

Property I Outline
Professor Volpp - Fall 1998

I. Basic Principles and Justifications for Private Property in the U.S. □ Original Allocation of Property Rights

A. Property in Context

Property laws is the interest of the state to regulate (competing interests between individuals/groups for scarce resources) vis-a-vis this property

Y= bundle of rights

1. Types of Property Rights

- a) Liberty to Use
- b) Right to Exclude
- c) Power to Transfer
- d) Power to Devise or Bequeath
- e) Immunity from Damage
- f) Immunity from Expropriation

*The Government by deciding to protect any one of the bundle of rights (Y) creates a property right in some way.

*Property law is about the decision judges and legislators make as to how to resolve the allocation of these rights when two or more people (indiv/groups) have competing desires for the same resource.

2. Distribution of Property

3. Social Contexts in Which Property Is Acquired

B. Theories of Property

1. Traditional American Indian Conceptions of Property

2. First Possession and Labor (Lockean proviso)

-property goes to first possessor on grounds that rewards the labor of using land for legitimate uses.

3. Positivism and Legal Realism

law is the law & we follow it b/c it is the law
before laws, no property; take away laws, and property ceases.

4. Rights, Social Contract, and Human Flourishing

Individuals interests override more general considerations of public policy.

5. Consequentialism, Utilitarianism, and Efficiency (cost/benefit)

-Consequences judged by comparing costs and benefits with goals of maximizing the aggregate level of human satisfaction= social utility.

6. Social Relations Approaches

-Analyze property rights as relations among persons regarding control of valued resources

Property Rights are given via:

1. Discovery

2. Rule of Capture

3. Rule of Labor

4. government grant

5. relationship (ie, via tribe)

C. Conquest and Redistribution

1. Conquest

Doctrine of Discovery: vacant land, finding of land, & symbolic taking of land gives discoverer title to the land the sole right to settle on land.

Absolute title of ownership vs. use rights of occupancy

Justifications for acquisition of property:

- 1) Acquisition through discovery: Sole right/title to land is encumbered by use rights of Indians, which can be extinguished at any time by conquest or purchase.

Court did not recognize Indian title of land
vs. Indians did own title of land, but title passed to U.S. thru discovery.
(Johnson v. M'Intosh)

vs. 2) Acquisition through Labor: Although Europeans were not the first possessors, the Indians were not either, & title given the person who works/labors the land

Johnson v. M'Intosh: Indians cannot transfer absolute title (own/transfer property) to others b/c:

- 1) absolute title was acquired by U.S. govt by discovery
- 2) Indians obtained title of occupancy (rights to use, but not to transfer title of land; I can transfer/revoke use rights); U.S. gov't not evicting Indians, but U.S. gov't has exclusive right to extinguish title of land via 1) conquest or 2) purchase.
*Not conquest, b/c to conquer means to become part of culture, to take by force & assimilate, in this case, Indians were still savage.
→ *J. Marshall* - preserve Indian lands via use rights

2. Distribution of Public Lands:

Promoting Development, Dispersing Ownership, and Satisfying Needs

a. Homestead Acts and Land Grants

b. Squatters

Set up laws to secure claim on Gov't land

Afraid gov't would sell land, set up Union to protect property.

= record property, form rules. - intend to live there.

c. Freed Slaves

Promised land & mule; obtain land via accumulations/earning it.

Govt retracted promise; take back land, work for master

D. Labor, Investment, and Possession

Rule of Capture vs. Rule of Labor vs. Discovery

Build arguments around following classifications:

- 1) **Fairness** - reward results/success vs. reward effort/labor
- 2) **Social Utility** - morality vs. market efficiency/productivity & competition
rights based theory - morality & social customs
vs. consequences - cost-benefit, incentives to kill fox (pest);
increase competition leads to productive use of labor
-encourage competition vs. discourage monopoly
-incentive for investment/encourage abundance of resources vs. discourage overabundance of resources
- 3) **Administrative Efficiency** -
certainty vs. security
judicial role vs. legislative role
less likely to lead to litigation vs. flexibility
rigid rules w/rule of capture (if have, you own)= easy to administer
flexible rules w/rule of labor- look at context

1. **Wild Animals** - Law of capture vs. Law of Labor

-If land owned by X, X's animal.

-If wild wasteland, possession through capture (physical, via wound/trap)

vs. possession through labor - reward labor & investment

-Pierson v. Post - (fox) Law of capture - the first person to reduce a wild animal to possession has possessory rights of the wild animal.

2. **Oil and Gas** - Law of capture provided that there is no waste/negligence.

-Absolute ownership allows landowner to have reasonable opportunity to his fair share of a common oil pool & has freedom of capture.

-& reasonable use (not negligent waste & destruction of oil, where depriving others of opportunity to their fair share.

Elliff v. Texon Drilling Co.

3. Water

a. Groundwater

*1) Free Use/Absolute Ownership - each surface owner is free to withdraw as much water as he likes from beneath surface of his property w/o liability, even if it has the effect of withdrawing water from underneath his neighbor's property; spoils to the victor (law of capture -got it, it's mine)

2) Reasonable Use - each owner must accommodate the interests of neighboring owners; only use so much, let others use.

3) Correlative Rights Test - allow each owner to withdraw a specified portion of groundwater; get % of what lies underneath prop.

4) Prior Appropriation Test - grant rights to property owner that first invested in withdrawing water.

b. Streams

Reasonable Use Test (balance social value of each owner's use, extent of harm to defendant, cost of preventing harm relative to benefit)

4. News

Rule of Labor (Locke) - expend labor in property, should get rewards

Quasi-property right (labor/property)

1) common property w/ respect to public (no property rights)

2) private property w/ respect to competitors (extend property rights in news to individuals, i.e. INS)

3) temporal nature of news.

-copyright vs. fair use (commercial vs. private and noncommercial use)

-secure investment vs. competition (release news to public, waive property rights and all have equal rights to use publicly available info)

-unfair competition (common property vs. private property)

-rewarding labor & providing incentives to investment

-exchange value of news (dependent on novelty of news) depends on legal protection of interest/monopoly over info.

