Chapter 1

Conflicts Across Property Types

1.1 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,[1] 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

[1] 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 **??** on page **??**, *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 & Lucus 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?

1.2 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 *Keeble* and the doctrines of *ratione soli* and free taking as reflecting principles applicable to **fugitive resources**: chattels that can move of their own accord from place to place, sometimes taking them onto owned land. There are plenty of valuable resources that share this quality, and many of them are the subject of heated legal disputes even today. We will focus here on two: water and oil.

Water is essential to life, but it can also be put to a variety of other practical uses: irrigating farmland, extracting minerals from mines and oil or gas from wells, powering dams and mills, cooling industrial equipment, and as an input to manufacturing, for example. Fresh water from rainfall and snowmelt may flow over the surface of land, either free-flowing (particularly during heavy rains or spring thaws) or in defined channels as streams and lakes. Rain and snowmelt can also seep down and be absorbed by the earth as subsurface groundwater or deep aquifers. In either

case, water has a fundamental physical connection to land, but it also moves freely over, under, and across land. (Sound familiar?)

Both surface and subsurface waters are renewable; they are replenished by precipitation. But they're still scarce. This scarcity comes in two basic forms, which map to the economic categories of **stocks** and **flows**. Depletion of a groundwater source at a rate exceeding its natural replenishment will eventually exhaust the stock—or finite total *amount*—of water at that source. A stream flows at a particular (though perhaps variable) rate, but that rate is primarily determined by ecological rather than human processes, so adding more users or more intense uses may not threaten *future* flows but does reduce the share of the flow available to each at any given time. Given these forms of scarcity, competition over water resources is inevitable, and property law may be called on to regulate that competition.

Complicating the matter, the rate of renewal of water stocks and the magnitude of water flows vary from time to time and place to place: Hawaii gets a lot more rain than Nevada, and California got a lot more rain in 1983 than it did in 2013. Reflecting this natural diversity, the American states have devised two broad categories of common-law responses to the challenge of managing conflicts over access to water, epitomized by the two cases below. The first response, **riparian rights**, dominates in the wetter, eastern states, and was firmly established by our first case, *Tyler v. Wilkinson*. The second response, **prior appropriation**, prevails in the more arid western states, and is sometimes referred to as the "Colorado Rule" given its historic association with our second case, *Coffin v. Left Hand Ditch Co*. Both cases deal with rights to flows, in particular the flow of a river. As you read these cases, try to understand how the two systems differ, and what might explain or justify the difference.

Tyler v. Wilkinson

24 F. Cas. 472, 4 Mason 397 (D.R.I. 1827)

STORY, Circuit Justice.

[The Pawtucket River forms part of the boundary between Rhode Island and Massachusetts. Plaintiffs owned several mills on the Massachusetts side of the river. For over a century, mills on both sides of the river had been powered by the flow of the Pawtucket as directed by a dam (the "lower dam"). Defendants owned several mills upstream of the plaintiffs on the Rhode Island side of the river and on a man-made canal called Sergeant's Trench, which bypassed the lower dam on the western bank.

Defendants erected a new dam (the "upper dam") to direct the flow of water toward their mills, interfering with the ability of plaintiffs to rely on the flow of the Pawtucket to the lower dam to power the plaintiffs' mills. Plaintiffs sued for a declaration that by "ancient usage" they had a superior claim to the waters of the Pawtucket over the defendants, whom the plaintiffs alleged were entitled only to "wastewater," or so much of the flow as was not needed by the plaintiffs. Supreme Court Justice Joseph Story, riding circuit, heard the dispute and rendered the following opinion.]

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands . . . .

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum acquae*. 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 wa-

ter, 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 propri-

etor, 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 artifi-

cial 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

1.1. **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 Realignment of Common-Law Water Rights*, 19 J. Leg. Stud. 261, 290-93 (1990). Any of these types of distinctions could justify a change in legal rules from one case to another. Which—if any—do you think best explain the difference between *Tyler* and *Coffin*?

1.2. **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*.

1.3. **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 (1895).[1] A corollary to this rule is that an aggrieved property owner's remedy for the loss, through drainage, of subsurface oil or gas has traditionally been to offset the effects of the developer's well by drilling his or her own well, often termed an "offset well." *See Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 365, 65 A. 801, 803 (1907) ("What then can the neighbor do? Nothing; only go and do likewise.").

