Open-Source Property: A Free Casebook

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1. Ownership

William Blackstone, ***Commentaries on the Laws of England***
vol. 1, pp. 131-136 (1765); vol. 2, p. 2

William Blackstone. Source: 6 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 582 (1865)

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

SO great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the

protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.…

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

A. The Right to Exclude

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

WILLIAM A. BABLITCH, Justice.

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

Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land … because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. … On the morning of delivery, … the assistant manager asked Mr. Jacque how much money it would take to get

permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. …

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

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. …[Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques $1 nominal damages and $100,000 punitive damages. Steenberg filed post-verdict motions claiming that the punitive damage award must be set aside because Wisconsin law did not allow a punitive damage award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive damage award. The circuit court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur….

II.

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

…The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. … The Jacques argue that both the

individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques….

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). This court has long recognized "[e]very person['s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." *Diana Shooting Club v. Lamoreux,* 114 Wis. 44, 59, 89 N.W. 880 (1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

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

> [T]hat is property to which the following label can be attached:
> To the world:
> Keep off X unless you have my permission, which I may grant or withhold.
> Signed: Private Citizen
> Endorsed: The state

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

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

… Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

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

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

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

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

from similar conduct in the future. An appropriate punitive damage award probably will.

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

Reversed and remanded with directions.

Notes and Questions

1. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call of a suspected heart attack? Of a broken leg? What if the snow-covered private road had instead been a recently collapsed bridge? What if Steenberg had tried to take the road despite the risks, and the truck had accidentally tipped and fallen onto the Jacques' land?

2. Would (or should) the result in *Jacque* have been different if, instead of steadfastly refusing to permit Steenberg's delivery truck to cross their land, the Jacques had demanded a large sum of money as a condition of permitting the crossing, which Steenberg refused to pay? Would the ultimate monetary award

have been different? If so, what incentive does this case give property owners facing requests from third parties for the use of their otherwise idle resources? Would Steenberg have been better off not asking permission in the first place?

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

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

Marsh v. State of Alabama

326 U.S. 501 (1946)

Mr. Justice BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The

town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

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

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

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation….

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

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

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise * * * the reasons * * * in support of the regulation of (those) rights." Schneider v. State, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious

literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

[Concurring opinion of Justice FRANKFURTER omitted.]

Mr. Justice REED, dissenting.

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

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

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

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

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

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

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

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that

obligation.… In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out … that after warning the property owner would be protected from annoyance. The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited… to show that it would protect the householder, after notice….

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

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

State of New Jersey v. Shack

58 N.J. 297, 277 A.2d 369 (1971)

WEINTRAUB, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J.S.A. 2A:170—31 which provides that "[a]ny person who trespasses on any lands * * * after being forbidden so to trespass by the owner *

* * is a disorderly person and shall be punished by a fine of not more than $50." Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial *de novo*. We certified their further appeal before argument in the Appellate Division.

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

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

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

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

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco's farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco's farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under

federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

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

I.

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

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) [and its progeny.] Those cases rest upon the fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in Marsh and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of Marsh to embrace the immediate situation.

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

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right a bar access to

governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II.

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

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

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

A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. Broom, Legal Maxims (10th ed. Kersley 1939), p. 238; 39 Words and Phrases, "Sic Utere Tuo ut Alienum Non Laedas," p. 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another….

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

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

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume or the present that the employer may regulate their entry or bar them, at least if the employer's purpose is

not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

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

Notes and Questions

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

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

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

Civil Rights Act of 1964, Title II, Section 201

Codified at 42 U.S.C. § 2000a

Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access

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

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

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

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

(e) Private establishments

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

Americans with Disabilities Act of 1990, Section 302-03

Codified at 42 U.S.C. § 12182-83

§ 302 — Prohibition of discrimination by public accommodations

(a) General rule

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

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

(a) Application of term

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

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection . . .; and

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

(b) Elevator

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

B. Other Rights of Ownership

The United States Supreme Court has noted that the right to exclude is "universally held to be a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard,* 512 U.S. 374, 384 (1994). But property owners typically enjoy a number of additional rights, which is one source of the "bundle of rights" metaphor referred to in *Dolan*. Among these are:

- The right of **possession** (sometimes called a "possessory" right);
- The right of **use** (sometimes called a "usufructary" right);
- The power of **alienation**—i.e., the right to or transfer ownership to someone else—which can be further decomposed into
    - The power to make a gratuitous transfer, *i.e.*, a **gift** (sometimes called a "donative" right)
    - The power to transfer in exchange for valuable consideration (sometimes called the right to "**sell**" or "vend," or the right of "market-alienation")
    - The power to dispose of property owned during life after death **by will** (sometimes called the "**testamentary**" right, or the right to "devise")

As with the right to exclude, each of these rights may be limited, particularly when they have the potential to conflict with competing rights or interests. Some of those limits are hinted at in the *Shack*: consider the New Jersey Supreme Court's reference to the latin maxim "*sic utere tuo ut alienum non laedas*". This maxim expresses a long-standing limitation on property owners' rights of *use*. Does it make sense for the court to have invoked this maxim in *Shack*? Do you think *Shack* is better understood as a case about the right to exclude or some other right of property owners?

We will study the law's protection of possession (and the limits of that protection) in our units on Allocation, Found and Stolen Property, and Adverse Possession. We will make an extensive study of the right to alienate in our units on Gifts, Estates and Future Interests, Co-Ownership, and Land Conveyancing. And we will return to limits on the right of use, and in particular the *sic utere tuo* principle, in our chapter on Nuisance. But for now let us consider one example of how these other rights of

ownership may be ambiguous, and subjected to limits in the face of competing interests:

Eyerman v. Mercantile Trust Co.
524 S.W.2d 210 (Mo. Ct. App. 1975)

RENDLEN, Judge.

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

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

The area involved is a "private place" established in 1902 by trust indenture which provides that Kingsbury Place and Kingsbury Terrace will be so maintained, improved, protected and managed as to be desirable for private residences. The trustees are empowered to protect and preserve "Kingsbury Place" from encroachment, trespass, nuisance or injury, and it is "the intention of these presents, forming a general scheme of improving and maintaining said property as desirable residence property of the highest class." The covenants run with the land and the indenture empowers lot owners or the trustees to bring suit to enforce them.

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

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

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

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

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

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

We are constrained to take judicial notice of the pressing need of the community for dwelling units as demonstrated by recent U.S. Census Bureau figures showing a decrease of more than 14% in St. Louis City housing units during the decade of the 60's. This decrease occurs in the face of housing growth in the remainder of the metropolitan area. It becomes apparent that no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served. Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary

loss in excess of $39,000.00 to the estate and is without benefit to the dead woman. No reason, good or bad, is suggested by the will or record for the eccentric condition. This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other interest in the property. To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.

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

In the early English case of *Egerton v. Brownlow*, 10 Eng.Rep. 359, 417 (H.L.C. it is stated: "The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land, (though it may be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void and allows the devisee to enjoy the estate free from the condition."…

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

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

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

…The term "public policy" cannot be comprehensively defined in specific terms but the phrase "against public policy" has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy "when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality." *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W.2d 615, 620 (1946); *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. banc 1959).

Public policy may be found in the Constitution, statutes and judicial decisions of this state or the nation. But in a case of first impression where there are no guiding

statutes, judicial decisions or constitutional provisions, "a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will." *In re Mohler's Estate*, 343 Pa. 299, 22 A.2d 680, 683 (1941). In the absence of guidance from authorities in its own jurisdiction, courts may look to the judicial decisions of sister states for assistance in discovering expressions of public policy.

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

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

DOWD, P.J., concurs.

CLEMENS, Judge (dissenting).

I dissent.
…The simple issue in this case is whether the trial court erred by refusing to enjoin a trustee from carrying out an explicit testamentary directive. In an emotional opinion,

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

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

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

…The leading Missouri case on public policy as that doctrine applies to a testator's right to dispose of property is *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120 [1, 2] (banc 1927), cert. den. 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325. There, an executor refused to pay a bequest on the ground the beneficiary was an enemy alien, and the bequest was therefore against public policy. The court denied that contention: "We may say, at the outset, that the policy of the law favors freedom in the testamentary disposition of property and that it is the duty of the courts to give effect to the intention of the testator, as expressed in his will, provided such intention does not contravene an established rule of law." And the court wisely added, "it is not the function of the judiciary to create or announce a public policy of its own, but solely to determine and declare what is the public policy of the state or nation as such policy is found to be expressed in the Constitution, statutes, and judicial decisions of the state or nation, . . . not by the varying opinions of laymen, lawyers, or judges as to the demands or the interests of the public." And, in cautioning against judges declaring public policy the court stated: "Judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before the court would be warranted in pronouncing a transaction void on this account." In resting its decision on public-policy grounds, the majority opinion has transgressed the limitations declared by our Supreme Court in *Rahn's Estate*.

…As much as our aesthetic sympathies might lie with neighbors near a house to be razed, those sympathies should not so interfere with our considered legal judgment as to create a questionable legal precedent. Mrs. Johnston had the right during her lifetime to have her house razed, and I find nothing which precludes her right to

order her executor to raze the house upon her death. It is clear that "the law favors the free and untrammeled use of real property." *Gibbs v. Cass*, 431 S.W.2d 662(2) (Mo.App.1968). This applies to testamentary dispositions. *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 222 S.W.2d 750(2) (1949). An owner has exclusive control over the use of his property subject only to the limitation that such use may not substantially impair another's right to peaceably enjoy his property. Plaintiffs have not shown that such impairment will arise from the mere presence of another vacant lot on Kingsbury Place….