Example: International News Service v. Associated Press - Property rights in news, but property rights extended to individuals (competitors), not to public in general; Def. did not violate property rights, but participated in unfair trade.

Holmes - no new right; use unfair competition to protect news.

Brandeis - no property rights in news, not unfair competition

b/c will curtail free use & socially useful activity, lead to monopoly

Role of legislature to decide.

5. Human Genes

Rule of Labor

-Conflicting policy goals: patient rights vs. socially beneficial behavior.

Example: Moore v. Regents of the University of California - doctors made patient's cells hold possessory rights over his genetic material after they had been extracted. patient does not hold possessory rights.

-Utilitarian theory: (like Brandeis) - result will create disincentives for research & socially useful activity; promote free mkt; decision for legis.

patient could have obtained rights via patent.

E. Family, Labor, and Need

Property rights obtained by grant or tribal relationship

1. Government Grant/ The Right to Get Property: Legal Rights to Shelter and Welfare

- Homelessness is not voluntary.
- w/o choice, resort to survival in public space.
- Homelessness perpetuates inequity; change way see bargaining power.
- a. The Right to be Somewhere and the Problem of Homelessness
 - Robinson v. Cahill - if exclude from public areas, status has been criminalized; cannot criminalize status, only acts.
 - Rossi - homelessness related shortage of inexpensive housing for poor families & poor unattached persons accelerating from '70s to '80s. decrease supply, increase demand = shortage
 - Ellickson - government exacerbating problem; shelters increase homelessness; these are troubled individuals not people down on luck; should try to encourage possession of property & discourage dependency.
- b. The Right of Families to Stay Together and Basic Needs Fulfillment
 - Relations between executive and legislative powers - States comply with legis.
 - Courts reluctant to change standards

2. American Indian Cultural Objects: Tribal Property or "Finders Keepers"?

Cultural property - tangible objects fundamental to identity of culture, as a result of relationships.

Tribal rights to property - depends on membership to tribe

- trumps claim over excavator
- property owner

a) Lost, mislaid and abandoned property

- Lost - owner accidentally misplaced it
- Mislaid - owner intentionally left it somewhere, & then forgets where she put it.
- Abandoned - owner forms intent to relinquish all rights in prop.
- Property lost/mislaid may subsequently be abandoned if owner intends to give up any claim to property.

b) True/original owner vs. finder

- True owner has right to recover lost property from finder
- Finder has right to keep abandoned property, since original owner relinquished rights/owner intended to abandon property

c) Finder vs. third parties

If finder is trespasser, landowner owns found property.

If finder is permitted on property:

- if object found in private home, object awarded to homeowner
- if object is on public grounds...
 - if object is lost prop, awarded to finder (after not being reclaimed for reasonable period.)
 - if object is mislaid, awarded to landowner.

d) Native American Graves Protection and Repatriation Act of 1990

Act provides that Indian cultural objects found on tribal or federal lands belong to tribe having strongest connection w/them; does not apply to objects found on private property [applies state laws.

Example: Charrier v. Bell - burial grounds - not intent to abandon, intent to remain permanently w/deceased. & not available for another to recover & possess as owner.

F. Reliance, Possession, Use and Title

1. Relativity of Title (relations between people)

Which competing claimants has the better claim?

Variables: OAB

A takes from O → O

A v. B → A has relative title, not absolute title; O trumps A for lost/mislaidd property.

Example: Tapscott v. Lessee of Cobbs - Tapscott is stranger/intruder. Relativity of title - peaceable possessor has relative title to intruder.

a) actual vs. constructive possession:

actual - actually have rel. w/land to have intent to possess land; have immediate physical/direct control over property

constructive - don't have direct control/actual presence on property, but have conscious intent to have control/presence on property.

b) Personal Property: true owners(O) vs. thieves(A) & bonafide purchasers

→Thieves can't transfer property

Relativity of title: O may obtain title against A, but not against B.

c) Bona fide purchasers of stolen property

Thief has no right to transfer title to third party. If bonafide purchaser obtains stolen items from a thief, bona fide purchaser does not have title, even if had no notice of theft. True owner prevails.

d)Voidable title

If true owner (O) has entrusted goods to merchant (A) who regularly deals in such goods, in a valid business transaction, & A sells to bona fide purchaser B, B will prevail over O.

Not stolen property but property from normal merchant transaction.

2. **Adverse Possession** - trespassers become owners of property

Possession of property

Definition: Allows a nonowner to acquire full ownership rights in real property if the nonowner "possesses" property without permission by the "true" owner (meaning the formal title holder) in a visible manner for a period of time established by the statute.

-Original owner has a statute of limitations to eject someone from their land.

Application:

1) affirmative suit of adverse possessor for declaratory judgment or to quiet title

2) defense to in an trespass or ejection action.

Nome 2000 v. Fagerstrom (Vacant Land)

-purchase of land vs. economic maximization

Brown v. Gobble (Border Disputes)

- tacking- no gaps;

-assume if prior owners treat land as theirs, assume you can treat way owners did.

Elements of Adverse Possession

1) Actual Possession - enclose it, use it or mistake in deed.

Demonstrate intent to use land as own as would any reasonable owner (note: rural area; easements)

2) Continuous (Tacking Doctrine)

- use as ordinary owner would of that type of property

NOTE: a. Seasonal Use, if normal use (ie, rural lands).

b. Tacking: add together succeeding periods of possession by different persons.

-*Note*: if there is no privity (first owner ousts the adverse possessor), can't use tacking.

3) Exclusive - use can't be shared by public/true owner

4) Open and Notorious -

Objective test: sufficiently visible & obvious as to put a reasonable owner on notice that her property is being occupied by nonowner w/intent to claim possessory rights; community reputation = sufficient notice (special notice for rural lands?)

-not a subject test as to what owner actually saw.

