation).

**23.6. 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?

Gentrification, generally defined, is the situation in which wealthier people move into a neighborhood and displace existing longtime residents. 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?

**23.7. 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.

## 23.2 Racially Restrictive Covenants

### *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 occupancy 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**

23.8. Racially restrictive covenants were widespread in the United States in the first half of the twentieth century. See generally Michael Jones-Correa, *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 our unit on Redlining, 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).

23.9. 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?

23.10. 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 ([link](#)), the University of Washington's Seattle Civil Rights & Labor History Project ([link](#)), and Prologue DC's Mapping Segregation project ([link](#)).

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), [link](#). 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), [link](#). In recent years, the law's treatment of racially restric-

tive 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?

23.11. 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, [link](#). 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



**Figure 23.2:** Robin Hutton, Shaved Head Family stickers 2, Sept. 25, 2012, BY-NC-ND.

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 comply with fair housing laws. LIHS's complaint is available here, [link](#), and the settlement is available here, [link](#).

### 23.3 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 judgment 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.<sup>3</sup>

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, does not *per se* constitute a family in even the conceptual sense. To approximate

---

<sup>3</sup>The 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).

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.<sup>4</sup>

---

<sup>4</sup>See, 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. Sup. 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

**23.12. 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

---

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).

decide what kinds of uses are detrimental to the peaceful 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*?

23.13. 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. In Justice Marshall’s view, 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.”

23.14. 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.<sup>3</sup> 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

---

<sup>3</sup>The relevant ordinance defined “family” as “a number of individuals related to the nominal head of the household or to the spouse” thereof, and further enumerated specific relatives that could qualify as part of the statutorily defined family.

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.”

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.” 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 adults—by forcing all to live in certain narrowly defined family patterns.”

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. 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.

23.15. Given this further detail about *Belle Terre* and *Moore*, do you think *Ladue v. Horn* reached the right conclusion? Consider PAUL BOUDREAU, 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 police power.

**23.16. 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.<sup>4</sup>

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.

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?

**23.17. 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). 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”). Many New York municipalities now presume that a group of individuals smaller than four is a functional

---

<sup>4</sup>See, 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).

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 family 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). 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).

23.18. 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 discrimination against their parents. Does the same rationale apply here to invalidate family composition ordinances, at least as applied to households with children?

23.19. **The Fair Housing Act and the Americans with Disabilities Act.** The 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 24

## Takings

We now address a final method of resolving incompatible property uses. **Eminent domain**, also called **condemnation**, 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 comply with the Takings Clause of the Fifth Amendment:

[N]or 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?

### 24.1 What Qualifies as a Taking

*Ruckelshaus v. Monsanto Co.*  
467 U.S. 986 (1984)

**Justice BLACKMUN delivered the opinion of the Court.**

In this case, we are asked to review a United States District Court’s determination that several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are unconstitutional. The provisions at issue authorize the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a pesticide in evaluating the appli-

cation of a subsequent applicant, and to disclose publicly some of the submitted data.

## I

Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture. While pesticide use has led to improvements in productivity, it has also led to increased risk of harm to humans and the environment. . . .

[The legislative history of FIFRA is complex but important. Here are the relevant parts.] As first enacted, FIFRA was primarily a licensing and labeling statute. [Applicants wishing to sell pesticides were required to provide the government with testing data about the product, which the Department of Agriculture (later the EPA) would use to verify the pesticide's labeling information.]

Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. [Relevant to the case, the law permitted the EPA to use submitted testing data for two purposes: (1) during consideration of a second manufacturer's application for approval of a pesticide similar active ingredients, and (data-consideration); and (2) disclosure to the public as part of the application process (data-disclosure). However, the applicant could designate parts of the data as "trade secrets or commercial or financial information." Under the 1972 amendments, the EPA was not allowed to use correctly designated data for either of the two above purposes.]

Congress enacted other amendments to FIFRA in 1978. [Regarding the data-consideration provision], applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter[, with the amount of compensation determined by binding arbitration.] Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation.