Notes and Questions

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

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

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

C. So What *Is* Property?

We began this chapter with Blackstone's strong statement of the "absolute right" of property, and have watched it gradually melt away. We have seen courts use a subtle and diverse array of tools to vindicate interests that conflict with a property owner's "absolute" rights. In *Marsh*, the Court opined that state-law rights of property must give way to more important principles enshrined in the federal Constitution. In *Shack*, the court explicitly avoids this kind of Constitutional trump card by manipulating the *scope of the owner's rights* under the common law of property to avoid conflict with competing *statutory* policies. The court in *Eyerman* takes a similar approach to the

testatrix's efforts to direct disposition of her property after death, even where there appears to be no danger of conflict with any Constitutional—or even statutory—interest. Is there any limit to the scope or variety of these types of manipulations? And if not, how are we ever to say what property *is*?

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

- In our unit on the Subject Matter of Property, we will see how some things may be called "property" even though they are not subject to certain of the traditional rights of ownership—particularly the right to alienate.
- In our unit on Estates and Future Interests, we will see how property rights can be *temporally* divided—that a property right in land that exists today may nevertheless not entitle its owner to *possession* of that land until some point in the future.
- In our unit on Concurrent Interests, we will see how the division of ownership rights among *multiple people* similarly cabins the rights to exclude, possess, alienate, and use—at least among co-owners.
- In our unit on Takings, we will see that in some circumstances the right to exclude, standing alone, may be a sufficient condition for identifying "property."

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

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

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

Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*

23 YALE L. J. 16, 28-30, 31-33, 45-46, 55 (1913)

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

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

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

. . .

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

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

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

The privilege is perfectly consistent with this sort of duty,—for the latter is of the *same* content or tenor as the privilege;—but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty *to stay off*. . . .

Passing now to the question of "correlatives," it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed-as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a "no-right," there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter. . . .

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

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

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

immunity is one's freedom from the legal power or "control" of another as regards some legal relation.

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

Wesley Newcomb Hohfeld, ***Fundamental Legal Conceptions as Applied in Judicial Reasoning***

26 YALE L. J. 710, 713-745 (1917)

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

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

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

In contrast to these examples are those relating to rights, or claims, *in rem*…. If A owns and occupies Whiteacre,* not only B but also a great many other persons—not necessarily all persons—are under a duty, e.g., not to enter on A's land. A's right against B is a … right *in rem*, for it is simply one of A's class of *similar*, though separate, rights, actual and potential, against *very many* persons. The same points apply as regards A's right that B shall not commit a battery on him, A's right that B shall not alienate the affections of A's wife, and A's right that B shall not manufacture a certain article as to which A has a so-called patent….

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

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

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

purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.…

What is here insisted on, —i.e., that all rights *in rem* are against persons, —is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that. Some concrete examples may serve to make this plain. Suppose that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that, in consideration of $100 *actually paid* by A to B, the latter agrees with A never to enter on X's land, Whiteacre. It is clear that A's right against B concerning Whiteacre is a right *in personam*…; for A has no similar and separate rights concerning Whiteacre availing respectively against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right *in rem*…; for it is but one of a very large number of fundamentally similar (though separate) rights which A has respectively against B., C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, *intrinsically considered*, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its "companions." So, in general, we might say that a right *in personam* is one having few, if any, "companions"; whereas a right *in rem* always has many such "companions."

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

(b) *A … right in rem is not always one relating to a thing, i.e., a tangible object:* …[A] right *in rem* is not necessarily one *relating to*, or *concerning*, a thing, i.e., a tangible object. … The term right *in rem* … is so generic in its denotation as to include: 1. …[R]ights, or claims, relating to a definite *tangible object*: e.g., a landowner's right that any ordinary person shall not enter on his land, or a chattel owner's right that any ordinary person shall not physically harm the object involved, —be it horse, watch, book, etc. 2. …[R]ights (or claims) relating neither to definite tangible object nor to (tangible)

person, e. g., a patentee's right, or claim, that any ordinary person shall not manufacture articles covered by the patent; 3. …[R]ights, or claims, relating to the holder's *own person*, e. g., his right that any ordinary person shall not strike him, or that any ordinary person shall not restrain his physical liberty, i.e., "falsely imprison" him; 4. …[R]ights residing in a given person and relating to *another* person, e. g., the right of a father that his daughter shall not be seduced, or the right of a husband that harm shall not be inflicted on his wife so as to deprive him of her company and assistance; 5. ..[R]ights, or claims, not relating directly to either a (tangible) person or a tangible object, e. g., a person's right that another shall not publish a libel of him, or a person's right that another shall not publish his picture, the so-called "right of privacy" existing in some states, but not in all.

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

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

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

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

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

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* Reproduced by permission of Henry E. Smith.

things presumably illustrates the grip of conceptualism on the civilian mind and a slavish devotion to the gods of Roman law.

Or does it? In related work, we have argued that, far from being a quaint aspect of the Roman or feudal past, the in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution.[7] Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing-not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself….

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

… Blackstone perceived that property rights are important because they establish a basis of security of expectation regarding the future use and enjoyment of particular resources. By establishing a right to resources that holds against all the world, property provides a guarantee that persons will be able to reap what they have

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

sown…. In other words, property is important because it gives legal sanction to the efforts of the owner of a thing to exclude an indefinite and anonymous class of marauders, pilferers, and thieves, thereby encouraging development of the thing.

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

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

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

than "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."[36]

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

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

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

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

The resemblance is no accident. Like the zero-transaction-cost world, no property system ever has or will build up legal relations smallest piece by smallest piece. Interestingly, in a zero-transaction cost world, one could do just that, and any benefit

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

* Reproduced by permission of Henry E. Smith.

to be secured by parsing out relations in a fine-grained manner could be obtained at zero cost. That is not our world.

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

. . . In recent times, various commentators have argued that property is not fully captured by the bundle picture. Going beyond the bundle usually involves emphasizing exclusion or some robust notion of the right to use. It can be motivated by analytical jurisprudence, natural rights, or information cost economics. The bundle theory can incorporate some of these perspectives. Consider, for example, the recent resurgence of interest in the *numerus clausus;* this principle that property forms come in a finite and closed menu can be added onto the bundle theory as a "menu" of collections of sticks. Bundle theorists can accommodate this development. But they are being reactive in this regard. . . .

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

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

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

The exclusion-governance architecture manages complexity in a way totally uncaptured by the bundle picture, and importantly, the former is modular while the latter is not. The exclusion strategy defines what a thing is to begin with. A fundamental question is how to classify "things," and, hence, which aspects of "things" are the most basic units of property law. Many important features of property follow from the semitransparent boundaries between things. Boundaries carve up the world into semiautonomous components—modules—that permit private law to manage highly complex interactions among private parties. . . .

The modular theory explains property's structure, which includes providing some reason why those structures are not otherwise. In a zero-transaction-cost world, we could use all governance all the time, whether supplied by government or through super fine-grained contracting among all the concerned parties. That is not our world, and the main point of exclusion as a delineation strategy is that it is a *shortcut* over direct delineation of this more "complete" set of legal relations. Analytically, it might be interesting to think of property as a list of use rights availing pairwise between all people in society, but actually creating such a list would be a potentially intractable problem in our world. On the other hand, exclusion is not the whole story either.

Causes of action like trespass implement a right to exclude, but the right to exclude is not *why* we have property. Rather, the right to exclude is part of *how* property works. Rights to exclude are a means to an end, and the ends in property relate to people's interests in using things.

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

At the base of the architectural approach is a distinction that the bundle theory—along with other theories—tends to obscure: the distinction between the interests we have in using things and the devices the law uses to protect those interests. Property serves purposes related to use by employing a variety of delineation strategies. Because delineation costs are greater than zero, which strategy one uses and when one uses it will be dictated in part by the costs of delineation—not just by the benefits that correspond to the use-based purposes of property. . . .

The traditional definition of property is a right to a thing good against the world—it is an in rem right. The special in rem character of property forms the basis of an information-cost explanation of the *numerus clausus* and standardization in property. In rem rights are directed at a wide and indefinite audience of duty holders and other affected parties, who would incur high information costs in dealing with idiosyncratic property rights and would have to process more types of information than they would in the absence of the *numerus clausus.* Crucially, parties who might create such

idiosyncratic property rights are not guaranteed to take such third-party processing costs into account. There is thus an information-cost externality, and the *numerus clausus* is one tool for addressing this externality. Other devices include title records and technological changes in communication. . . .

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

Notes and Questions

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

8. Recall the questions in Notes 1 and 2 on pages 7-7 (following *Jacque*). They may lead us to another way of framing the distinction between the two interpretations of the "bundle" metaphor. Consider this: if I ask you: "Does A have a property right in Whiteacre," how confident are you that you will be able to answer the question without knowing the answer to a different question: "A right against whom?"

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

10. Consider the following two propositions:

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

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

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

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

property as a legal right in "things" in our unit on the Subject Matter of Property.