-duty & responsibility of responsible owner

5) Adverse or Hostile - owner did not permit use

-**Objective test* - owner's state of mind & owner has not given possession of land

-If not explicit oust - presumed to be *nonpermissive*

-If initially permissive, not adverse until explicit revocation of permission by true owner or explicit statement by adverse possessor to true owner that he intends to oust owner from property.

-Owner's silence is presumed permissive.

-Def. burden of proof - use was nonpermissive.

-Pl's burden - use was permissive.

-*Subjective test* - state of mind of adverse possessor

1. *intent* - known full well that adverse occupying property owned by someone else and must intend to oust or dispossess the true owner.

2. acted in *good faith* - ie, mistakenly occupied property b/c mistaken in deed.

6) Color of Title or Claim of Title-

Color of Title - *written*, defective deed where occupy in good faith belief the purchaser mistakenly believed they possessed a substantial portion of property described in deed

-given a shorter statutory period to reward good faith.

-if defective deed, court will give actual possession of whole land described in deed, even though adverse possessor only occupied a small portion of the land.

vs. Claim of Title (actual possession) - *no written document*

Adverse possessor treats property as his own. - reward those who don't know & use in good faith.

- For the Statutory Period - tolled for severe disabilities

- Claims Against the Government - can't possess public property.

Unless public property is used for private use.

Govt can't take land & use arg. of adverse possession.

3. Hohfeldian Terminology

- ways state will/won't step in to enforce rights vis-a-vis property.

rights

duties

privileges

4. Justification for Adverse Possession:

Pro - efficient use of land & establishes ownership.

Against - recording system of deeds; title through purchase (deprive those who paid in favor of those who paid nothing; encourage trespass)

1) Admin. efficiency - lowers administrative costs of establishing rightful ownership & rigid rules to avoid uncertainty.

2) Maximize efficient use of land - prevent valuable resources from being left idle for long periods of time by an unproductive user. use it, lose it.

3) Promote use & reliance - Reliance interests that the possessor developed over longstanding possession of property. (fairness)

4) Give victims incentives to bring lawsuits within a reasonable time.

5) Facilitate greater use of land with wider distribution of private prop.

II. Land Use Regulation

Right to Exclude

A. Public Rights of Access to Property vs. Right to Exclude Nonowners

Factual Context Questions to ask:

- 1) What interests are asserted by the possessor in excluding nonowner from property?
- 2) What interests are asserted by nonowner to justify a right of access?
- 3) What source of law is claimed as basis for right of access - common law, statute or constitution?
- 4) How do judges analyze competing interests, what reasons do they give the accommodation they reach?

1. Trespass vs. Public Policy

Trespass is remedy when exclusive possession of land is intentionally invaded.

a. Public Policy Limits on the Right to Exclude

Defenses against trespass:

- 1) consent
- 2) necessity to well-being
- 3) public policy - violations against privacy & dignity

Example: State v. Shack - farmer employed migrant worker for seasonal needs; farmer refused attny from interacting with workers.

-*property rights of owner vs. social interest of workers*

-filed criminal action (vs. common law actions): - governed by statutes with purpose of deterring wrongful activities & to punish.

common law trespass - intentional intrusion on another's property.

criminal trespass - refuse to leave when property owner tells him.

→employer may not deny worker his privacy/interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens; rights too fundamental to be denied on basis of property interest

→use state law of trespass w/public policy interest in welfare of migrant workers to open private property to public interest

b. Right of Reasonable Access to Property Open to the Public

-**Majority common law rule:** Right of absolute exclusion, where can arbitrarily exclude people; except inns & common carriers (planes, trains, buses) have a duty to serve members of the public without arbitrary discrimination unless they have a good reason not to provide services (i.e., disrupted premises/threatened security) - right of reasonable access.

-**Minority rule:** (*New Jersey*) *all open areas are subject to the right of reasonable access.*

Uston v. Resorts International Hotel, Inc. (NJ state common law)- Casino place excluded P for counting cards.

-presumption that stores have right to arbitrarily exclude public unless specified by statute →NJ statute

→extend *right of reasonable access to all businesses open to the public.*

b/c Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open premises for public use; still subject to federal antidiscrimination laws.

→State v. Schmid - (NJ state common law) - the more private property is devoted to public use, the more it must accommodate rights of those individuals of the general public who use that property.

Patricia Williams

Walter Williams

2. *Public Accommodations vs. Discriminatory Exclusion*

Refer to Federal & state statutes for antidiscrimination laws (requirements differ)

a. Race and Sex Discrimination

1) Federal Law - not all-inclusive list, only certain groups are protected.
Civil Rights Act of 1964, Title II, 42 U.S.C. §§2000a, et seq.
Prohibition Against Discrimination or Segregation in Places of Public Accommodation

(a) - race, color, religion, national origin (NOT gender)

(b) - place of public accommodation (listed - p. 206)

exemption - private establishment, retail stores

"not open to public"

- must affect commerce/affect state action.

§2000a-3(c) - req. plaintiffs to refer complaint to a state agency for resolution before proceeding in federal court; if brought later in federal court under act, plaintiff entitled only to declaratory & injunctive relief (no damages)

→if ambiguity, Cts will expand & interpret broadly to protect minority groups

Civil Rights Act of 1866, 42 U.S.C. §1981

-intended to regulate state/govt action (not private actions), interpreted to prohibit state legislature from passing statutes that discriminated based on race

-recently interpreted to prohibit retail establishments from discrimination based on race; regulate behavior of private clubs.

→Since actions by private clubs are immune from liability under Title II of 1964 Civil Rights Act, plaintiff can bring an independent claim for relief under §1981.

Example: Watson v. Fraternal Order of Eagles - private club - claim filed under §1981, not under 1964 Act = received injunctive/declaratory relief.

Federal vs. state statutes

Preemption - Federal law preempts where no state action

(ie, immigration)

-Baseline threshold = federal law

-if state consistent w/Constitutional rights & expands w/greater protection = state statutes.