The reference to "the lands of another" in the above quote does not suggest a developer may invade the subsurface area of a neighboring property by drilling at an angle rather than vertically (referred to as slant drilling or slant wells), or by drilling horizontally beneath the surface. This is because the title holder of a parcel of land generally owns everything directly beneath the surface. Rather, and as suggested by the "no trespass" predicate, it refers to the potential for oil and gas to migrate from the plaintiff's property to the developer's land when extracted from a common pool or reservoir spanning both parcels.

B. Hydraulic fracturing

One of the central questions in this matter involves how these principles apply where hydraulic fracturing is used to extract oil or gas from subsurface geological formations. According to the federal government, hydraulic fracturing is used in "unconventional" gas production. "Unconventional" reservoirs can cost-effectively produce gas only by using a special stimulation technique, like hydraulic fracturing . . . . This is often because the gas is highly dispersed in the rock, rather than occurring in a concentrated underground location. United States Environmental Protection Agency (the "EPA"), *The Process of Unconventional Natural Gas Production*, *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 forma-

[1]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. Hydraulic fracturing fluid commonly consists of water, proppant and chemical additives that open and enlarge fractures within the rock formation. These fractures can extend several hundred feet away from the wellbore. The proppants—sand, ceramic pellets or other small incompressible particles—hold open the newly created fractures.

Id.

After injection, fluid is withdrawn from the well while leaving the proppants in place to hold the fissures open. This enhances the drainage of oil or gas into the wellbore where it can be captured.

C. Factual and Procedural History of This Case

(i) Introduction

The parties presently favor essentially the same rule of law: they both, in substance, argue that the traditional rule of capture should apply, subject to the common-law standard for trespass of real property based on physical intrusion onto another's land. Each party, moreover, depicts the other as erroneously suggesting that an exception to this framework should pertain where hydraulic fracturing is used to obtain oil or natural gas. In particular, the plaintiffs suggest that Southwestern wishes to convert the rule of capture into a precept whereby energy developers may physically invade the property of others to capture natural gas so long as they are using hydraulic fracturing. For its part, Southwestern portrays the plaintiffs and the Superior Court decision from which it appeals as positing that the rule of capture simply does not apply when hydraulic fracturing is used for energy development on one's own land.

(ii) Undisputed Facts

Adam, Paula, Joshua, and Sarah Briggs ("Plaintiffs") own a parcel of real estate consisting of approximately eleven acres in Harford Township, Susquehanna County. During all relevant times, Plaintiffs have not leased their property to any entity for natural gas production. Plaintiffs' property is adjacent to a tract of land leased by Appellant Southwestern Energy Production Company for natural gas extraction (the "Production Parcel"). Southwestern maintains wellbores on the Production Parcel and has used

hydraulic fracturing to boost natural gas extraction from the Marcellus Shale formation through those wellbores.

[(iii–iv) Proceedings]

In November 2015, Plaintiffs commenced an action against Southwestern in which they stated two causes of action, trespass and conversion [to the natural gas under their land]. . . . 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 discovery, the trial court granted summary judgment of no trespass. The appellate Superior Court reversed.]

. . . [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

[The court reiterated that no one had addressed the possibility that Southwestern had physically trespassed on the plaintiffs' land. The plaintiffs had not alleged it in their pleadings, the appellate court had stated that there was no evidence of a physical intrusion, and Southwestern had framed the issue before the Pennsylvania Supreme Court as "whether the rule of capture should be 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." Thus, the court declined to review the question of whether a physical intrusion had actually occurred.]

III. Analysis

The issue as stated by Southwestern should nonetheless be resolved for purposes of this dispute—and to provide guidance to the bench and bar—because at least part of the Superior Court's opinion can reasonably be construed as setting forth a *per se* rule foreclosing application of the rule of capture in hydraulic fracturing scenarios, and that rule rests on faulty assumptions. In particular, and most saliently, the panel appears to have indicated that one litmus for whether the rule of capture applies is whether the defendant's gas extraction methodology relies only on the natural drainage of oil or gas within a conventional pool or reservoir, or whether instead those methods utilize some means of artificial stimulation to induce drainage.

The Superior Court's position in this respect logically rests on one of two grounds: (a) the act of artificially stimulating the cross-boundary flow through the use of hydraulic fracturing solely on the developer's property in and of itself renders the rule of capture inapplicable; or (b) as Plaintiffs argue, any time natural gas migrates across property lines resulting, directly or indirectly, from hydraulic fracturing, a physical intrusion into the plaintiff's property must necessarily have taken place.