2. Subject Matter of Property

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

- your home or apartment
- your car or bike
- your computer
- the software on your computer
- the emails stored on your computer
- the emails stored on your cloud-based email service

- your bank account
- the money in your bank account
- the money you lent to your friend that hasn't been repaid
- the money your friend lent to you that you haven't paid back
- the things you bought with the money your friend lent to you that you haven't paid back

- your pet dog
- the rats in your animal research lab
- your dairy cow
- the pig you're raising for meat

- your prescription medications
- your doctor's/pharmacist's/insurance company's records of your prescription medications

- your handwritten diary
- your unpublished novel
- your published novel
- your social media profiles and content
- your password-protected blog

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

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

Felix Cohen, ***Transcendental Nonsense and the Functional Approach***
35 COLUM. L. REV. 809, 814-817 (1935)

There was once a theory that the law of trade marks and trade-names was an attempt to protect the consumer against the "passing off" of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field. Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization. But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar devices. For if they advanced any such argument, it might seem that they were taking sides upon controversial issues of politics and economics. Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal argument runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a

particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. This argument may be embellished, in particular cases, with animadversions upon the selfish motives of the infringing defendant, a summary of the plaintiff's evidence (naturally uncontradicted) as to the amount of money he has spent in advertising, and insinuations (seldom factually supported) as to the inferiority of the infringing defendant's product.

The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word "Palmolive" is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued. In other words, the fact that courts did not protect the word would make the word valueless, and the fact that it was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of that word should be protected.

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

The theory that judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made

by mortal men. The effect of this theory, in the law of unfair competition as elsewhere, is to dull lay understanding and criticism of what courts do in fact.

What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality. If courts, for instance, should prevent a man from breathing any air which had been breathed by another (within, say, a reasonable statute of limitations), those individuals who breathed most vigorously and were quickest and wisest in selecting desirable locations in which to breathe (or made the most advantageous contracts with such individuals) would, by virtue of their property right in certain volumes of air, come to exercise and enjoy a peculiar economic advantage, which might, through various modes of economic exchange, be turned into other forms of economic advantage, e.g. the ownership of newspapers or fine clothing. So, if courts prevent a man from exploiting certain forms of language which another has already begun to exploit, the second user will be at the economic disadvantage of having to pay the first user for the privilege of using similar language or else of having to use less appealing language (generally) in presenting his commodities to the public.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered. Is there, for practical purposes, an unlimited supply of equally attractive words under which any commodity can be sold, so that the second seller of the commodity is at no commercial disadvantage if he is forced to avoid the word or words chosen by the first seller? If this is not the case, i.e. if peculiar emotional contexts give one word more sales appeal than any other word suitable for the same product, should the peculiar appeal of that word be granted by the state, without payment, to the first occupier? Is this homestead law for the English language necessary in order to induce the first occupier to use the most

attractive word in selling his product? If, on the other hand, all words are originally alike in commercial potentiality, but become differentiated by advertising and other forms of commercial exploitation, is this type of business pressure a good thing, and should it be encouraged by offering legal rewards for the private exploitation of popular linguistic habits and prejudices? To what extent is differentiation of commodities by trade names a help to the consumer in buying wisely? To what extent is the exclusive power to exploit an attractive word, and to alter the quality of the things to which the word is attached, a means of deceiving consumers into purchasing inferior goods?

Without a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interests of business and identifies the interests of business with the interests of society, will not be critically examined by courts and legal scholars until it is recognized and formulated. It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.

Hinman v. Pacific Air Transport

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

HANEY, Circuit Judge.

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

It is then alleged that defendants are engaged in the business of operating a commercial air line, and that at all times "after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and

trespassed upon the ownership and possession of plaintiffs' tract"; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses…. The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiffs' property and for [damages].

Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine does not apply in California. We have examined the statutes of California, …but we find nothing therein to negative the ad coelum formula….If we could accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

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

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

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

The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land.

This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet.

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

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

Since, therefore, appellants must confine their claim to 150 feet of the airspace above the land, to the use of the space as related to the enjoyment of their land, to what extent, then, is this use necessary to perfect their title to the airspace? Must the use be actual, as when the owner claims the space above the earth occupied by a building constructed thereon; or does it suffice if appellants establish merely that they may reasonably expect to use the airspace now or at some indefinite future time?

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

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

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

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

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

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of.

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

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

Notes and Questions

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

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

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

16. **Drones.** The increasing availability of personal aerial robots ("drones") is threatening to bring *Hinman* back into the spotlight. In November of 2014, a hobbyist was flying a custom-built "hexacopter" over his parents' farm in California, when a neighbor's son shot it out of the sky with a shotgun. The neighbor claimed the drone had been flying over his land, though the drone owner disputed this. In any event, the drone owner demanded compensation for damage to the drone, and the neighbor refused. They ended up in small claims court where the neighbor was held liable for $850 in damages and court costs, on grounds that he "acted unreasonably in having his son shoot the drone down regardless of whether it was over his property or not." Jason Koebler, *The Sky's Not Your Lawn: Man Wins Lawsuit After Neighbor Shotgunned His Drone*, MOTHERBOARD (June 28, 2015),

http://motherboard.vice.com/read/the-skys-not-your-lawn-man-wins-lawsuit-after-neighbor-shotgunned-his-drone.

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

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

3. Property in Persons

Is there something special about calling a right a "property" right? Property usually has a standard set of attributes, including alienability and in particular market-alienability: the owner's ability to transfer the property through sale. These attributes – sometimes known as sticks in the bundle of rights that makes up property – can often be removed and added without changing a thing's status as property. However, the more the bundle at issue differs from from the standard "property" bundle, the more it seems like the legislature should decide the exact contours of the right rather than calling it property and giving it the standard set of property attributes by default. Another way of looking at the question is to ask whether anything is inherent in the concept of property. That is, does property define what you can do to what you "own"? If the answer is yes, that may be a reason to refuse to allow certain things to become property, like people or their parts. If the answer is no, then what purpose is the label property serving?

A. Owning Other People

The Amistad
40 U.S. 518 (1841)

STORY, Justice, delivered the opinion of the Court.

[The Amistad was a ship bound from one part of Cuba to another. On board were three Spanish subjects: Captain Ransom Ferrer, Jose Ruiz, and Pedro Montez. Also on board were 53 Africans, recently kidnapped from their home country and transported to Cuba, a Spanish territory, where Ruiz and Montez had purchased them as slaves. Slavery was legal in Cuba at the time, though Spanish law banned the *importation* of slaves from Africa to the Americas. At sea, the Africans rose up, killed Ferrer, and took control of the Amistad, attempting to sail it back to Africa. Instead, they ended up off the coast of Long Island, where they and the ship were taken into custody by the U.S. Navy and brought to port in Connecticut. Ruiz and Montez filed libels—a type of property claim in admiralty law—seeking to recover the Africans and other cargo they had on board. Their claim was backed by both the Spanish crown and the Federal government, both of which cited a treaty between the two

countries (discussed by the Court below). The district court denied the Spaniards' claim for the Africans, but granted their claim for the cargo, and the Circuit Court summarily affirmed.]

… [T]he only parties now before the Court on one side, are the United States, intervening for the sole purpose of procuring restitution of the property as Spanish property, pursuant to the treaty, upon the grounds stated by the other parties claiming the property in their respective libels. The United States do not assert any property in themselves…. They simply confine themselves to the right of the Spanish claimants to the restitution of their property, upon the facts asserted in their respective allegations.

In the next place, the parties before the Court on the other side as appellees, are … the negroes, (Cinque, and others,) asserting themselves in their answer, not to be slaves, but free native Africans, kidnapped in their own country, and illegally transported by force from that country; and now entitled to maintain their freedom.

No question has been here made, as to the proprietary interests in the vessel and cargo. It is admitted that they belong to Spanish subjects, and that they ought to be restored. … The main controversy is, whether these negroes are the property of Ruiz and Montez, and ought to be delivered up; and to this, accordingly, we shall first direct our attention.

It has been argued on behalf of the United States, that the Court are bound to deliver them up, according to the treaty of 1795, with Spain…. The ninth article provides, 'that all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.' This is the article on which the main reliance is placed on behalf of the United States, for the restitution of these negroes. To bring the case within the article, it is essential to establish, First, That these negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty. Secondly, That there has been a rescue of them on the high seas, out of the hands of the pirates and robbers; which, in the present case, can only be, by showing that they themselves are pirates and robbers,

and Third, That Ruiz and Montez, the asserted proprietors, are the true proprietors, and have established their title by competent proof.

If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognized by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation. But, admitting this, it is clear, in our opinion, that … these negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free. Ruiz and Montez are proved to have made the pretended purchase of these negroes, with a full knowledge of all the circumstances….

If then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board the Amistad; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts, by which they asserted their liberty, and took possession of the Amistad, and endeavored to regain their native country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least so far as those laws have been brought to our knowledge. Nor do the libels of Ruiz or Montez assert them to be such.

…It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects. The conflict of rights between the parties under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and

international law. If the contest were about any goods on board of this ship, to which American citizens asserted a title, which was denied by the Spanish claimants, there could be no doubt of the right to such American citizens to litigate their claims before any competent American tribunal, notwithstanding the treaty with Spain. *A fortiori*, the doctrine must apply where human life and human liberty are in issue; and constitute the very essence of the controversy. The treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights.

…Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, … and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without day.

BALDWIN, Justice, dissented.