Also in 1978, Congress added a new subsection, that provides for disclosure of all health, safety, and environmental data to qualified requesters, notwithstanding the prohibition against disclosure of trade secrets[, with limited exceptions].

## II

Appellee Monsanto Company (Monsanto) is an inventor, developer, and producer of various kinds of chemical products, including pesticides. . . . The District Court found that Monsanto had incurred costs in excess of \$23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA. . . . Monsanto also uses this information to develop additional end-use products and to expand the uses of its registered products. The information would also be valuable to Monsanto's competitors. For that reason, Monsanto has instituted stringent security measures to ensure the secrecy of the data.

. . . Monsanto alleged that [the data-consideration and data-disclosure] provisions effected a "taking" of property without just compensation, in violation of the Fifth Amendment. [The district court agreed.] We noted probable jurisdiction.

## III

In deciding this case, we are faced with [three] questions: (1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause in the health, safety, and environmental data it has submitted to EPA? (2) If so, does EPA's use of the data to evaluate the applications of others or EPA's disclosure of the data to qualified members of the public effect a taking of that property interest? (3) If there is a taking, is it a taking for a public use? . . .\*

This Court never has squarely addressed the applicability of the protections of the Taking Clause of the Fifth Amendment to commercial data of the kind involved in this case. In answering the question now, we are mindful of the basic axiom that "'[p]roperty interests . . . 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.' " Monsanto asserts that the health, safety, and

---

\*The Court also considered the means of providing just compensation for any taking, and concluded that the Tucker Act gave Monsanto a sufficient means of obtaining compensation. —Eds.

environmental data it has submitted to EPA are property under Missouri law, which recognizes trade secrets, as defined in § 757, Comment *b*, of the Restatement of Torts, as property. The Restatement defines a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” And the parties have stipulated that much of the information, research, and test data that Monsanto has submitted under FIFRA to EPA “contains or relates to trade secrets as defined by the Restatement of Torts.”

Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. Information that is public knowledge or that is generally known in an industry cannot be a trade secret. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.

Trade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable. A trade secret can form the res of a trust, and it passes to a trustee in bankruptcy.

Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a “proprietary interest” in their data. Further, Congress reasoned that submitters of data are “entitled” to “compensation” because they “have legal ownership of the data.” This general perception of trade secrets as property is consonant with a notion of “property” that extends beyond land and tangible goods and includes the products of an individual’s “labour and invention.” 2 W. Blackstone, *Commentaries* \*405; see generally J. Locke, *The Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947).

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:

It is conceivable that [the term “property” in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

*United States v. General Motors Corp.*, 323 U. S. 373, 377-378 (1945).

We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment.

#### IV

Having determined that Monsanto has a property interest in the data it has submitted to EPA, we confront the difficult question whether a “taking” will occur when EPA discloses those data or considers the data in evaluating another application for registration. . . .

The inquiry into whether a taking has occurred is essentially an ad hoc, factual inquiry. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond “regulation” and effects a “taking.” Among those factors are: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data.

#### A

A “reasonable investment-backed expectation” must be more than a “unilateral expectation or an abstract need.” . . . With respect to any data

submitted to EPA on or after October 1, 1978, Monsanto knew that . . . once the 10-year period had expired, EPA could use the data [in considering another's application] without Monsanto's permission. . . . The statute also gave Monsanto notice that much of the health, safety, and efficacy data provided by it could be disclosed to the general public at any time. If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Monsanto argues that the statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit. But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community. . . . Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

## B

[For data prior to the 1972 FIFRA amendments, the Court concluded that federal law offered no promise that the government would protect trade secrets.] Absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. . . .

## C

The situation may be different, however, with respect to data submitted by Monsanto to EPA during the period from October 22, 1972, through September 30, 1978. Under the statutory scheme then in effect, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. . . . The statute gave Monsanto explicit assurance that EPA was prohibited from disclosing

publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. . . . This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

The right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.<sup>16</sup> That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.