As to the first proposition, all drilling for subsurface fugacious minerals involves the artificial stimulation of the flow of that substance. The mere act of drilling interferes with nature and stimulates the flow of the minerals toward artificially-created low pressure areas, most notably, the wellbore. This Court has held that the rule of capture applies although the driller uses further artificial means, such as a pump, to enhance production from a source common to it and the plaintiff—so long as no physical invasion of the plaintiff's land occurs. *See Jones*, 194 Pa. at 384, 44 A. at 1075 (indicating that, absent physical intrusion, a developer may use "all the skill and invention of which a man is capable" to appropriate resources from under his own property). There is no reason why this precept should apply any differently to hydraulic fracturing conducted solely within the driller's property.

. . . Accordingly, we reject as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs entirely within the developer's property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing,

or that such drainage stems from less "natural" means than conventional drainage.

The second predicate—that drainage from under a plaintiff's parcel can only occur if the driller first physically invades that property—does not lend itself to a purely legal resolution. . . . By design, hydraulic fracturing creates fissures in rock strata which store hydrocarbons within their porous structure. On the state of the present record, this alone does not establish that a physical intrusion into a neighboring property is necessary for such action to result in drainage from that property. We cannot rule out, for example, that a fissure created through the injection of hydraulic fluid entirely within the developer's property may create a sufficient pressure gradient to induce the drainage of hydrocarbons from the relevant stratum of rock underneath an adjacent parcel even absent physical intrusion. Nor can we discount the possibility that a fissure created within the developer's property may communicate with other, pre-existing fissures that reach across property lines. Whether these, or any other non-invasive means of drainage occasioned by hydraulic fracturing, are physically possible in a given case is a factual question to be established through expert evidence.

The Superior Court panel appears to have assumed, if implicitly, that such occurrences were impossible—but, again, there is no basis in the record for such an assumption. In all events, a plaintiff asserting a cause of action "must be able to prove all the elements of his case by proper evidentiary standards." *Papieves v. Lawrence*, 437 Pa. 373, 379, 263 A.2d 118, 121 (1970). Thus, to the extent this lawsuit goes forward on Plaintiffs' new, physical-intrusion theory, Plaintiffs will bear the burden of demonstrating that such an intrusion took place.

We have not overlooked Southwestern's argument that trespass should not be viewed as occurring miles beneath the surface of the earth. As Southwestern observes, in some jurisdictions traditional concepts of physical trespass have been relaxed where activities take place miles below the surface and the plaintiff is not deprived of the use and enjoyment of the land. Southwestern posits that this is analogous to the principle that trespass does not arise high above the surface. *See Causby*, 328 U.S. at 260-61. It emphasizes that other socially useful endeavors—such as carbon sequestration projects, energy storage wells, and waste disposal sites—could be

jeopardized if the rule against trespass were to be enforced in an unduly stringent manner where deep subsurface activities are concerned.

Without speaking to the merit of such a claim, we note that this Court is limited to the issue as it was framed in the petition for allowance of appeal, and Southwestern has not articulated any reason an exception should be made in the present dispute. Thus, to the extent Southwestern argues it should be permitted to escape liability even if it is ultimately found to have effectuated a physical intrusion into Plaintiff's subsurface property, its claim in this regard has not been preserved for review by this Court.

This brings us to the question of whether the lawsuit can, indeed, progress on a theory of trespass by physical intrusion, and by extension, to the question of the appropriate mandate from this Court. Ordinarily, and for the reasons explained, we would deem any such contention to be absent from the litigation, as it does not appear to have been mentioned in Plaintiffs' pleadings or argued as a basis to deny Southwestern's motion for summary judgment. The Superior Court, however, evidently believed there was some legitimate basis to dispose of the appeal on the presupposition that Southwestern was alleged to have physically invaded Plaintiffs' subsurface property with hydraulic fracturing liquid and proppants; and, as noted, Southwestern has not challenged the intermediate court's action in this respect.

That being the case, . . . we find that the appropriate action at this juncture is to vacate the Superior Court's order and remand for reconsideration in light of the guidance provided in this opinion, and the certified record on appeal . . . .