-if no fed/state legislation on sex/public accommodations discriminations, rely of Federal discrimination laws; rely on §1981 claim

2) *State Laws*

→states are broader than federal laws re: gender discrimination

Minnesota Human Rights Act

example: United States Jaycees v. McClure

1)Minn. statute defined term "public accommodation" more broadly than ordinary meaning (i.e., public business - selective criteria, size of membership)

2)statute focuses on conduct - not nec. physical location, but conduct of a business facility

→(broad interpretation of statute using public vs. private test) an organization engaged in business of seeking to advance its members & encourage membership by selling membership in this state is a public business facility, & thus violates MN statute by discriminating membership based on sex.

example: Frank v. Ivy Club

→Where a private club/organization and place of public accommodation (i.e., university) share a mutually beneficial/ symbiotic relationship, particularly where the allegedly "private" entity supplies an essential service not provided by the public accommodation & functions as a public accommodation, the private club becomes subject to laws against discrimination.

3. *Free Speech Rights of Access to Private Property*

a. *United States Constitution: The First Amendment*

Public Function Doctrine: (state common law) where property acts as a public/municipality function, the more an owner opens up property for use by public in general. (where private property owners are acting in ways prohibiting rights of the public)

→ rights of citizens (free speech) > right of property

→Malls have a municipality function

Example: Marsh - privately-owned company town was functional equivalent of a public business district.

Logan Valley - shopping center functions as a "business district," replacing downtown business district. →Ct. allowed picketing were picketing was "directly" related in its purpose to use of shopping center & no other location w/reasonable opp. to convey message to intended audience.

→public function doctrine not extended to all retail stores

Lloyd Corp., Ltd. v. Tanner (*federal law*) → war protestors had no right of free speech at shopping centers.

→just b/c welcome public, property is not state actor & not required to allow public to exercise free speech right.

-Reject:

Marsh - no comparable assumption of municipal power.

Logan - protects speech to use of mall

-Dissent: increasing change in society - importance of access and communication to civil rights.

b. *State Constitutions: The Right to Speak Freely*

→States can choose between free speech rights or property rights (neither violates constitution)

- allows free right of access to shopping malls

→State constitutional law entitled to provide more protection for free speech rights than that mandated by federal constitution, as long as it does not provide less protection for free speech & does not violate/limit other constitutional/individual rights, i.e. rights of property owners (commerce/economic profits).

→Supremacy clause - federal law trumps state law; invalidates any state laws that conflicts w/federal law.

Federal law gives minimum level of protection

Example: New Jersey Coalition Against War in the Middle East v. J.M.B. Realty (NJ)→ Allowed 1st Amendment right of free speech, altho not required by 1st Amendment, provided that right does not interfere with commerce/profits/use of mall/mall's interests.

-malls invite & encourage people to come as potential customers for non-retail purposes = functions as a community.

- increased Constitutional right of free speech, by allowing distribution of leaflets, does not interfere w/ commerce/use of mall = no violation.
- if commerce is affected, property interests > free speech.

PruneYard - State is free to choose between protecting right of shopping center owners to exclude nonowners and protecting right of access for free speech purposes to property otherwise open to the public.

4. *Beach Access and the Public Trust*

Public Trust Doctrine - ownership, dominion & sovereignty over land flowed by tidal waters belong to the State/sovereign, but for the common use of all people (protects fishing & commerce)

- state common law
- right of public to have access
- revocable privilege;

-if use is in conflict with public uses/public welfare, gov't can revoke deed.

- no requirement of compensation b/c interfered w/public uses.

→NJ/CA - expands geographic scope (beach) & for more public use (recreation)

example: Matthews v. Bay Head Improvement Association

-membership limited to Bay Head residents

?dry land beaches for public access?

→1) extend public trust privilege to recreational use (beyond fishing).

- extend privilege to include dry sand beaches

b/c recreation of citizens w/in state interest - welfare/physical health & impossible to not use dry land - access to water via dry land

-quasi-public property argument - beaches act like municipality in its function (lifeguard, etc.) → could apply to private property in future.

→Fluctuating doctrine responding to changing conditions & public needs.

Arguments in favor of public trust doctrine:

- fundamental need to preserve resources (vs. exploitation of resources)
- private ownership leads to unequal access
- tradition & precedent (extend public trust doctrine)

Arguments against public trust doctrine:

- Does not preserve reserves, but trampled w/public access
- devote resource to high use w/private ownership; most-valued use
- satisfy public right of access limit to public areas.
- interfere w/private owner property & privacy

B. Rules Governing Relations Among Neighbors in the Absence of Agreement

1. *Land Use Conflicts Among Neighbors*

- Trespassory and Nontrespassory Invasions

Trespass - unprivileged physical intrusion onto property possessed by another.

Nontrespassory - interferences w/use & enjoyment of property via use of own property in ways that harm neighbor's property interests.

- Basic Solutions to Land Use Conflicts Between Neighbors

- Entitlements

- Defendant's privilege - freedom to act despite harm
- Plaintiff's security - strict liability/absolute right to be free from harm

- 3) Reasonableness test
- 4) Prior Use: prior appropriation/prescription
- 2) Remedies
 - 1) privilege - dismissal of complainant
 - 2) strict liability - damages
 - 3) reasonableness - injunction
 - 4) prescription - purchased injunction
- c. The Reciprocal Nature of the Problem (**Ronald Coase**): Social Cost
 - Protection is an infringement on another's right (reciprocal nature)
 - Greater social good/utility by awarding to one who wants it more
 - not factoring in "wrongness" or values

2. Nuisance

Protection of Use and Enjoyment of Land

-Common law cause of action from interference from others.

Questions:

- 1) Which party has basic entitlements?
- 2) What is the remedy is used to vindicate entitlement?

Test:

- 1) unreasonable conduct by D (causes more social harm than good)
 - gravity of harm outweighs social utility of harm?
- 2) substantial harm to P's use & enjoyment of property
 - (question of rights): does right to security trump right of use?