EPA encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a "pre-emption" of whatever

---

<sup>16</sup>We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking. If, however, a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

property rights Monsanto may have had in those trade secrets.<sup>†</sup> . . . This argument proves too much. If Congress can “pre-empt” state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, “by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.”

. . . .

In summary, we hold that EPA’s consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978 . . . .

## V

We must next consider whether any taking of private property that may occur by operation of the data-disclosure and data-consideration provisions of FIFRA is a taking for a “public use.” We have recently stated that the scope of the “public use” requirement of the Taking Clause is “coterminous with the scope of a sovereign’s police powers.” The role of the courts in second-guessing the legislature’s judgment of what constitutes a public use is extremely narrow.

. . . Here, the public purpose behind the data-consideration provisions is clear from the legislative history. Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products. Such a procompetitive purpose is well within the police power of Congress.

---

<sup>†</sup>If you are not familiar with it, preemption is the doctrine that where a state law conflicts with a federal law, the federal law overrides the state law. The EPA was in essence arguing that FIFRA eliminated state trade secret protection by virtue of preemption. —Eds.

. . . The court found that the data-disclosure provisions served no use [because the EPA-approved pesticide label] provided the public with all the assurance it needed that the product is safe and effective. It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question. We further observe, however, that public disclosure can provide an effective check on the decisionmaking processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product.

We therefore hold that any taking of private property that may occur in connection with EPA's use or disclosure of data submitted to it by Monsanto between October 22, 1972, and September 30, 1978, is a taking for a public use.

[JUSTICE O'CONNOR dissented in part. In her view, the government had a confidentiality obligation in the pre-1972 data, so a disclosure of it would have been a taking.]

### **Notes and Questions**

24.1. What exactly is the “property” that the government has taken in *Monsanto*? One answer is the data that Monsanto spent \$23 million to develop. But then the government would “take” that data by requiring Monsanto to disclose it merely for purposes of pesticide approval—something the Court plainly does not hold. What rights or value has Monsanto lost? What does that tell you about what property is?

24.2. **Other IP rights.** 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.<sup>1</sup>

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.”).

---

<sup>1</sup>Compare, e.g., David 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.”).

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. In *Kremen v. Cohen*, for example, the Ninth Circuit held that a domain name could be property for purposes of a conversion action. See 337 F.3d 1024 (9th Cir. 2003). That 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.

24.3. If intellectual property is protected under the Takings Clause, what government acts constitute a taking? In particular, is infringement of a patent a taking? In *James v. Campbell*, the Supreme Court in dicta held that a patent “confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation.” 104 U.S. 356, 358 (1882). Recent cases have cited *James* approvingly for this point, leading some scholars to argue that the proposition is good law. See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350 (2015). However, *James* was followed just a few years later by *Schillinger v. United States*, which rejected the argument that government infringement of a patent is a taking, a view that courts continue to follow. See 155 U.S. 163, 168 (1894); *Golden v. US*, 955 F.3d 981, 988 (Fed. Cir. 2020). As one scholar has put it, patent infringement “is described in terms of eminent domain or takings when that characterization is irrelevant to the resolution of the case.” Jonathan Masur & Adam Mortara, *Patents, Property, and Prospectiveity*, 71 STAN. L. REV. 963, 991–92 (2019).

24.4. **Property under the Due Process Clause.** In *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, the Supreme Court reasoned that

patents “are surely included within the ‘property’ of which no person may be deprived by a State without due process of law.” 527 U.S. 627, 642 (1999). In fact, many things have been deemed property under the Due Process Clause: welfare benefits, professorial tenure, and public education. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Should these be property as well under the Takings Clause? For other purposes? Can something to be property for one constitutional provision but not another? Note that in these cases, all that the Due Process Clause required was notice and a hearing before deprivation of property; it does not require any monetary compensation.