Justice DOUGHERTY[, concurring in part and dissenting in part:]

I join the majority's holding that the rule of capture remains effective in Pennsylvania to protect a developer from trespass liability where there has been no physical invasion of another's property. In so holding, the majority correctly recognizes that if there **is** such a physical invasion the rule of capture will **not** insulate a developer engaged in hydraulic fracturing from trespass liability. As I agree with both propositions, I also agree the matter should be remanded for further proceedings involving a specific inquiry into a physical invasion. I respectfully dissent, however, from the notion that this question must be determined by the Superior Court on the present record . . . . Given the state of the record, which was apparently not complete at the time the trial court erroneously entered summary judgment, I

would remand the matter to that court for further proceedings, including the completion of discovery on the factual question of physical invasion, and trial thereon as necessary.

Notes and Questions

1.4. **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.)

1.5. **I Drink Your Milkshake.**[2] *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

[2] There Will Be Blood (Paramount Vantage/Miramax Films 2007).

Figure 1.1: Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, *link*.

the very same oil? Does the distinction have any practical effect? Does the advent of fracking technology change your answer?

1.6. **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 1.1 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?

1.7. **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 in-

centive to undertake the costs of responsibly managing the resource (i.e., where an owner would be willing to internalize the externalities of using the resource). *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

So goes the theory, at any rate. But this theory leaves open a host of practical questions, primarily about *allocation* of these theoretically attractive private property rights. Does it make the most sense to have one owner of the whole pasture? Should the pasture be divided into parcels, and if so, how many and how should they be assigned? What if dividing the pasture into smaller parcels leaves each owner with insufficient space to pasture animals? If there is just one owner, how are we supposed to choose the lucky winner? And once the winner is chosen, what is everyone else supposed to do? Finally, who has the authority to decide all these questions?

We can apply these questions to our oil and gas example. If you were trying to avoid overexploitation of the oil field at Signal Hill in 1923, would you assign private property rights over the entire oil field? How? To whom? Is there an alternative to private property rights that can avoid inefficient overexploitation? Might the experience of other societies whose territory includes valuable fossil fuel reserves be instructive? *See* Helge Ryggvik, *A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals*, 89 BUS. HIST. REV. 3 (2015).

1.8. **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 de-

signed 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.

1.9. **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).

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

1.10. 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?

1.3 Intellectual Property Exhaustion

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.

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

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 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 voide, 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 condi-

tional limitation on alienation attached to a transfer of the entire interest in personalty 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

1.11. 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 refillers 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?

1.12. 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?

1.13. *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 personal property overrides the right to subdivide intellectual property. 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 demon-

strate. But neither is the right to alienate—regulations such as drug approval can prohibit sales of products.

1.14. 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).

1.15. 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 2

Restrictive Covenants

The historical antipathy of English law toward *negative* easements—the right of a landowner to *prevent* particular uses of *someone else's* land—made private ordering over conflicting land uses somewhat difficult. The basic problem is relatively easy to understand. Suppose Abigail pays her neighbor Beatrice $1000 in exchange for a promise that Beatrice will use her land only for residential purposes, because Abigail does not want to live next door to a busy commercial or industrial facility. Suppose that Beatrice then begins to construct a factory on her land. Abigail could sue for breach of contract and obtain appropriate remedies—perhaps including injunctive relief barring Beatrice from building the factory.

But now suppose that instead of building a factory herself, Beatrice sells her land to Clara, who intends to build a factory on the land. Clara didn't promise Abigail anything, and Abigail gave Clara no consideration—they are not in privity of contract. We might therefore conclude that Abigail is out of luck: she cannot enforce a contract against someone who didn't agree to be bound by it. But if that is our conclusion, there is now a huge obstacle to Abigail and Beatrice ever reaching their agreement in the first place: how could Abigail ever trust that her consideration is worth paying if Beatrice can deprive Abigail of the benefit of the bargain by selling her (Beatrice's) land? More generally, if a promise to *refrain* from certain uses will not **run with the land**, can private parties ever effectively resolve their disputes over competing land uses by agreement?

This is the problem to be solved with the property interest called the **restrictive covenant**, also called the "real covenant." It looks much like a simple contract between two parties, with a bunch of additional legal requirements for formation. But being a property interest, the covenant is more than a contract—it has the power to

run with the land and bind future owners, even ones who may never have wished to be bound by the terms of the covenant.