Notes and Questions

18. James Somerset was an enslaved African man who had been transported from colonial Massachusetts to England. Once in England he escaped, but was recaptured and imprisoned on a ship docked in the Thames, soon to depart for Jamaica. Somerset petitioned the King's Bench for a writ of *habeas corpus* challenging his confinement against his will by the ship's captain. In *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772), Lord Chief Justice Mansfield, noting that slavery was legal in both the North American colonies and Jamaica but had never been formally recognized as legal by the English Parliament, granted the writ, saying:

    "[T]he slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory:

it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

The result in *Somerset* is, on some level, the same as in *Amistad*—both courts order captured and enslaved human beings to be set free. But the facts that put the question and the justifications for the result are subtly different in each case. Can you articulate the distinction(s) between Lord Mansfield's reasoning and Justice Story's? What are the implications of these distinctions for the law of property in England and America, respectively, as it applies to property rights in human beings?

The Illustrated London News, Sept. 27, Sept. 27, 1856, p. 315. "Slave auction at Richmond, Virginia," 1856. Prints and Photographs Division, Library of Congress. Reproduction Number LC-USZ62-15398

19. Is your body your "property"? The English philosopher John Locke, who heavily influenced Blackstone and the Anglo-American legal tradition generally, seemed to think so. In his *Second Treatise on Government*, Chapter V, Section 27, Locke wrote:

> "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."

What are the implications of the view of the human body as "property"? If you can own your own body, why can't someone else own it? At the very least, could you sell yourself into slavery? Why don't biological mothers own their children, who are produced from their bodies?

It is not accidental that Locke said that every "man" has a property in his own person; he didn't include women. Currently, the law insists that people are not property, even if the relation between a person and her own body, or her own labor, can be described in property terms.

1. Emancipation and Compensation

Generally, if the government "takes" "property" for its own use, the government has to pay the former owner the fair market value of that property, as we will discuss in the section on takings.

The Constitution, as amended, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., amend. XIII. The Thirteenth Amendment, along with its cousins the Fourteenth and Fifteenth Amendments, were designed to embed the results of the Civil War into the Constitution.

Before the Civil War, slavery's defenders considered enslaved people to be property, and many of slavery's opponents conceded that enslaved people were property according to the law of the land. Henry Clay, speaking against abolition, contended: "The total value … of the slave property in the United States, is twelve hundred millions of dollars. … It is the subject of mortgages, deeds of trust, and family settlements. It … is the sole reliance, in many instances, of creditors within and without the slave States …. *That is property which the law declares to be property*." Was he right? If he was wrong, how are we to determine what is property?

The U.S. did not compensate enslavers upon emancipation; nor did it compensate enslaved people. *But see* Roy E. Finkenbine, *Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts*, 64 Wm. & Mary Q. 95 (2007) (discussing a rare example of a pension being granted to an aged ex-slave by the Massachusetts legislature, in consideration of her long enslavement). By contrast, in 1833, Britain abolished

slavery but also provided for the compensation of enslavers for their lost "property," representing roughly 800,000 enslaved people. The £20 million the government set aside to pay enslavers off represented 40% of the total government expenditure for 1834, and is the equivalent of between £16 and £17 billion, or $26 billion, in 2015 terms. Until the bank bailouts of 2009, this payout – to 46,000 enslavers – was the largest in British history. Moreover, enslaved people were compelled to provide 45 hours of unpaid labor each week for their former masters for a further four years. Many well-known Britons can trace their ancestors – and some fraction of their family wealth – to enslavers. *See* Legacies of British Slave-Ownership.

Likewise, in 1825, France, warships at the ready, demanded that its former colony Haiti compensate France for its loss of plantations and enslaved people. Enslavers submitted detailed claims, which were later reduced to 90 billion francs (roughly $14 billion in modern terms) to be paid over thirty years. Haiti took until 1947 to pay off both the original claim to France and the additional interest accrued from borrowing from French banks to meet France's deadlines. Haiti is currently the poorest country in the Americas.

2. Owning Labor

The Thirteenth Amendment is notable, among other things, for its lack of any state action requirement. While the other provisions of the Constitution control what the government may do and how it may do it, the Thirteenth Amendment is a command to everyone: there shall be no slavery in the United States. Why write it this way, rather than as a constraint on government action?

Consider employment contracts that bar employees from competing if they leave, or bar them from working in the same area or the same industry, or bar them from using any information they learned while working for the employer. These restrictive covenants may mean that a person may be unable to work in the only field for which she is trained if she leaves her current employer, which is likely to give her employer substantial leverage in negotiating salary and other terms of employment. Do these attempted contractual restrictions raise any Thirteenth Amendment issues? *See* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 Texas L. Rev. 789 (2015) (discussing multiple restrictions employers have used to restrict former employees' use of their own knowledge); Dave Jamieson, Jimmy John's 'Oppressive' Noncompete Agreement Survives Court Challenge, Huffington Post, Apr. 10, 2015 (discussing fast food restaurant's noncompete agreement that precludes low-wage employees from working for any competitor).

Separately, consider the Thirteenth Amendment's exception for "involuntary servitude" as punishment for crime. Prison takes away prisoners' liberty and their ability to use their own property, and also coerces their labor. Does this mean that prisoners are property? In

1871, the Virginia Supreme Court declared prisoners to be "slaves of the state." Ruffin v. Commonwealth, 62 Va. 1024 (1871). After the Civil War, African-Americans in the South were routinely arrested for almost any reason, and local governments then sold their labor to white landowners for agricultural work. Prison labor currently produces over $2 billion worth of goods every year, though most production now takes place within prison walls. All able-bodied federal prisoners are required to work, at a pay scale ranging from $0.25 to $1.15 per hour. Texas and Georgia require prisoners to work without any pay.

3. Alternatives To Property

If the relationship between a prisoner and the state, or between a child and a parent, isn't a property relationship, what kind of relationship is it? Can an owner ever have positive duties to take care of property? Can cats be property? What about chimpanzees?

B. Publicity Rights

Even if people can't be property, perhaps names, faces, or parts of people can be property. Among other questions we will want to ask: Is labor necessary to create property rights? In the phenomenon known as "accession," it's not: a cow's owner automatically owns her calf, whether or not the owner invested anything in the calf. Is labor sufficient to create property rights? Again, the answer elsewhere is: not always.

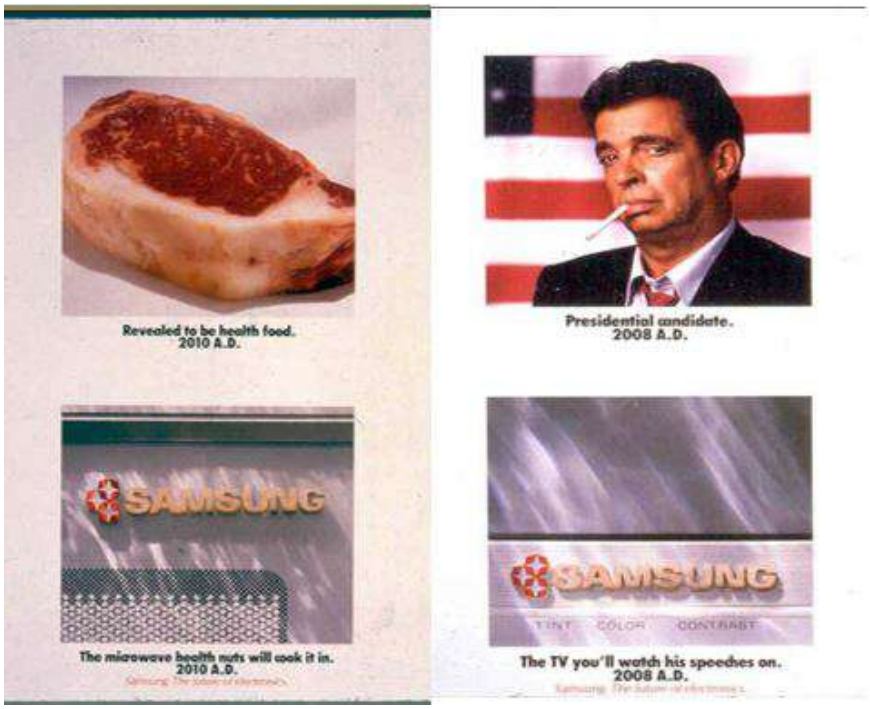
Property is often called on to decide issues of morality. Concepts of unjust enrichment, in which someone wrongfully benefits from another's efforts, often play a role in resolving property disputes, as we see in the following case about owning attributes of identity, distinguishable from a physical body.

White v. Samsung Electronics America, Inc.
971 F.2d 1395 (9th Cir. 1992)

This case involves a promotional "fame and fortune" dispute. In running a particular advertisement without Vanna White's permission, defendants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White's fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court granted summary judgment in favor of the defendants. We affirm in part, reverse in part, and remand.