24.5. **Preemption.** *Monsanto* rejects an argument that federal preemption of a state-law intellectual property right avoids the Takings Clause. There are actually quite a few examples of federal preemption of state IP rights. Federal patent law preempted a Florida statutory protection for boat hull designs, see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and the recently enacted Classics Protection and Access Act, 17 U.S.C. § 301(c), preempted state-level copyright protection in certain old sound recordings. Is just compensation owed? What value does preemption of state intellectual property rights serve?

24.6. **Regulatory exclusivities.** Under the 1978 FIFRA amendments described in *Monsanto*, if a pesticide manufacturer seeks approval for a new active ingredient, the EPA cannot use that data in considering other manufacturers’ products for 10 years. The first manufacturer enjoys a patent-like right over that active ingredient, insofar as competitors cannot win approval for that ingredient (at least without doing expensive and duplicative tests to reproduce the data). In the pharmaceutical industry, there are similarly “regulatory exclusivities” that limit the Food and Drug Administration’s ability to approve competitor drugs for several years after a first product is approved.

These regimes are much like intellectual property rights, and some commentators have described them as such. See, e.g., Robin Feldman, *Regulatory Property: The New IP*, 40 COLUM. J.L. & ARTS 53 (2016). To the extent that they are a kind of property, regulatory exclusivities are often criticized as poorly designed. If you were advising lawmakers on designing a regulatory exclusivity, what would you recommend they include? Consider revisiting James Grimmelmann’s list of themes of property law to answer this question.

## 24.2 “Public Use”

For a taking of property to be permissible under the Fifth Amendment, the property must be taken “for public use.” As *Monsanto* suggested, however, that limitation is construed deferentially. How far can the government go before running afoul of the public use requirement?

### *Kelo v. City of New London, Conn.*

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. [The development plan had as its centerpiece a \$300 million research facility that the pharmaceutical company Pfizer Inc. would build. The development plan further proposed an “urban village” with a waterfront con-

ference hotel, restaurants, shopping, residences, offices, and services supporting the nearby marina and state park.]

The [plan's creators] 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. [Other petitioners were similarly situated.] 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. [The trial court partially enjoined the condemnation. A split Supreme Court of Connecticut reversed, holding all the proposed takings valid.]

We granted certiorari . . . .

## 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.” 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. . . .

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. . . .

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." . . .

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' pro-

posal. 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. . . .

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-

ing 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 . . . . 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.

[In this case, Justice Kennedy agreed “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. . . .

**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. . . . 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.

[T]he 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.**

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**

24.7. 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 operations 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?

24.8. *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?

24.9. 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?

24.10. 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 pay-off 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, *link*.

## 24.3 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.

## 24.4 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 con-

demned; 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.").

## 24.5 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 "essential 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.

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."<sup>\*</sup> 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

---

\*The original opinion included a much more extensive discussion of the Commission's dedication requirements, its findings on the connections between those requirements and the city's planning objectives, and the procedure of Dolan's appeals. This and the next paragraph are instead from Section III.B of the opinion. They are much more concise, and apparently the Court viewed these facts as sufficient to decide the case. —Eds.

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 dedication of a 15-foot strip of property above the floodplain boundary, noted above, was for use as a bicycle and pedestrian pathway.] 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 Oregon Court of Appeals and the Oregon Supreme Court both affirmed.]

## II

... 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 re-

solved, 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 . . . .

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. 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." We do not think the Federal Con-

stitution 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.

....

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.]

### **Notes and Questions**

24.11. Would this case have come out differently if the City of Tigard had made more specific factual findings? Or do you think that the greenway and bicycle path requirements could never avoid being an exaction? If you were a member of the City Planning Commission, what would you have done once this case arrived back on remand after the Supreme Court’s decision?

24.12. In *Monsanto*, the government conditioned marketing approval of pesticides on giving up intellectual property. Is that an exaction?

24.13. **Exactions of Money.** In *Koontz v. St. John’s River Water Management District*, 570 U.S. 595 (2013), the Supreme Court considered a local government’s demand that, to receive a permit for developing part of his land, the property owner pay for contractors to do work on unrelated public lands. The local government argued that this was not an exaction, because no interest in real property was being demanded. The Court disagreed, holding 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’s] demand is for money.”