This chapter and the next will trace the history of the restrictive covenant. It is a story of how an ancient legal device came to be adapted, modified, and repurposed, from a tool for binding medieval tenant farmers to the legal foundation of today's suburban landscape—the modern planned community.

2.1 Historical Development

The traditional real covenant at law demanded compliance with a strict set of requirements before an agreement between two landowners would 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 first and third of these elements are straightforward. The touch-and-concern element will be discussed in the *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank* case presented later. As for the horizontal and vertical privity elements, collectively called "privity of estate," are strict technical tests relating to the nature of the covenanting parties' property interests. The privity rules are not given here because, as the cases to come will show, courts have been willing to relax them from their original common-law strictness.

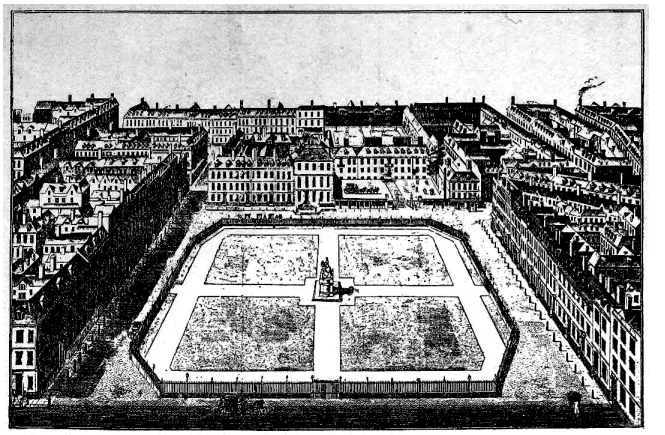

Figure 2.1: Leicester Square in the 18th Century. Source: JOHN HOLLINGSHEAD, THE STORY OF LEICESTER SQUARE 19 (1892), British Library Online, *link*.

More importantly, the result of this strict test was that common-law real covenants were hard to enforce and of limited value. This ultimately led to the creation of a new form of restrictive covenant: the **equitable servitude**.

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.

*This and the next quotation have been separately paragraphed and indented to improve readability. —Eds.

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

2.1. 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?

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

2.3. *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).

2.4. Although *Tulk* is not explicit about this, the general view is that the equitable servitude eliminates the privity requirements with a notice requirement. In other words, the required elements for an equitable servitude are (1) compliance with the statute of frauds and contract formation, (2) the covenanting parties' intent to bind successors, (3) the covenant touching and concerning the land, and (4) that successors-in-interest have constructive or actual notice. Jurisdictions differ, of course, but insofar as courts typically treat equitable servitudes and real

covenants as largely interchangeable, this is why the traditional, strict privity requirements are not worth dwelling on.

2.5. The THIRD RESTATEMENT, adopted in some jurisdictions, provides yet another form of restrictive covenant that differs from both the common-law real covenant and the equitable servitude. 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. First, the privity requirement is eliminated. Under the RESTATEMENT view, a contract containing the covenant is sufficient to bind successors, even if it passes no *other* property interest, so long as the parties intended the covenant to run with the land. (Under this view, a covenant intended to bind successors is *itself* a sufficient interest in land.) Second, there is a deep connection between covenants that run with the land and "common-interest communities"—a property law institution that we will investigate further in Chapter **??**. 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.

2.6. 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 push-

ing 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.

2.7. **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"?

2.8. 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?

2.9. Recall the dispute between Abigail, Beatrice, and Clara on page 33. 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?

2.10. 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?

2.2 Formation

Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank

15 N.E.2d 793 (N.Y. 1938)

Lehman, Judge.

The plaintiff, as assignee of Neponsit Realty Company, has brought this action to foreclose a lien upon land which the defendant owns. The lien, it is alleged, arises from a covenant, condition or charge contained in a deed of conveyance of the land from Neponsit Realty Company to a predecessor in title of the defendant. The defendant purchased the land at a judicial sale. The referee's deed to the defendant and every deed in the defendant's chain of title since the conveyance of the land by Neponsit Realty Company purports to convey the property subject to the covenant, condition or charge contained in the original deed . . . .

Upon this appeal the defendant contends that the land which it owns is not subject to any lien or charge which the plaintiff may enforce. Its arguments are confined to serious questions of law. . . . On this appeal we may confine our consideration to the merits of these questions, and, in our statement of facts, we drew indiscriminately from the allegations of the complaint and the allegations of the answer.