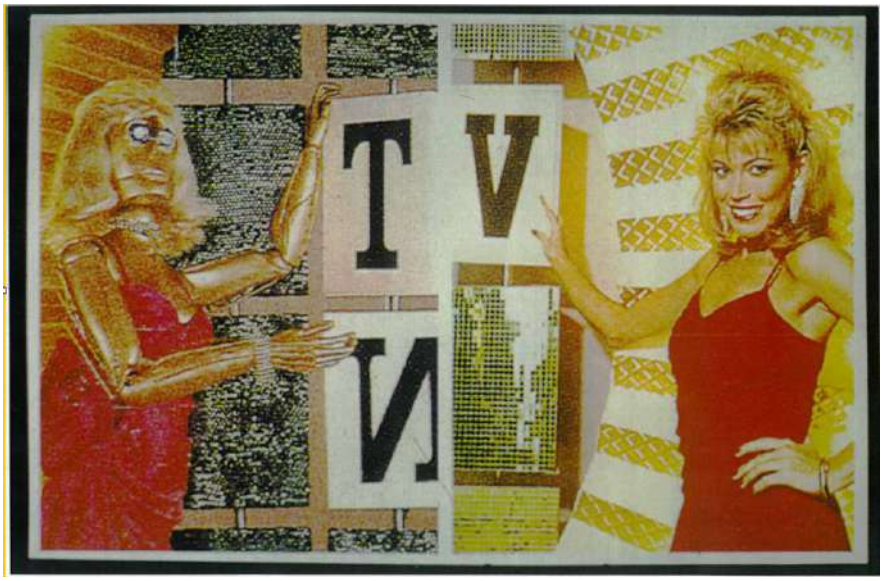
Plaintiff Vanna White is the hostess of "Wheel of Fortune," one of the most popular game shows in television history. An estimated forty million people watch the program daily. Capitalizing on the fame which her participation in the show has bestowed on her, White markets her identity to various advertisers.

The dispute in this case arose out of a series of advertisements prepared for Samsung by Deutsch. The series ran in at least half a dozen publications with widespread, and in some cases national, circulation. Each of the advertisements in the series followed the same theme. Each depicted a current item from popular culture and a Samsung electronic product. Each was set in the twenty-first century and conveyed the message that the Samsung product would still be in use by that time. By hypothesizing outrageous future outcomes for the cultural items, the ads created humorous effects. For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: "Revealed to be health food. 2010 A.D." Another depicted irreverent "news"-show host Morton Downey Jr. in front of an American flag with the caption: "Presidential candidate. 2008 A.D."



The advertisement which prompted the current dispute was for Samsung video-cassette recorders (VCRs). The ad depicted a robot, dressed in a wig, gown, and

jewelry which Deutsch consciously selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: "Longest-running game show. 2012 A.D." Defendants referred to the ad as the "Vanna White" ad. Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.



Side by side comparison of robot and White

Following the circulation of the robot ad, White sued Samsung and Deutsch in federal district court …. The district court granted summary judgment against White on each of her claims. White now appeals. …

II. Right of Publicity

White next argues that the district court erred in granting summary judgment to defendants on White's common law right of publicity claim. In Eastwood v. Superior Court, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983), the California court of appeal stated that the common law right of publicity cause of action "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." The district court dismissed White's claim for failure to satisfy Eastwood's second prong, reasoning that defendants had not appropriated White's "name or likeness" with their robot ad. We agree that the robot ad did not make use of White's name or likeness. However, the common law right of publicity is not so confined.

… [T]he common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable. …

As the Carson court explained:

> [t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity … . If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used.

It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so.… A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice….

Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.… Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised.

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof. We decline Samsung and Deutch's invitation to permit the evisceration of the common law right of publicity through means as facile as those in this case. Because White has alleged facts showing that Samsung and Deutsch had

appropriated her identity, the district court erred by rejecting, on summary judgment, White's common law right of publicity claim.

[The court rejected First Amendment claims because the Samsung ad was commercial speech, which generally receives less constitutional protection than noncommercial speech. The court also allowed White's Lanham Act claim, alleging that the ad caused confusion about whether White sponsored or was affiliated with Samsung, to continue.]…

[The partial dissent of Judge Alarcon is omitted]

White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993)

Kozinski, J., dissenting from denial of rehearing en banc

Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts.* Clint Eastwood doesn't want tabloids to write about him.† Rudolf Valentino's heirs want to control his film biography.‡ The Girl Scouts don't want their image soiled by association with certain activities.§ George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars."** Pepsico doesn't want singers to use the word "Pepsi" in their songs.†† Guy Lombardo wants an exclusive

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* See Eben Shapiro, Rising Caution on Using Celebrity Images, N.Y. Times, Nov. 4, 1992, at D20 (Iraqi diplomat objects on right of publicity grounds to ad containing Hussein's picture and caption "History has shown what happens when one source controls all the information").

† Eastwood v. Superior Court, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983).

‡ Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454 (1979) (Rudolph Valentino); see also Maheu v. CBS, Inc., 201 Cal.App.3d 662, 668, 247 Cal.Rptr. 304 (1988) (aide to Howard Hughes). Cf. Frank Gannon, Vanna Karenina, in Vanna Karenina and Other Reflections (1988) (A humorous short story with a tragic ending. "She thought of the first day she had met VR__SKY. How foolish she had been. How could she love a man who wouldn't even tell her all the letters in his name?").

§ Girl Scouts v. Personality Posters Mfg., 304 F.Supp. 1228 (S.D.N.Y.1969) (poster of a pregnant girl in a Girl Scout uniform with the caption "Be Prepared").

** Lucasfilm Ltd. v. High Frontier, 622 F.Supp. 931 (D.D.C.1985).

†† Pepsico Inc. claimed the lyrics and packaging of grunge rocker Tad Doyle's "Jack Pepsi" song were "offensive to [it] and …] likely to offend [its] customers," in part because they "associate [Pepsico] and its

property right to ads that show big bands playing on New Year's Eve.* Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis.† Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs.‡ And scads of copyright holders see purple when their creations are made fun of.§

Pepsi marks with intoxication and drunk driving." Deborah Russell, Doyle Leaves Pepsi Thirsty for Compensation, Billboard, June 15, 1991, at 43. Conversely, the Hell's Angels recently sued Marvel Comics to keep it from publishing a comic book called "Hell's Angel," starring a character of the same name. Marvel settled by paying $35,000 to charity and promising never to use the name "Hell's Angel" again in connection with any of its publications. Marvel, Hell's Angels Settle Trademark Suit, L.A. Daily J., Feb. 2, 1993, § II, at 1.

Trademarks are often reflected in the mirror of our popular culture. See Truman Capote, Breakfast at Tiffany's (1958); Kurt Vonnegut, Jr., Breakfast of Champions (1973); Tom Wolfe, The Electric Kool-Aid Acid Test (1968) (which, incidentally, includes a chapter on the Hell's Angels); Larry Niven, Man of Steel, Woman of Kleenex, in All the Myriad Ways (1971); Looking for Mr. Goodbar (1977); The Coca-Cola Kid (1985) (using Coca-Cola as a metaphor for American commercialism); The Kentucky Fried Movie (1977); Harley Davidson and the Marlboro Man (1991); The Wonder Years (ABC 1988-present) ("Wonder Years" was a slogan of Wonder Bread); Tim Rice & Andrew Lloyd Webber, Joseph and the Amazing Technicolor Dream Coat (musical).

Hear Janis Joplin, Mercedes Benz, on Pearl (CBS 1971); Paul Simon, Kodachrome, on There Goes Rhymin' Simon (Warner 1973); Leonard Cohen, Chelsea Hotel, on The Best of Leonard Cohen (CBS 1975); Bruce Springsteen, Cadillac Ranch, on The River (CBS 1980); Prince, Little Red Corvette, on 1999 (Warner 1982); dada, Dizz Knee Land, on Puzzle (IRS 1992) ("I just robbed a grocery store-I'm going to Disneyland / I just flipped off President George-I'm going to Disneyland"); Monty Python, Spam, on The Final Rip Off (Virgin 1988); Roy Clark, Thank God and Greyhound [You're Gone], on Roy Clark's Greatest Hits Volume I (MCA 1979); Mel Tillis, Coca-Cola Cowboy, on The Very Best of (MCA 1981) ("You're just a Coca-Cola cowboy / You've got an Eastwood smile and Robert Redford hair … ").

Dance to Talking Heads, Popular Favorites 1976-92: Sand in the Vaseline (Sire 1992); Talking Heads, Popsicle, on id. Admire Andy Warhol, Campbell's Soup Can. Cf. REO Speedwagon, 38 Special, and Jello Biafra of the Dead Kennedys.

The creators of some of these works might have gotten permission from the trademark owners, though it's unlikely Kool-Aid relished being connected with LSD, Hershey with homicidal maniacs, Disney with armed robbers, or Coca-Cola with cultural imperialism. Certainly no free society can demand that artists get such permission.

* Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

† Geller v. Fallon McElligott, No. 90-Civ-2839 (S.D.N.Y. July 22, 1991) (involving a Timex ad).

‡ Prudhomme v. Procter & Gamble Co., 800 F.Supp. 390 (E.D.La.1992).

§ E.g., Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir.1992); Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490 (2d Cir.1989); Fisher v. Dees, 794 F.2d 432 (9th Cir.1986); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir.1981); Elsmere Music, Inc. v. NBC, 623 F.2d 252 (2d Cir.1980); Walt

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. …

II

… Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't have been funny had it depicted White or someone who resembled her – the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012….

Disney Prods. v. The Air Pirates, 581 F.2d 751 (9th Cir.1978); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.1964); Lowenfels v. Nathan, 2 F.Supp. 73 (S.D.N.Y.1932).

III

… Intellectual property rights aren't like some constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant. They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say, *Presumed Innocent*; I can't make a movie out of it. But I'm perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit. So what if I got the idea from *Presumed Innocent*? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.