While a general requirement to pay money is not a taking, see *E. Enters. v. Apfel*, 524 U.S. 498 (1998), the *Koontz* Court held that a taking could occur where there is a “direct link” between the monetary demand and a property interest. In the Court’s view, the land at issue in the permitting process created that direct link, rendering the Takings Clause applicable to the monetary exaction. The dissenters, by contrast, reasoned that the *Nollan/Dolan* framework applies only if the government’s underlying demand would constitute a taking, standing alone. Since a demand for monetary payment in isolation is not a taking, the dissenters reasoned, a payment demand as a condition of permitting cannot be either.

24.14. Building permits often require compliance with building codes that specify construction materials, arrangement of exits, fire safety, and numerous other matters. These requirements are conditions on obtaining the permit. Are these building code requirements exactions? Try to make an argument in both directions.

24.15. **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 resources, and does not apply to legally obligated acts like the payment of money. That was the logic of five Justices in *Eastern Enterprises*, which was discussed and distinguished in *Koontz*.

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 en-

trenched 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 property that are nonetheless excluded from operation of the Takings Clause. We have already seen one example in the ruleOne example is the rule 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.



# Chapter 25

## Regulatory Takings

Traditional eminent domain actions involve the government intentionally selecting a property right to appropriate—a parcel of land, for example. But the Fifth Amendment 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. This chapter will review the Supreme Court's case law on these so-called "regulatory takings."

*Pennsylvania Coal Co. v. Mahon* is generally treated as the origin of the regulatory takings doctrine. A mining company held property rights to mine coal in a certain area, but sold the surface rights for private houses. Subsequently, Pennsylvania enacted a law prohibiting coal mining in ways that might cause subsidence of a house, rendering the mining company's rights worthless. Justice Holmes, for the Supreme Court, recognized the tension in calling the mining regulation a taking:

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 does that mean that the regulated property owner must always eat the costs of public-beneficial regulation? No:

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.

Accordingly, the Court concluded that the regulation was a taking:

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.

The three cases in this section will explore what “too far” means. The first establishes the general balancing test used for regulatory takings. The other cases explore two major exceptions in which a regulation is considered a *per se* taking without need for balancing: (1) where the property’s economic value is entirely wiped out, and (2) where the regulation causes a physical occupation of property.

As you read these cases, consider the many different areas that the U.S. government regulates: the environment, food quality, pharmaceuticals, telecommunications, electricity, and more. What do these cases say about the government’s regulatory powers? How could you use the concepts and doctrines of property, expansive over many types of subject matter, to advance or forestall these regulatory objectives on behalf of your clients or in the public interest? Besides being an especially controversial and debate-worthy area of law, the regulatory takings doctrine demonstrates the rhetorical and doctrinal power of this concept of “property” that we have explored.

## 25.1 The *Penn Central* Test

### *Penn Central Transportation 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**

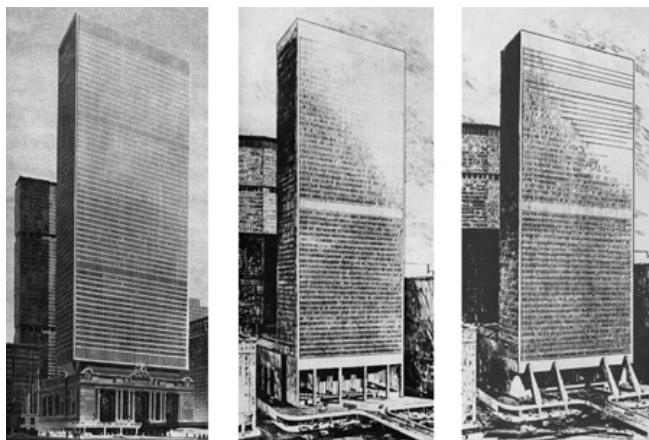
New York City . . . adopted its Landmarks Preservation Law in 1965. [Under the law, the Landmarks Preservation Commission designates buildings as "landmarks," subject to hearings, city approval, and judicial review.] Thus far, 31 historic districts and over 400 individual landmarks have been finally 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. . . .