It appears that in January, 1911, Neponsit Realty Company, as owner of a tract of land in Queens county, caused to be filed in the office of the clerk of the county a map of the land. The tract was developed for a strictly residential community, and Neponsit Realty Company conveyed lots in the tract to purchasers, describing such lots by reference to the filed map and to roads and streets shown thereon. In 1917, Neponsit Realty Company conveyed the land now owned by the defendant to Robert Oldner Deyer and his wife by deed which contained the covenant upon which the plaintiff's cause of action is based.

That covenant provides:

> And the party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part further covenants that the property conveyed by this deed shall be subject to an annual charge in such an amount as will be fixed by the party of the first part, its suc-

> cessors 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 grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant . . . .

The covenant in this case is intended to create a charge or obligation to pay a fixed sum of money to be "devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part [the grantor], its successors or assigns." It is an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant. Does such a covenant "touch" or "concern" the land? . . . In truth such a description or test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case." Clark, op. cit. p. 76.

Even though that be true, a determination by a court in one case upon particular facts will often serve to point the way to correct decision in other cases upon analogous facts. Such guideposts may not be disregarded. It has been often said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land. Such statements are based upon English decisions which hold in effect that only covenants, which compel the covenanter to submit to some *restriction on the use* of his property, touch or concern the land, and that the burden of a covenant which requires the covenanter to do an affirmative act, even on his own land, for the benefit of the owner of a "dominant" estate, does not run with his land. . . . [Nevertheless 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 benefit shall run to the assigns of the grantor who "may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph." The plaintiff has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners. Various definitions have been formulated of "privity of estate" in connection with covenants that run with the land, but none of such definitions seems to cover the relationship between the plaintiff and the defendant in this case. The plaintiff has not succeeded to the ownership of any property of the grantor. It does not appear that it ever had title to the streets or public places upon which charges which are payable to it must be expended. It does not appear that it owns any other property in the residential tract to which any easement or right of enjoyment in such property is appurtenant. It is created solely to act as the assignee of the benefit of the covenant, and it has no interest of its own in the enforcement of the covenant.

The arguments that under such circumstances the plaintiff has no right of action to enforce a covenant running with the land are all based upon a distinction between the corporate property owners association and the property owners for whose benefit the association has been formed. If that distinction may be ignored, then the basis of the arguments is destroyed. How far privity of estate in technical form is necessary to enforce in equity a restrictive covenant upon the use of land, presents an interesting question. Enforcement of such covenants rests upon equitable principles, and at times, at least, the violation "of the restrictive covenant may be restrained

at the suit of one who owns property or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or of contract between the parties, or whether an action at law were maintainable." *Chesebro v. Moers*, 233 N.Y. 75, 80, 134 N.E. 842, 843, 21 A.L.R. 1270. . . . We do not attempt . . . to formulate a definite rule as to when, or even whether, covenants in a deed will be enforced, upon equitable principles, against subsequent purchasers with notice, at the suit of a party without privity of contract or estate. There is no need to resort to such a rule if the courts may look behind the corporate form of the plaintiff.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners' Association, Inc., is acting as the agent or representative of the Neponsit property owners. As we have said in another case: when Neponsit Property Owners' Association, Inc., "was formed, the property owners were expected to, and have looked to that organization as the medium through which enjoyment of their common right might be preserved equally for all." *Matter of City of New York, Public Beach, Borough of Queens*, 269 N.Y. 64, 75, 199 N.E. 5, 9. Under the conditions thus presented we said: "It may be difficult, or even impossible to classify into recognized categories the nature of the interest of the membership corporation and its members in the land. The corporate entity cannot be disregarded, nor can the separate interests of the members of the corporation" (page 73, 199 N.E. page 8). Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant . . . .

Notes and Questions

2.11. 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?

2.12. 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.

2.13. 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

2.14. 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?

2.15. 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.

2.16. 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?

2.17. 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*.

2.3 Modification and Termination

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. Note, however, that where a covenant benefits and burdens multiple lots simultaneously (as in *Neponsit*), these grounds for termination will be inordinately more difficult to satisfy, simply because more parties must give their consent or acquiescence and thus any one of them could effectively veto the covenant's termination.