Analysis:

- rights theory* - right to security vs. right to act
- social benefits theory* - gravity of harm outweigh social benefits?
- cost-benefit analysis* - who is benefited vs. who is hurt & to what extent
 - = which of alternatives will make society better off on the whole
 - J. Posner - whatever produces most monetary wealth is the best outcome.
 - Problems w/theory - looks at ends, not means
 - favor people who are already wealthy, ignores rights, disparity of wealth

Remedies:

- 1) **Property rule** - one party has right: P/D
 - Can contract independently around situation
 - if nuisance (substantial harm to P) & (neighbor's conduct is unreasonable) → injunction - to stop behavior.
 - free to bargain - D pays to continue
 - if no nuisance (harm is not substantial to P) or (P harmed, but D's conduct is good for society and reasonable to impose costs on P) → D can continue conduct.
 - free to bargain - P offers D \$ to stop.
- 2) **Liability rule** -
 - Cannot contract independently to change relationship
 - Follow court's value of conduct (stop or keep going)
 - if nuisance, (substantial harm to P), but benefit outweighs costs
 - damages to P (compensation) but no injunction
 - D is free to continue w/harm as long as he pays.
 - if no nuisance, D wins,
 - but P can get a purchased injunction - an injunction by paying D to stop activity for D's loss of profits
- 3) **Inalienability rule** -
 - No bargaining; no private agreements
 - No monetary exchange to change situation/ stop activity
 - Social consensus (statute) that don't want to have harm continue

Remedy Summary Scenarios for nuisance:

- 1) P may obtain injunction against D's conduct when:
 - D's conduct is unreasonable (causes social harm > good)
 - D causes substantial harm to P
- 2) P may obtain damages but no injunction if:
 - D's conduct is reasonable (more social good than harm)
 - but substantial harm to P, so that it is unfair to burden P w/cost
 - D's socially useful conduct.
- 3) P entitled to no remedy if:
 1. Harm to D is not substantial; or
 2. D's conduct causes more social good than harm & not unfair to impose costs of D's activity on P; or
 3. imposition of damages would put D out of business and avoiding this result (b/c of social value of D's conduct) is more important than prevent harm to P.
- 4) P entitled to a purchased injunction if:
 - D's conduct causes more harm than good
 - but fair to impose cost of shutting down D's activity on P (i.e., when P comes to the nuisance)

→try to bring all 3 causes of action - nuisance, trespass, negligence, where states permit.

nuisance - protect use & enjoyment

trespass - protect exclusive possession/physical invasion

negligence - protect from tortious actions by others

examples: toxic waste, smoke

b. Radiation: Defining Unreasonable Land Use

Example: Page County Appliance Center v. Honeywell, Inc.

Nuisance Test:

unreasonableness

gravity of harm

utility of conduct

priority of occupation

Nuisance Arguments & Counterarguments (p.366- 374)

C. Public Regulation of Private Arrangements Restricting Use or Ownership of Land

Power to Transfer: Agreements to open/restrict property

1. Servitudes

-Agreements to land use

a. Doctrinal Categories

b. Central Issues

2. Licenses - revocable permission to enter real property that is possessed by another.

a. Revocable Licenses

1. Revocable at will by grantor

2. Affirmative promise to enter someone's property (granted)

3. No writing required → implied (i.e., stores)

4. Non-transferrable (inherited or left by will)

5. Does not last forever

Licenses cannot be freely revoked in 4 circumstances:

- 1) owner gives permission to someone else to enter the owner's land to remove licensee's personal property → license coupled with an interest (ie, recovering a car)
- 2) promise to grant license (ie, movie theater ticket, but can be transferable)
- 3) constructive trusts - take land & put in trust
- 4) easement by estoppel - owner is estopped from denying continued access to his land, where licensee relies on & invests in based on license,

b. Easements by Estoppel (Irrevocable Licenses)

Revocable license becomes irrevocable when:

1. detrimental reliance by licensee
improvements have to be related to property (\$ invested)
 2. reasonable reliance
 3. notice & acquiescence by licensor -licensor must give permission
- Policy conflict: intent of grantor vs. reliance by licensee (fairness)

Example - Holbrook v. Taylor - prior to T, owners given permission to use roadway for purposes of moving coal from newly opened mine. T used road for ingress/egress from home, invested money in improving road by neighbor's actual/tacit approval. H now wants formal agreement secured in writing & put steel cable across road to prevent use. Not an easement by prescription case b/c no evidence that use of road was adverse, continuous, or uninterrupted.
→License to use the subject roadway may not be revoked, b/c use to get from home to public highway, general improvement of premises, maintenance of roadway, & construction of home, all with actual consent/tacit approval by licensor.

3. Easements -

1. right to control or enter property
2. irrevocable
3. affirmative/negative easements
-*affirmative* - owner allowed to do something to/on servient estate
-*negative* - servient estate owner prevented from doing something on/to land

easement by:

- estoppel
- prescription
- express agreement
- implied agreement

a. Negative Easements - Limits of Easement and Nuisance Doctrine

1) Light and Air

a. Rejection of Nuisance Doctrine: No Easement for Light and Air

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc. -2 neighboring hotels arguing about defendant's plan to build an addition that would cast a shadow over plaintiff hotel's swimming pool. Plaintiff claimed that it enjoyed unobstructed access to light & air for a long time & therefore had acquired an easement by prescription.

→*No negative prescriptive easement* for right to light & air.
just b/c enjoyed light & air on one's property for many years will not create an easement for light & air that prevents one's neighbor from building on her property.

-Since there is no legal right to the free flow of light & air from the adjoining land, where a structure serves a useful & beneficial purpose, it does not give rise to a cause of action for either damages/injunction, even though it causes injury to another by cutting off light & air and interfere w/view.