**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. . . .

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" . . . . 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 and Penn Central developed several proposals for such an office building, but the Landmarks Preservation Commission rejected all of them. UGP and Penn Central filed



**Figure 25.1:** Reproductions of the proposals. From Marcel Breuer Papers, 1920–1986, box 23, reel 5731, frames 1281–1288 (Smithsonian Institution, Archives of Am. Art, c. 1969), [link](#), via *Detroit's Grand Central: Michigan Central Station*, ARCHITAKES (May 27, 2015), [link](#).

suit in New York state court alleging a Fifth Amendment taking. The trial court agreed, but the state appellate courts reversed, holding that no taking had occurred.]

## II

....

### A

... The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . 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.

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,” 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. . . .

[The Court gave examples of non-taking regulations: taxation, water management, zoning under *Euclid*, cutting down trees to prevent infestation, and nuisance laws against operating certain industries in areas. It also discussed cases where regulations were considered takings: *Mahon*, as described previously, and *United States v. Causby*, where low-flying government planes traveled through a chicken farmer’s airspace and literally scared the chickens to death.]

## B

[The Court rejected several arguments attempting to distinguish the landmark designation from permissible zoning. Among these arguments:] Appellants 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. “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to deter-

mine 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.”

[And:] 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.

....

## C

Rejection of appellants’ broad arguments is not, however, the end of our inquiry . . . . 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.

[The Court observed that current uses of the Terminal would still be allowed, that shorter or different office building plans might be permitted, and that a provision in the Landmarks Preservation Law opened up additional development opportunities on other city land parcels.] 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. . . .

### Notes and Questions

25.1. **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.

25.2. **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.

25.3. **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 v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). 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.”).

25.4. 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 legitimate 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.”

25.5. 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 ENVT'L. 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 av-

erage, 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.”).

## 25.2 “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, which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. A state trial court found that this prohibition rendered Lucas’s parcels “valueless.” 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.”

## I

### A

....

In the late 1970’s, Lucas and others began extensive residential development 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. [At that time, South Carolina’s Coastal Zone Management Act did not impose restrictions on development of single-family residences, which Lucas intended to build.]

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. 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. 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. [The trial court agreed and ordered just compensation of \$1.2 million. 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 or the functional equivalent of a "practical ouster of [the owner's] possession." 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). 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. [This will be discussed in the *Cedar Point Nursery v. Hassid* case below.]

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. . . .<sup>7</sup>

---

<sup>7</sup>Regrettably, 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

We have never set forth the justification for this rule. Perhaps it is simply . . . that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. “[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*, in a manner that secures an “average reciprocity of advantage” to everyone concerned, *Mahon*. 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”—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.<sup>8</sup>

---

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. 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.

<sup>8</sup>[In response to Justice Stevens’s dissent:] 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. . . .

**B**

[The Supreme Court does not explain this explicitly, but the South Carolina Supreme Court reached its result of no taking based on a rule that “a taking has not been found when the regulation exists to prevent serious harm” (i.e., a nuisance). The U.S. Supreme Court responded as follows.]

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. . . .<sup>12</sup>

. . . 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.\* 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

---

<sup>12</sup>In 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.

\*The remainder of the majority opinion has been reorganized and heavily edited. Alterations are not marked. —Eds.

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. 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.

In the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, a property owner ought to be aware of the possibility that new regulation might even render his property economically worthless. See *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). Or 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 it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

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 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.

**Justice KENNEDY, concurring in the judgment.**

. . . 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 property 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. . . .

**Justice BLACKMUN, dissenting.**

Today the Court launches a missile to kill a mouse. . . . 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 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." 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 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. . . .

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.