The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law.… Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her. After all, that's all Samsung did: It used an inanimate object to remind people of White, to "evoke [her identity]."[17]

Consider how sweeping this new right is. What is it about the ad that makes people think of White? … Remove the game board from the ad, and no one would think of Vanna White. But once you include the game board, anybody standing beside it – a brunette woman, a man wearing women's clothes, a monkey in a wig and gown – would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.

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[17] Some viewers might have inferred White was endorsing the product, but that's a different story. The right of publicity isn't aimed at or limited to false endorsements; that's what the Lanham Act is for.
Note also that the majority's rule applies even to advertisements that unintentionally remind people of someone. California law is crystal clear that the common-law right of publicity may be violated even by unintentional appropriations.

This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically.

This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings. All of these diminish an intellectual property owner's rights. All let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.

The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own. The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung "appropriated" something of White's begs the question: Should White have the exclusive right to something as broad and amorphous as her "identity"? Samsung's ad didn't simply copy White's schtick – like

all parody, it created something new. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of "the difference between fun and profit," but in the entertainment industry fun is profit. Why is Vanna White's right to exclusive for-profit use of her persona – a persona that might not even be her own creation, but that of a writer, director or producer – superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

To paraphrase only slightly Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it.…

Notes and Questions

Kozinski's dissent is often quoted because of its eloquence (not to mention its witty if now somewhat dated cultural references). Is it persuasive?

Consider the following argument: Property needs boundaries. With intangible rights, those boundaries may be difficult to determine – though as you will see, it may not be all that simple to determine the appropriate boundaries of physical property either. Kozinski argues that the difficulty of determining where celebrity identity ends and general cultural reference or invention begins is a reason to reject a right of publicity. But the majority concludes that commercial speech – here, advertising – provides an acceptable boundary. Why isn't that a legitimate response? Among other things, celebrities were not satisfied with a right of publicity that only covered advertising, and courts proved responsive to their desires. Subsequent cases extended California's

right of publicity to art, video games, and even a *Cheers*-themed bar featuring animatronic robots. (As Judge Kozinski said, "Robots again!")

Another recurring issue raised by Kozinski's dissent is the way in which one person's property claims can interfere with another's. Giving Vanna White a property right in her identity means that Samsung, which owns the copyright in its ad, can't freely run its ad. In the *Cheers* case, two actors who had appeared on the television show were able to prevail against the *Cheers*-themed bar even though the bar had a license from the owner of the copyright in the television show. Thus, granting publicity rights directly decreased the scope of the rights conferred by the copyright in *Cheers*, which otherwise would have extended to allow the creation of such "derivative works" as character-imitating robots.

Does it matter if we call the right of publicity a "property" right? Consider the following: "[I]n addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture … . Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). Suppose we characterized all privacy rights as property rights. Would the label "property" make any difference to how the law ought to treat invasions of privacy, such as the surreptitious recording of women trying on clothes in changing rooms?

C. Body Parts

In the following case, the classification "property" was vital to the nature of the harm recognized and the scope of the available damages. As you read, consider why the label "property" matters so much. Also, pay attention to the three separate things that might be called property at issue here: the cells extracted from the plaintiff's body; the "cell line" grown from those cells; and the University's patent.

Moore v. Regents of University of California

793 P.2d 479 (Cal. 1990)

PANELLI, Justice.

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. FACTS

… The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde (Golde), a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc. (Genetics Institute); and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde confirmed that diagnosis. At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation … was necessary to slow down the progress of his disease."

Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. … [N]either Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center … removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship … ." On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,] throughout the period of time that [Moore] was under [Golde's] care and treatment, … the defendants were actively involved in a number of activities which they concealed from [Moore] … ." Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively … [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] on-going physician-patient relationship … ."

Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes.[2] On January 30, 1981, the Regents applied for a patent on the cell line,

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[2] A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA.

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack.

listing Golde and Quan as inventors. "[B]y virtue of an established policy … , [the] Regents, Golde, and Quan would share in any royalties or profits … arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent.

The Regent's patent also covers various methods for using the cell line to produce lymphokines. Moore admits in his complaint that "the true clinical potential of each of the lymphokines … [is] difficult to predict, [but] … competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] … ."

[The Regents, Golde and Quan negotiated commercial agreements that paid them for exclusive rights to the cell line.] ….

III. DISCUSSION

A. Breach of Fiduciary Duty and Lack of Informed Consent

Moore repeatedly alleges that Golde failed to disclose the extent of his research and economic interests in Moore's cells before obtaining consent to the medical procedures by which the cells were extracted. These allegations, in our view, state a cause of action against Golde for invading a legally protected interest of his patient. This cause of action can properly be characterized either as the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, as the performance of medical procedures without first having obtained the patient's informed consent.

Moore's T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify. …

Cells taken directly from the body (primary cells) are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a "cell line," a culture capable of reproducing indefinitely. This is not, however, always an easy task. "Long-term growth of human cells and tissues is difficult, often an art," and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case.

Our analysis begins with three well-established principles. First, "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." Second, "the patient's consent to treatment, to be effective, must be an informed consent." Third, in soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision. …

Accordingly, we hold that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment. …

B. Conversion

Moore also attempts to characterize the invasion of his rights as a conversion – a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

… In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose. Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system. …

1. Moore's Claim Under Existing Law

"To establish a conversion, plaintiff must establish an actual interference with his

ownership or *right of possession* … . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion."

Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs,[22] blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. One line of cases involves unwanted publicity. These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. For purposes of determining whether the tort of conversion lies, however,

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[22] See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to "give all or part of [his] body" for certain designated purposes, including "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." The act does not, however, permit the donor to receive "valuable consideration" for the transfer.

the characterization of the right in question is far from pointless. Only property can be converted.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?" However, as the defendants' patent makes clear – and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent – the goal and result of defendants' efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

… [O]ne may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of "property" in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 7054.4, "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state

department [of health services] to protect the public health and safety."[32] Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms. Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult – often considered an art … ," and the probability of success is low. It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention. …

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[32] … Surgically removed organs, such as a spleen, are both "recognizable anatomical parts" and "human tissues." Virus-infected cells, such as Moore's T-lymphocytes, fit reasonably within the statute's definition of "infectious waste." …

2. Should Conversion Liability Be Extended**?**

… There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent. This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress, the Office of Technology Assessment emphasized that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well.

> "Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists."

Indeed, so significant is the potential obstacle to research stemming from uncertainty about legal title to biological materials that the Office of Technology Assessment reached this striking conclusion: "[R]egardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future of biotechnology than resolving it in any particular way."

We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision. In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few.

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated

by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of responding to requests. At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.…

In deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society, such as research.…

[T]he theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, "companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists." …[42]

… If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision. Complex policy choices affecting all society are involved, and "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties

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[42] In order to make conversion liability seem less of a threat to research, the dissent argues that researchers could avoid liability by using only cell lines accompanied by documentation of the source's consent. But consent forms do not come with guarantees of validity. As medical malpractice litigation shows, challenges to the validity and sufficiency of consent are not uncommon. Moreover, it is sheer fantasy to hope that waivers might be obtained for the thousands of cell lines and tissue samples presently in cell repositories and, for that reason, already in wide use among researchers. The cell line derived from Moore's T-lymphocytes, for example, has been available since 1984 to any researcher from the American Type Culture Collection. Other cell lines have been in wide use since as early as 1951.

present evidence and express their views … .” Legislative competence to act in this area is demonstrated by the existing statutes governing the use and disposition of human biological materials….

Finally, there is no pressing need to impose a judicially created rule of strict liability, since enforcement of physicians’ disclosure obligations will protect patients against the very type of harm with which Moore was threatened….

For these reasons, we hold that the allegations of Moore’s third amended complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion….

ARABIAN, Justice, concurring.

… I write separately to give voice to a concern that I believe informs much of that opinion but finds little or no expression therein. I speak of the moral issue.

Plaintiff has asked us to recognize and enforce a right to sell one’s own body tissue *for profit*. He entreats us to regard the human vessel – the single most venerated and protected subject in any civilized society – as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.

My learned colleague, Justice Mosk, in an impressive if ultimately unpersuasive dissent, recognizes the moral dimension of the matter…. He concludes, however, that morality militates in favor of recognizing plaintiff’s claim for conversion of his body tissue. Why? Essentially, he answers, because of these defendants’ moral shortcomings, duplicity and greed. Let them be compelled, he argues, to disgorge a portion of their ill-gotten gains to the uninformed individual whose body was invaded and exploited and without whom such profits would not have been possible.

I share Justice Mosk’s sense of outrage, but I cannot follow its path. His eloquent paean to the human spirit illuminates the problem, not the solution. Does it uplift or degrade the “unique human persona” to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind plaintiff’s claim? I do not know the answers to these troubling questions, nor am I willing – like Justice Mosk – to treat them simply as issues of “tort” law, susceptible of *judicial*

resolution….

Clearly the Legislature, as the majority opinion suggests, is the proper deliberative forum. Indeed, a legislative response creating a licensing scheme, which establishes a fixed rate of profit sharing between researcher and subject, has already been suggested. Such an arrangement would not only avoid the moral and philosophical objections to a free market operation in body tissue, but would also address stated concerns by eliminating the inherently coercive effect of a waiver system and by compensating donors regardless of temporal circumstances….

BROUSSARD, Justice, concurring and dissenting.

… Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories – a factual setting not presented here – the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action.…

As a general matter, the tort of conversion protects an individual not only against improper interference with the right of possession of his property but also against unauthorized use of his property or improper interference with his right to control the use of his property. Sections 227 and 228 of the Restatement Second of Torts specifically provide in this regard that "[o]ne who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the

other for conversion" and that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." California cases have also long recognized that "unauthorized use" of property can give rise to a conversion action.

… Although in this case defendants did not disregard a specific directive from plaintiff with regard to the future use of his body part, the complaint alleges that, before the body part was removed, defendants intentionally withheld material information that they were under an obligation to disclose to plaintiff and that was necessary for his exercise of control over the body part; the complaint also alleges that defendants withheld such information in order to appropriate the control over the future use of such body part for their own economic benefit. If these allegations are true, defendants clearly improperly interfered with plaintiff's right in his body part at a time when he had the authority to determine the future use of such part, thereby misappropriating plaintiff's right of control for their own advantage. Under these circumstances, the complaint fully satisfies the established requirements of a conversion cause of action….

Although the damages which plaintiff may recover in a conversion action may not include the value of the patent and the derivative products, the fact that plaintiff may not be entitled to all of the damages which his complaint seeks does not justify denying his right to maintain any conversion action at all. …

III

… [E]ven in the rare instance – like the present case – in which a conversion action might be successfully pursued, the potential liability is not likely "to destroy the economic incentive to conduct important medical research," as the majority asserts. If, as the majority suggests, the great bulk of the value of a cell line patent and derivative products is attributable to the efforts of medical researchers and drug companies, rather than to the "raw materials" taken from a patient, the patient's damages will be correspondingly limited, and innocent medical researchers and drug manufacturers will retain the considerable economic benefits resulting from their own work. Under established conversion law, a "subsequent innocent converter" does not

forfeit the proceeds of his own creative efforts, but rather "is entitled to the benefit of any work or labor that he has expended on the [property] … ."

Finally, the majority's analysis of the relevant policy considerations tellingly omits a most pertinent consideration. In identifying the interests of the patient that are implicated by the decision whether to recognize a conversion cause of action, the opinion speaks only of the "patient's right to make autonomous medical decisions" and fails even to mention the patient's interest in obtaining the economic value, if any, that may adhere in the subsequent use of his own body parts. Although such economic value may constitute a fortuitous "windfall" to the patient, the fortuitous nature of the economic value does not justify the creation of a novel exception from conversion liability which sanctions the intentional misappropriation of that value from the patient.

…. Far from elevating these biological materials above the marketplace, the majority's holding simply bars *plaintiff,* the source of the cells, from obtaining the benefit of the cells' value, but permits *defendants,* who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion….

MOSK, Justice, dissenting.

… The majority [finds] three "reasons to doubt" that Moore retained a sufficient ownership interest in his cells, after their excision, to support a conversion cause of action. In my view the majority's three reasons, taken singly or together, are inadequate to the task.

The majority's first reason is that "no reported judicial decision supports Moore's claim, either directly or by close analogy." Neither, however, is there any reported decision rejecting such a claim. The issue is as new as its source – the recent explosive growth in the commercialization of biotechnology.

The majority next cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion. Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of

the common law. "'The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.' In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.' … Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." …

2.

The majority's second reason for doubting that Moore retained an ownership interest in his cells after their excision is that "California statutory law … drastically limits a patient's control over excised cells." For this proposition the majority rely on Health and Safety Code section 7054.4, set forth in the margin.[5] The majority concede that the statute was not meant to directly resolve the question whether a person in Moore's position has a cause of action for conversion, but reason that it indirectly resolves the question by limiting the patient's control over the fate of his excised cells: "By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." As will appear, I do not believe section 7054.4 supports the just quoted conclusion of the majority.

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[5] Section 7054.4 provides:

> "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.
>
> "As used in this section, 'infectious waste' means any material or article which has been, or may have been, exposed to contagious or infectious disease."

First, in my view the statute does not authorize the principal use that defendants claim the right to make of Moore's tissue, i.e., its commercial exploitation….

By its terms, section 7054.4 permits only "scientific use" of excised body parts and tissue before they must be destroyed. … It would stretch the English language beyond recognition, however, to say that commercial exploitation of the kind and degree alleged here is also a usual and ordinary meaning of the phrase "scientific use."

… Secondly, even if section 7054.4 does permit defendants' commercial exploitation of Moore's tissue under the guise of "scientific use," it does not follow that – as the majority conclude – the statute "eliminates so many of the rights ordinarily attached to property" that what remains does not amount to "property" or "ownership" for purposes of the law of conversion.

The concepts of property and ownership in our law are extremely broad. A leading decision of this court approved the following definition: " 'The term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.'"

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object – principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift. "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property. For example, both law and contract may limit the right of an owner of real property to use his parcel as he

sees fit.[6] Owners of various forms of personal property may likewise be subject to restrictions on the time, place, and manner of their use.[7] Limitations on the disposition of real property, while less common, may also be imposed.[8] Finally, some types of personal property may be sold but not given away,[9] while others may be given away but not sold,[10] and still others may neither be given away nor sold.[11]

In each of the foregoing instances, the limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, yet what remains is still deemed in law to be a protectible property interest. "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title … ." (People v. Walker (1939) 33 Cal.App.2d 18, 20, 90 P.2d 854 [even the possessor of contraband has certain property rights in it against anyone other than the state].) The same rule applies to Moore's interest in his own body tissue: even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at

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[6] Zoning or nuisance laws, or covenants running with the land or equitable servitudes, or condominium declarations, may prohibit certain uses of the parcel or regulate the number, size, location, etc., of buildings an owner may erect on it. Even if rental of the property is a permitted use, rent control laws may limit the benefits of that use. Other uses may, on the contrary, be compelled: e.g., if the property is a lease to extract minerals, the lease may be forfeited by law or contract if the lessee does not exploit the resource. Historic preservation laws may prohibit an owner from demolishing a building on the property, or even from altering its appearance. And endangered species laws may limit an owner's right to develop the land from its natural state.

[7] Public health and safety laws restrict in various ways the manufacture, distribution, purchase, sale, and use of such property as food, drugs, cosmetics, tobacco, alcoholic beverages, firearms, flammable or explosive materials, and waste products. Other laws regulate the operation of private and commercial motor vehicles, aircraft, and vessels.

[8] Provisions in a condominium declaration may give the homeowners association a right of first refusal over a proposed sale by a member. Provisions in a commercial lease may require the lessor's consent to an assignment of the lease.

[9] A person contemplating bankruptcy may sell his property at its "reasonably equivalent value," but he may not make a gift of the same property.

[10] A sportsman may give away wild fish or game that he has caught or killed pursuant to his license, but he may not sell it….

[11] E.g., a license to practice a profession, or a prescription drug in the hands of the person for whom it is prescribed.

the time of its excision he at least had the right to do with his own tissue whatever the defendants did with it: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable. As noted above, the majority cite no case holding that an individual's right to develop and exploit the commercial potential of his own tissue is not a right of sufficient worth or dignity to be deemed a protectible property interest. In the absence of such authority – or of legislation to the same effect – the right falls within the traditionally broad concept of property in our law.

3.

The majority's third and last reason for their conclusion that Moore has no cause of action for conversion under existing law is that "the subject matter of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property." The majority then offer a dual explanation: "This is because the patented cell line is *factually* and *legally* distinct from the cells taken from Moore's body." Neither branch of the explanation withstands analysis.

First, in support of their statement that the Mo cell line is "factually distinct" from Moore's cells, the majority assert that "Cells change while being developed into a cell line and continue to change over time," and in particular may acquire an abnormal number of chromosomes. No one disputes these assertions, but they are nonetheless irrelevant. For present purposes no distinction can be drawn between Moore's cells and the Mo cell line. It appears that the principal reason for establishing a cell line is not to "improve" the quality of the parent cells but simply to extend their life indefinitely, in order to permit long-term study and/or exploitation of the qualities already present in such cells. The complaint alleges that Moore's cells naturally

produced certain valuable proteins in larger than normal quantities; indeed, that was why defendants were eager to culture them in the first place. Defendants do not claim that the cells of the Mo cell line are in any degree more productive of such proteins than were Moore's own cells.…

Second, the majority assert in effect that Moore cannot have an ownership interest in the Mo cell line because defendants patented it. The majority's point wholly fails to meet Moore's claim that he is entitled to compensation for defendants' unauthorized use of his bodily tissues *before* defendants patented the Mo cell line: defendants undertook such use immediately after the splenectomy on October 20, 1976, and continued to extract and use Moore's cells and tissue at least until September 20, 1983; the patent, however, did not issue until March 20, 1984, more than seven years after the unauthorized use began. Whatever the legal consequences of that event, it did not operate retroactively to immunize defendants from accountability for conduct occurring long before the patent was granted.

Nor did the issuance of the patent in 1984 necessarily have the drastic effect that the majority contend. … [Moore] seeks to show that he is entitled, in fairness and equity, to some share in the profits that defendants have made and will make from their commercial exploitation of the Mo cell line. I do not question that the cell line is primarily the product of defendants' inventive effort. Yet likewise no one can question Moore's crucial contribution to the invention – an invention named, ironically, after him: but for the cells of Moore's body taken by defendants, *there would have been no Mo cell line*. Thus the complaint alleges that Moore's "Blood and Bodily Substances were absolutely essential to defendants' research and commercial activities with regard to his cells, cell lines, [and] the Mo cell-line, … and that defendants could not have applied for and had issued to them the Mo cell-line patent and other patents described herein without obtaining and culturing specimens of plaintiff's Blood and Bodily Substances." Defendants admit this allegation by their demurrers, as well they should: for all their expertise, defendants do not claim they could have extracted the Mo cell line out of thin air.…

4.