(Law and Economics)

b. Nuisance Doctrine Applied to Light

Prah v. Maretti

→no prescriptive easement; lack of acces →nuisance for right to light & air

b. Prescriptive Easements (p.169-177)

No negative prescriptive easements
(same requirements as adverse possession)

1. open & notorious
2. actual use
3. continuous
4. w/in statute of limitations
5. *adverse use* - use land in way using in past years
6. *exclusivity* -
7. *acquiescence* - presumes initial permissive use, & not nec. mean permission: true owner failed to attempt to stop the adverse use by bringing a trespass action vs. require prescriptive easement claimant to prove *both* that the true owner never gave permission *and* that the true owner never objected to the adverse use in some manner short of bringing a trespass action.
8. *good faith problem* - courts will award prescriptive rights regardless of good faith on grounds that the point of the doctrine is to settle land claims in long-standing users (rewards trespassers); good faith (ie, mistaken in deed).

Example: - Community Feedstore vs. Northeastern (p.169)

→plaintiff met burden by establishing general outlines of easement w/reasonable certainty.

c. Implied Easements

1. No express agreement
2. infer intention from parties
3. infer intention by considering public policy

(dominant estate - estate that benefits from easement)

(servient estate - estate that is burdened by easement)

1) Implied Easements from Prior Use

- Req.:
1. *common ownership* of piece of land, now subdivided & severed into dominant & servient parcel.
 2. before conveyance, owner had burdened one parcel for benefit of another where use was *continuous, apparent, permanent*.
 3. use is *reasonably necessary & beneficial* for enjoyment of property (more than simple convenience).

→when one part or parcel (benefitted or burdended part) is sold, the court will grant easement by prior use

→easement runs indefinitely but does not run with the land.

Example - Granite Properties Limited Partnership v. Manns

easements for both shopping center & apartment complex.

→evidence of prior use that use was apparent & continuous, impossible for trucks to go in/out w/o easement, found that convenient to use easements.

→elastic necessity requirement - the more apparent, continuous the use, the less the plaintiff needs to show that convenient for him using it.

- require a higher degree of necessity by conveyor as claimant, than claimant as conveyee, b/c conveyee getting what they pay for vs. conveyor will be conveying interest they own

Arguments for implied easements:

maximize mutual utility of land

protect intentions not in formal/express agreements.

Counterarguments: judicial efficiency

2) Implied Easements by Necessity

Requirements:

1. parcel is divided & one part is sold to another

2. landlocked property conveyed

3. easement by strict necessity

→need is created b/c sale of parcel created landlocked parcel at the time of transaction (parcel has to be landlocked at the time of transaction to grant easement)

a) easement may lay dormant (silent & not formalized) thru several transfers, & evoked later, until the need to use them.

-easement by *reservation* - seller reserves for self, easement by reservation.

-easement by *grant* - impliedly grant easement by purchase.

b)easement may be exercised at any time by the titleholder/servient state.

c) Pro Easements vs. Against Easements:

→Intent vs. Public Policy:

Against easements:

1. market price reflected risks- mkt price reflects that the buyer is getting landlocked parcel. Therefore, the court should not create an easement where there was none in the contract.

2. intent - grantor did not intend to grant easement at time of transaction. issue is with other neighbors who can confer easements through their land via other roads. Therefore, not a question of necessity.

3. freedom of contract - *laisse faire*- let the market handle;

-*certainty* - granting an easement after the time of transaction, where there was none, this would discourage adherence to transactions over property and lead to the lack certainty (market efficient depends on certainty).

4. if wanted easement, buy from neighbors.

Pro easements:

1. public policy to promote efficient utilization of property.

→Court will generally disregard intent b/c public policy mandates easement by necessity, regardless of intent of prior parties b/c efficient utilization of property is so important.

Example: Finns v. Williams - plaintiffs and predecessors had used road before; landlocked parcel.

→ easement by necessity lies dormant, & remains attached to servient land. Exercised by holder of title, when no outlet, unless over other's land, then easement through grantor's land.

-policy reasons:

1. utilization of land
2. effectuate intent of policies - who would buy land knowing that it will be landlocked.

d. Express Easements

1. Requirements to create:

a. *Writing*

-grantor will write in deed

-sell easement by itself or sell easement created by transaction.

b. *Substantive Limitations* on Kinds of Easements That Can be Created

1) *Limits on Negative Easements:*

1. light
2. air
3. support for building
4. conservation (environment)
5. historic preservation
6. solar

→Can't imply negative easement by prescription.

2) No Affirmative Easements to Act on One's Own Land

ie, duty to build a structure or pay a monthly fee to a condominium association.

2. Rule: Can't reserve an easement in a Third Party

The grantor simply conveys the property to the party who is intended to own the easement; that party then conveys the property to the ultimate grantee, reserving an easement over the property for herself.

ie, grantor (O), conveys property to B, who then conveys it to A, reserving an easement for herself. The easement owner becomes the grantor, rather than a 3rd-party grantee, and the easement will be recognized since the grantor may reserve an easement in herself.

3. When do easements run with the land?: Transferrability/Running w/the Land

Burden

a) Requirements for the Burden to Run with the Land

- W** i) Writing - -req. original writing creating easements; not nec. included with subsequent deeds
- I** ii) Intent - -original grantor had intended future owners to be subjected to easement.
- N** iii) Notice- ...at the time of purchase
- 1) actual
 - 2) constructive - would have known if had done a search
 - 3) inquiry - visible signs of easements.

Benefit

b) Requirements for the Benefit to Run with the Land

(Appurtenant vs. In Gross) - depends on intent of grantor

Easement in appurtenant - when benefit *runs with the land* & treated as if *attached* to that particular parcel of land.

1. benefits dominant estate
2. can't sever or sell separately from the land.
3. transferrable easement - follow estate w/ subsequent transfers

- Rules:*
1. Appurtenant easement runs w/ the land thru its subdivisions, unless carefully drafted restrictions on the easement.
 2. Cannot create an unreasonable burden on servient estate.