**Justice STEVENS, dissenting.**

... 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. . . . 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. . . .

[Regarding the nuisance exception:] 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. . . .

**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[, namely that Lucas had been deprived of his entire economic interest,] 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. . . .

**Notes and Questions**

25.6. For some before-and-after photos of the Lucas lot, visit William A. Fischel, *A Photographic Update on Lucas v South Carolina Coastal Council: A Photographic Essay* (last updated Mar. 30, 2000), [link](#). 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 and Oliver A.

Houck, eds., Foundation Press, 2005), *link*. 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.

25.7. 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).

25.8. **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.

Courts frequently issue decisions that change the scope or coverage of intellectual property rights. *Alice Corp. Pty. Ltd. v. CLS Bank International*, for example, rendered a wide range of patents on software and business method technologies invalid, depriving those patents of their entire economic value. See 573 U.S. 208 (2014). Is this a taking under *Lucas*? Try to come up with arguments on both sides.

25.9. **“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*, 139 S. Ct. 2162, 2177 (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.”).

25.10. *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.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court considered an 8-month moratorium on development around Lake Tahoe while a state agency conducted environmental studies. Land developers contended that this temporary moratorium constituted a *Lucas* taking, because

the developers were deprived of all economically viable use during the period. The Supreme Court disagreed:

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 we must focus on “the parcel as a whole.” . . .

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. Both dimensions must be considered if the interest is to be viewed in its entirety. . . . 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.

What if one of the land developers only held a life estate or an 8-month lease?

### 25.3 Physical Occupations

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a New York statute required landlords to allow cable television companies to install a cable and outlets on the leased property. The installed components were tiny—a box four inches to the side, plus wiring—and actually improved the value of the property, according to the courts. Was such a regulation a taking? The Supreme Court held that it categorically was a taking, short-circuiting the *Penn Central* test, because of the physical occupation:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. . . . To borrow a metaphor, the government does not simply take a single “strand” from the “bundle” of property rights: it chops through the bundle, taking a slice from every strand.

Among other things, the Court claimed that its *per se* rule “presents relatively few problems of proof” and “will rarely be subject to dispute.” Is it so easy? Consider this case.

***Cedar Point Nursery v. Hassid***

141 S. Ct. 2063 (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 Board enacted a regulation requiring agricultural employers to permit union organizers onto their property for up to 120 days a year. Per the regulation, a set number of organizers “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.”]

[Cedar Point Nursery is a strawberry grower, whose property was accessed by the United Farm Workers union.] 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. . . .

**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. . . .

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. . . . 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. . . .

## 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.

. . . .

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  $\frac{1}{2}$ -inch diameter cable and two  $1\frac{1}{2}$ -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 Court rejected arguments that the regulation was not a taking because the unions only had access to agricultural property for a fraction of time.]

**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.” . . .

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.

**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 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. 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.”) . . .

*Second*, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding back-

ground 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[, such as necessity, to effect an arrest, or to conduct a Fourth Amendment search].

*Third*, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. 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.

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. . . .

**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 company property to communicate with employees. . . . 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.

**Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.**

The Court holds that the provision’s “access to organizers” requirement amounts to a physical appropriation of property. . . . 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.” In my view, the majority’s conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. . . .

[Justice Breyer’s dissent is wide-ranging, and only a selection of its arguments are presented here.]

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 exclude 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.

[Justice Breyer reviewed takings precedents, concluding that they supported distinguishing permanent and temporary rights of access.] 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 impracti-

cal 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.

[The exceptions in section III of the majority opinion were, in Justice Breyer’s view, insufficient to address this problem. In particular, regarding the Court’s position that “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking”:]

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. 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?

### Notes and Questions

**25.11. 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?

**25.12. 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."

**25.13. 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).

25.14. **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 exactions 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.

**25.15. 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?

*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ruled that it was not a taking for state law to require a shopping mall to permit speech and petition ac-

tivities 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)?

25.16. **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?

25.17. **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?

25.18. **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?