One basis for modification or termination that is perhaps more likely to arise with respect to restrictive covenants than it is for easements is that conditions of the land have changed to such an extent that continued enforcement is inappropriate. This is particularly so where the restrictive covenants are part of a common scheme or plan for a community—precisely the circumstance in which other means of termination are likely to be difficult. In such a community, what types of changes

to "facts on the ground" should justify terminating the covenants shaping the community's land uses?

El Di, Inc. v. Town of Bethany Beach

477 A.2d 1066 (Del. 1984)

HERRMANN, Chief Justice for the majority:

This is an appeal from a permanent injunction granted by the Court of Chancery upon the petition of the plaintiffs, The Town of Bethany Beach, et al., prohibiting the defendant, El Di, Inc. ("El Di") from selling alcoholic beverages at Holiday House, a restaurant in Bethany Beach owned and operated by El Di.

I.

The pertinent facts are as follows:

El Di purchased the Holiday House in 1969. In December 1981, El Di filed an application with the State Alcoholic Beverage Control Commission (the "Commission") for a license to sell alcoholic beverages at the Holiday House. On April 15, 1982, finding "public need and convenience," the Commission granted the Holiday House an on-premises license. The sale of alcoholic beverages at Holiday House began within 10 days of the Commission's approval. Plaintiffs subsequently filed suit to permanently enjoin the sale of alcoholic beverages under the license.

On appeal it is undisputed that the chain of title for the Holiday House lot included restrictive covenants prohibiting both the sale of alcoholic beverages on the property and nonresidential construction.[1] The same restriction was placed on property in Bethany Beach as early as 1900 and 1901 when the area was first under development.

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[1]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."

As originally conceived, Bethany Beach was to be a quiet beach community. The site was selected at the end of the nineteenth-century by the Christian Missionary Society of Washington, D.C. In 1900, the Bethany Beach Improvement Company ("BBIC") was formed. The BBIC purchased lands, laid out a development and began selling lots. To insure the quiet character of the community, the BBIC placed restrictive covenants on many plots, prohibiting the sale of alcohol and restricting construction to residential cottages. Of the original 180 acre development, however, approximately 1/3 was unrestricted.

The Town of Bethany Beach was officially incorporated in 1909. The municipal limits consisted of 750 acres including the original BBIC land (hereafter the original or "old-Town"), but expanded far beyond the 180 acre BBIC development. The expanded acreage of the newly incorporated Town, combined with the unrestricted plots in the original Town, left only 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 ½ 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 con-

ditions 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

2.18. 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.

2.19. 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?

2.20. 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 servi-

> tude 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?

2.21. 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?*

2.4 Beyond Real Property

Servitudes, easements, and restrictive covenants are creatures of real property law. There are no doctrines of covenants for personal property or intellectual property, for example. But the broader concept behind covenants—using property-like agreements to restrict behavior—is potentially useful and applicable beyond the domain of real estate. Indeed, clever lawyers have attempted to devise ways of simulating the operation of servitudes in a wide range of domains.

Here are a few examples of servitude-like arrangements. What do you think of them? Do they strike you as achieving useful goals? Would the world be better served if servitude law were recognized in other domains, rather than the sometimes-hackish solutions below? Or do these situations strike you as overreaching? Is there, perhaps, a good reason for servitudes to be limited to land?

Personal property. The general view is that "personal property servitudes are seldom enforceable." Van Houweling, *supra*, at 906. Nevertheless, product manufacturers have long sought to control the ways in which consumers use their products—that is, to impose servitude-like control over personal property—so that those manufacturers can control markets for repairs, resale, and parts. Keurig would prefer that coffee drinkers only buy authorized (and more expensive) K-Cups;

John Deere would prefer that farmers repair their tractors only at John Deere service centers; Apple would prefer that you buy a new phone every year or two.

To achieve this, manufacturers often turn to intellectual property rights as a vehicle for controlling personal property. *See id.* at 924–27; PERZANOWSKI & SCHULTZ, *supra*. *Impression Products, Inc. v. Lexmark International, Inc.* was an attempt at imposing a covenant-like restriction on reselling toner cartridges using patent law. Another strategy is to embed copyrighted software in a product, and to include an End User License Agreement with the product so that the consumer does not "own" the copy of the software, but rather only receives a license to use it. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010). Even if a consumer sells the product downstream, every subsequent purchaser must have a copyright license to use the software and therefore must comply with the EULA, meaning that the license terms effectively "run with the product."