Easement in gross - personal; when benefit does not run w/ the land

1. personal, attached to person, separate from land
2. no dominant estate - no parcel of land is benefitted, b/c personal to individual.
3. not transferrable b/c personal
exception: Commercial easement in gross - not attached to land but attached to commercial interest
4. irrevocable - (vs. license - revocable)
ie, swimming, hunting

Test for distinguishing in gross from appurtenant easements:

1. intent of the grantor:

a. *clear language/writing in deed conveying easement*

-writing or parol evidence

b. *surrounding circumstances & policy considerations:*

-whether the easement would be *useful* separate from ownership of neighboring land (ie, utility easement - ie, right of way for telephone lines), courts likely to hold that it was intended to be in gross.

-if *not useful* separate from ownership of land, useful to anyone who owns the land benefitted by easement (ie, Green v. Lupo) → easement appurtenant.

3) social utility

-essential need for city - w/in public interest
vs. people less likely to grant easement if know that (ie, sewage) will pass under their property.

2. Presumption:

a. Courts generally prefer appurtenant easements b/c

1) limit # of persons w/ easements over land to the # of neighboring parcels.

2) b/c limited to owners of neighboring property (vs. easements in gross can be owned by anyone), easements in gross create more uncertainty about land use rights than appurtenant easements.

3) can check w/ neighbors to see if any appurtenant rights exist, but harder to check w/ general public to find owners of easements in gross.

b. counterarguments for easements in gross:

less likely to clog up marketing of land burdened by easements

Example: Green v. Lupo - P owned land; sold part of land to Ds, D promised P easement via written deed. P's property used to build mobile homes & some kids used easement w/ motorbikes. D refused to grant easement as promised.

-If easement in gross, easement granted only to persons in agreement (Greens)

-If easement appurtenant, easement runs with the land, & when dominant estate is subdivided, easement can be transferred to all persons who own portion of dominant estate. (kids on motorbikes can use easement)

-To discern intent of parties, consider:

1. Writing - written deed, promise of easement to Greens for ingress/egress
2. Parol evidence - oral evidence offered outside of written contract.

Holding: easement appurtenant - use of easement was to obtain access to use of land (ingress/egress). Utility was to benefit parcel of land.

-pro-easement in appurtenant: can more easily sell easements that burden land b/c more certain of land use rights

-counterarguments for easements in gross: less likely to clog up marketing of land burdened by easements.

4. *Interpretation of Ambiguous Easements*: Whether grantor intended to benefit individual people or benefit dominant estate & its owners?

Issue of Scope or Apportionment?

a. *Scope of easement*: 3 issues

1) whether the use is of a *kind* contemplated by the grantor.

-*intent at time grant was created*

if ambiguous intent of parties, court will contemplate whether *reasonable use* of the land w/in social context (allows for changes w/ time and technology):

-intensity of use

-character of use

2) whether the use is so heavy that constitutes an *unreasonable burden* on the servient estate beyond that contemplated by the grantor at the time the easement was created.

-when the grantor's intent is ambiguous, court must balance the interests of the easement owner in *freedom to develop his property* (improve or maintain) vs. interests of the servient estate owners in *security from having their property overly burdened* in a way they could not have anticipated or should not have had to anticipate.

-*social utility* - essential need w/in public interest vs. people will be less likely to grant easement if they know ie, sewage, will pass under their property.

3) *Divisibility or apportionability*: whether easement can be *subdivided*.

-*nonexclusive* - grantor/owner of servient estate has retained for herself the right to use the easement in conjunction w/ the grantee

→nonapportionable easement b/c grantor still has some interest in how easement has been used.

-*exclusive* - grantor has no right to use the easement in conjunction w/ grantee. only grantee has right to easement

→apportionable easement b/c grantee is not interfering w/ any rights the grantor might have to sell or lease use of easements to others.

Example: Cox v. Glenbrook Co. - *Appurtenant Easements*- Lake Tahoe, P was to create residential subdivision to make money; access through run-down backroad; Glenbrook wants to prevent future subdivision owners from imposing burden on dominant estate; conveying instrument did not specify width of easement.

Issue: Scope - intended character of use? was use so heavy that constitutes an unreasonable burden on the dominant estate than the original grantor had intended?

-easement "as presently constructed and maintained."

grading - improving the easement for more subdivided landowners to use; & benefits Glenbrook too.

vs. *widening the road* - exceeding the scope of easement b/c considered to be more of an intrusive use by taking away land of servient landowner.

Example: Henley v. Continental Cablevision of St. Louis - Easements in Gross - D given right to maintain telephone lines.

D given right to grant easements to others to improve telephone lines.

Agree that easements in gross given to companies.

Issue: Whether easements in gross were exclusive and apportionable by utilities?

→ While tech. change did not account for cable, expressed intention of P's predecessors was to obtain for homeowners in subdivision the benefits of electric power and telephonic communications. W/in public interest to use facilities already installed for purposes of carrying out this intention to provide the most economically feasible and least environmentally damaging vehicle for installing cable systems.

5. Terminating Easements

- a. Agreement of parties to terminate in writing (release of easement)
- b. Terminated by their own terms (ie, deed expressly states will last for 10yrs)
- c. Termination through prescription/adverse possession
- d. Merger (when holder of servient estate becomes owner of dominate estate)
- e. by Abandonment - owner intends to abandon easement, indicated by conduct.

"marketable title acts" - requirement to re-record easement periodically otherwise not binding.

purpose is to limit how far back a buyer has to look in chain of title to determine validity of seller's title & existence of encumbrance on land. & make unenforceable those interests too long ago.

e. Covenants Running with the Land

Promises re: land use enforceable against the promisor and successors of land

-affirmative promises- require owner to take action against landowners (ie, single family homes) vs. affirmative easements - can't make affirmative easements on own land.

-negative promises - restrict own land for benefit of neighboring landowners (ie, promise not to build something on land) vs. negative easements - limited uses.

1. Real Covenants and Equitable Servitudes

Neighboring Parcels

Whitinsville Plaza v. Kotseas

2. Formal Requirements (1st 3 same requirements as appurtenant easements)

W a) *Writing*

I b) *Intent to Run with the Land*

expressed - in writing that covenants travel w/ successors of land

implied - courts will presume that covenants will travel w/ the land b/c benefit

N c) *Notice* Actual - in writing

Constructive - title search

Inquiry - should have known from condition of property

→ Courts will assume that if benefit from covenant, had notice.

→ if burdened, constructive notice; some courts say yes/no

T* d) *Touch and Concerned*

1) affect use & enjoyment of land

2) affect market value of the land?

Rule: Reasonable covenants against competition may be considered to run with the land when they serve the purpose of facilitating orderly and harmonious development for commercial use.

Note: Anti-competitive covenants are now considered to touch and concern the land, when w/in public interest and reasonable time limit

→ **Equitable servitude** has been established → **injunction** - stop person from enforcing promise in enforcing land.

- P** e) *Privity of Estate*
- A → B 1) *Horizontal Privity*-
- privity relationship btwn 2 original covenant parties.
 - Interest in the same parcel of land
 - relaxed requirement (benefit can run w/ land where don't have horizontal privity (ie, homeowner's org.)
- prove: a) Instantaneous privity - transfer property interest in land (ie, lease or mortgage).
- or b) Mutual privity - mutual property interest; already have a relationship btwn property & both have a property interest in land (ie, easement in another's land, landlord/tenant relationship)
- A 2) *Vertical Privity* -
- C -privity rel. between original covenant parties & successor owners.
- excluded: A cannot have future interest in property, when transfer it to later owners. (ie, excludes landlord/tenant relationship)
 - strict requirement on burden side
 - relaxed requirement on benefit side
 - (minority) -

→For burden to run w/ land, require both horizontal & vertical privity
→For benefit to run w/ land, some don't req. horiz. privity; some don't req. vertical privity.

→ **Covenant** has been established → **damages**

3. Benefit & Burden Analysis:

(see attached)

- Examples of variables in vertical privity: landlord/tenant; inherited/trust estates
- where landlord or trustee retains interest in privity

b. Contexts: Land Use Restrictions in Residential Subdivisions

1) Policy Concerns

a. *conflict of rights*: inevitable role of regulation: adjudicating conflicting interests in *free use* and *security*

-*liberty interests* of owners to use their property as they see fit vs. *security interests* of owners who want to use private agreements to protect the value of their investment & create a particular kind of property right (ie, a home in a residential neighborhood)

b. *consumer protection & reliance* - developer & buyer

c. *dead hand problem* - developer who tries to retain control of area after all the units are sold.

d. *equal access vs. community control* - homeowners association misuse to impose exclusionary practices (racial exclusion) & to interfere w/ liberty of owners to sell their property as they wish

& liberty of potential buyers to purchase & move into community.

e. efficiency - efficiency may require void land restrictions that unreasonably prevent land from being transferred to a more highly valued use, to owner who values it more highly than current owner.

2) *Equitable Servitudes and the Common Plan*

1. *Implied Reciprocal Easement* - covenant enforced for person who buys w/notice of restriction against a person who does not buy w/notice of restriction in deed, where covenants restricting land in an area would be mutually enforceable among all owners if the properties were all intended to be part of a *common or general plan*. (exception to writing requirement for servitude to run w/land b/c left out or oral promise of restrictions)

1. Use for Residential Community
2. Control of use of neighboring lots to be used for residential community.

2. Requirements:

1. Demonstrate a *common scheme*
2. notice assumed through inquiry notice; (ie, oral promises by developer of restrictions on land)

3. Developer's Role & the problem of holding the benefit of covenants in gross.

- no longer has interest/relationship w/the land
- no mutual easement/simultaneous privity
- Can't sue the developer for injunction
- Can't sue developer for breach of contract.

Example: Evans v. Pollock - restrictive covenants in deeds for lake front lots in condominium development.

Issue: Does restriction apply by implication to all of the lots?

→Common scheme applied only to similarly situated lots, not necessarily to all lots. In this case, applied only to lake front lots.

Example: Sanborn v. McLean - Bought property w/no restrictions & no notice. D's titles run back to deed w/no restrictions. But common owner declared common scheme

→Inquiry Notice - strictly uniform character to neighborhood & therefore knew or should have known that there was a common scheme.

Example: Riley v. Bear Creek Planning Committee - Inadvertently forgot to write restrictions in deed. At time of purchase, P had no notice of restrictions.

c. *Terminating Covenants*

1) Common Law: *Changed Conditions*

Changed conditions - substantial change that deprives owner of dominant estate of benefits of covenants.

-have conditions changed so that no longer beneficial to dominant estate?

-Relative hardship doctrine - focus on *servient estate*;

relative harm on servient estate vs. benefit to dominant estate

-has to be a *considerable magnitude*.

-terminate, if hardship to servient estate is greater than benefit to dominant estate.

Example: El Di, Inc. v. Town of Bethany Beach

2) *Equitable Defenses*

1. acquiescence - P has tolerated previous violations of covenant by owner of servient estate (P vs. D)

2. unclean hands - owner has also violated covenant (P vs. D)

3. abandonment - P has tolerated violations of covenant by owners of other restricted parcels in neighborhood covered by the covenant (P vs. 3rd party)

3) *Estoppel* - If owner of dominant estate orally represents to owner of servient estate that she will not enforce the covenant may be estopped from asserting her interest in enforcing the covenant if the owner of the servient estate changes his position in reliance on oral statement.

4) *Laches* - If the covenant has been ignored/breached for a substantial period of time (but less than the time necessary to establish prescriptive rights)

5) *Marketable title acts* (ie, Mass Gen. Laws) - statutes that terminate restrictive covenants if they are not re-recorded after a specified period of time.

6) Other ways to terminate covenants:

a. Language in instrument

b. Merger

c. Release

d. Prescription

7) Statutory Regulation of Covenants (p. 517)

Massachusetts General Laws

Blakeley v. Gorin