Furthermore, the manufacturer can install software on the product that programmatically enforces use restrictions. For example, car manufacturers often lock vehicles down with software, such that the car owner cannot service the car without authorization from the manufacturer or a licensed service dealer. Again, this works even if the car is resold, so the repair restriction runs with the car. If a car owner attempts to tamper with the software to overcome the restriction, then the owner potentially violates the Digital Millennium Copyright Act, which prohibits circumvention of technological protection measures that protect copyrighted works. 17 U.S.C. § 1201.

Open-source works. Many software developers are willing to make their computer programs freely available for others to use or modify. This "open-source" software is big business: Fundamental Internet and communications technologies rely on it, and just about all of the largest technology companies make open-source contributions. But these developers are rightfully concerned about shady third parties taking their freely available programs and selling them. In effect, open-source developers want a covenant-like restriction on their software, preventing others from commercially selling it.

To achieve this result in the absence of "software covenants," open-source communities have developed a number of standard license texts, such as the GNU Public License, or GPL. These licenses exploit the same copyright-based strategy described above. The license grants any recipient of the open-source software a copyright license to copy or modify the software, so long as the recipient complies with the terms of the license document. Typically this requires the recipient to give attribution to the original author, and precludes the recipient from selling the soft-

ware commercially. Some open-source licenses, like the GPL, go further, requiring as well that if the recipient modifies the software, then the recipient must also make those modifications available under the GPL. This is why open-source licenses are sometimes described as "viral," and it makes them very covenant-like, binding a potentially enormous range of downstream recipients of the licensed software.

The open-source license model has been adapted outside the software world, in the form of the Creative Commons license. The original *Open Source Property* modules are governed by a Creative Commons license, which is why this book is free.

Access to technologies. Patents on vital drugs or on critical infrastructure can restrict the public's access to important technologies, and so it is often useful to impose usage restrictions on patents to enhance public access. Ideally, such usage restrictions continue to have force even if the patent is sold to someone else—that is, the restrictions should run with the patent.

One place this arises is in federal funding of research. Say the U.S. government gives a grant to a university to do research on a disease. If the university discovers a treatment for the disease, it can get a patent on the treatment.[1] But the government, as grantor, presumably wants to ensure that the grantee exploits the invention in the public interest. To achieve this, the Bayh–Dole Act imposes a variety of limitations on patent rights obtained through federal funding. 35 U.S.C. §§ 202–204. The most famous of these are the government's "march-in rights," which can force the grantee to license their patents on federally funded inventions when certain conditions are met, such as licensing being "necessary to alleviate health or safety needs." 35 U.S.C. § 203(a)(3).

In the case of 35 U.S.C., the "covenants" on federally funded patents were to the benefit of the government, and they were achieved through targeted legislation. What if the benefit runs to a private party that cannot simply change patent law? Consider the Institute of Electrical and Electronics Engineers, which develops the technical specifications for communication technologies like Wi-Fi. Companies like Motorola come up with improved wireless communication systems, and IEEE may incorporate those improvements into newer versions of Wi-Fi. But if Motorola has patents on its improvements, then anyone who uses Wi-Fi is potentially liable. Insofar as IEEE wants Wi-Fi to be broadly adopted without fear of patent lawsuits,

[1] This is perhaps controversial—if the public paid for the research, why should the grantee profit a second time through a patent? But the current prevailing view is that patenting of funded research results is appropriate because it gives the grantee the incentives to do the additional work of bringing the product to market, such as getting regulatory approval.

IEEE contracts with Motorola, with Motorola agreeing to license its patents on reasonable terms.

But what if another company, say Google, acquires Motorola's patents? Google has no contract with IEEE, and so is theoretically free to sue all the Wi-Fi users it wants. The solution from 2013: The Federal Trade Commission contended that Google's failure to honor Motorola's reasonable-licensing contract was anticompetitive behavior, and got Google to agree to honor it through a consent decree. *See In re Motorola Mobility LLC*, 156 F.T.C. 147 (July 23, 2013); Bernard Chao, *In re Motorola Mobility LLC, & Google: FRAND, Injunctions and Unfair Competition*, *in* FRAND Cases in Context (Jorge L. Contreras ed., forthcoming 2026).

Would intellectual property covenants have been a better approach? And what might they look like? *See* Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 Ind. L.J. 10, 294–304 (2014).