Having concluded – mistakenly, in my view – that Moore has no cause of action for conversion under existing law, the majority next consider whether to "extend" the

conversion cause of action to this context. Again the majority find three reasons not to do so, and again I respectfully disagree with each.

The majority's first reason is that a balancing of the "relevant policy considerations" counsels against recognizing a conversion cause of action in these circumstances. … [14]

…The majority observe that many researchers obtain their tissue samples, routinely and at little or no cost, from cell-culture repositories. The majority then speculate that "This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit." There are two grounds to doubt that this prophecy will be fulfilled.

To begin with, if the relevant exchange of scientific materials was ever "free and efficient," it is much less so today. Since biological products of genetic engineering became patentable in 1980, human cell lines have been amenable to patent protection and, as the Court of Appeal observed in its opinion below, "The rush to patent for exclusive use has been rampant." Among those who have taken advantage of this development, of course, are the defendants herein: as we have seen, defendants Golde and Quan obtained a patent on the Mo cell line in 1984 and assigned it to defendant Regents. With such patentability has come a drastic reduction in the formerly free access of researchers to new cell lines and their products ….

Secondly, to the extent that cell cultures and cell lines may still be "freely exchanged,"

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[14] On this record the majority's solicitude for the protection of "innocent parties" seems ironic. The complaint is replete with factual allegations – which we must accept as true on this appeal – to the effect that defendants repeatedly lied to Moore about their commercial exploitation of his tissue. For example, the complaint contains detailed allegations that defendants falsely told Moore that his numerous postoperative trips from his home in Seattle to the Medical Center of the University of California at Los Angeles between 1976 and 1983 were necessary because his blood and other bodily fluids could be extracted only by them at the latter facility; that defendants falsely told Moore that the purpose of such extractions was to promote his health, when in fact it was solely to promote defendants' ongoing research and commercial activities; and that even when Moore expressly asked if defendants had discovered anything about his blood that might have potential commercial value, defendants falsely told him "they had discovered nothing of any commercial or financial value in his Blood or Bodily Substances, and in fact actively discouraged such inquiries." These are not the acts of "innocent parties."

e.g., for purely research purposes, it does not follow that the researcher who obtains such material must necessarily remain ignorant of any limitations on its use: by means of appropriate recordkeeping, the researcher can be assured that the source of the material has consented to his proposed use of it, and hence that such use is not a conversion. To achieve this end the originator of the tissue sample first determines the extent of the source's informed consent to its use – e.g., for research only, or for public but academic use, or for specific or general commercial purposes; he then enters this information in the record of the tissue sample, and the record accompanies the sample into the hands of any researcher who thereafter undertakes to work with it. "Record keeping would not be overly burdensome because researchers generally keep accurate records of tissue sources for other reasons: to trace anomalies to the medical history of the patient, to maintain title for other researchers and for themselves, and to insure reproducibility of the experiment." As the Court of Appeal correctly observed, any claim to the contrary "is dubious in light of the meticulous care and planning necessary in serious modern medical research."…

The majority claim that a conversion cause of action threatens to "destroy the economic incentive" to conduct the type of research here in issue, but it is difficult to take this hyperbole seriously. First, the majority reason that with every cell sample a researcher "purchases a ticket in a litigation lottery." This is a colorful image, but it does not necessarily reflect reality: as explained above, with proper recordkeeping the researcher acquires not a litigation-lottery ticket but the information he needs precisely in order to avoid litigation. … Second, … [only one person can make a claim] – the original source of the research material that began that process. …

In any event, in my view whatever merit the majority's single policy consideration may have is outweighed by two contrary considerations, i.e., policies that are promoted by recognizing that every individual has a legally protectible property interest in his own body and its products. First, our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against direct abuse of the body by torture or other forms of cruel or unusual punishment. Another is our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent

form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor's prison, have also disappeared. Yet their specter haunts the laboratories and boardrooms of today's biotechnological research-industrial complex. It arises wherever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient's tissue for their sole economic benefit – the right, in other words, to freely mine or harvest valuable physical properties of the patient's body: "Research with human cells that results in significant economic gain for the researcher and no gain for the patient offends the traditional mores of our society in a manner impossible to quantify. Such research tends to treat the human body as a commodity – a means to a profitable end. The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product."

A second policy consideration adds notions of equity to those of ethics. Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another. This is particularly true when, as here, the parties are not in equal bargaining positions. We are repeatedly told that the commercial products of the biotechnological revolution "hold the promise of tremendous profit." In the case at bar, for example, the complaint alleges that the market for the kinds of proteins produced by the Mo cell line was predicted to exceed $3 billion by 1990. These profits are currently shared exclusively between the biotechnology industry and the universities that support that industry….

There is, however, a third party to the biotechnology enterprise – the patient who is the source of the blood or tissue from which all these profits are derived. While he may be a silent partner, his contribution to the venture is absolutely crucial: as pointed out above, but for the cells of Moore's body taken by defendants there would have been no Mo cell line at all. Yet defendants deny that Moore is entitled to any share whatever in the proceeds of this cell line. This is both inequitable and immoral. …

"Recognizing a donor's property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions. … Failing to compensate the patient unjustly enriches the

researcher because only the researcher's contribution is recognized." In short, as the Court of Appeal succinctly put it, "If this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits."

5.

The majority's second reason for declining to extend the conversion cause of action to the present context is that "the Legislature should make that decision." I do not doubt that the Legislature is competent to act on this topic. The fact that the Legislature may intervene if and when it chooses, however, does not in the meanwhile relieve the courts of their duty of enforcing – or if need be, fashioning – an effective judicial remedy for the wrong here alleged. …

By selective quotation of the statutes the majority seem to suggest that human organs and blood cannot legally be sold on the open market – thereby implying that if the Legislature were to act here it would impose a similar ban on monetary compensation for the use of human tissue in biotechnological research and development. But if that is the argument, the premise is unsound: contrary to popular misconception, it is not true that human organs and blood cannot legally be sold.

As to organs, the majority rely on the Uniform Anatomical Gift Act (UAGA) for the proposition that a competent adult may make a post mortem gift of any part of his body but may not receive "valuable consideration" for the transfer. But the prohibition of the UAGA against the sale of a body part is much more limited than the majority recognize: by its terms the prohibition applies only to sales for "transplantation" or "therapy." Yet a different section of the UAGA authorizes the transfer and receipt of body parts for such additional purposes as "medical or dental education, research, or advancement of medical or dental science." No section of the UAGA prohibits anyone from selling body parts for any of those additional purposes; by clear implication, therefore, such sales are legal. Indeed, the fact that the UAGA prohibits *no* sales of organs other than sales for "transportation" or "therapy" raises a further implication that it is also legal for anyone to sell human tissue to a biotechnology company for research and development purposes.

With respect to the sale of human blood the matter is much simpler: there is in fact

no prohibition against such sales. … [I]ndeed, such sales are commonplace, particularly in the market for plasma.

It follows that the statutes regulating the transfers of human organs and blood do not support the majority's refusal to recognize a conversion cause of action for commercial exploitation of human blood cells without consent. On the contrary, because such statutes treat both organs and blood as property that can legally be sold in a variety of circumstances, they impliedly support Moore's contention that his blood cells are likewise property for which he can and should receive compensation, and hence are protected by the law of conversion.

6.

The majority's final reason for refusing to recognize a conversion cause of action on these facts is that "there is no pressing need" to do so because the complaint also states another cause of action that is assertedly adequate to the task; that cause of action is "the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, … the performance of medical procedures without first having obtained the patient's informed consent."…

The remedy is largely illusory. "[A]n action based on the physician's failure to disclose material information sounds in negligence. As a practical matter, however, it may be difficult to recover on this kind of negligence theory because the patient must prove a *causal connection* between his or her injury and the physician's failure to inform." There are two barriers to recovery. First, "the patient must show that if he or she had been informed of all pertinent information, he or she would have declined to consent to the procedure in question." … "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such a causal connection arises only if it is established that had revelation been made consent to treatment would not have been given."

The second barrier to recovery is still higher, and is erected on the first: it is not even enough for the plaintiff to prove that he personally would have refused consent to the proposed treatment if he had been fully informed; he must also prove that in the same circumstances *no reasonably prudent person* would have given such consent. …

Few if any judges or juries are likely to believe that disclosure of … a possibility of research or development would dissuade a reasonably prudent person from consenting to the treatment. For example, in the case at bar no trier of fact is likely to believe that if defendants had disclosed their plans for using Moore's cells, no reasonably prudent person in Moore's position – i.e., a leukemia patient suffering from a grossly enlarged spleen – would have consented to the routine operation that saved or at least prolonged his life. …

The second reason why the nondisclosure cause of action is inadequate for the task that the majority assign to it is that it fails to solve half the problem before us: it gives the patient only the right to *refuse* consent, i.e., the right to prohibit the commercialization of his tissue; it does not give him the right to *grant* consent to that commercialization on the condition that he share in its proceeds.…

Third, the nondisclosure cause of action fails to reach a major class of potential defendants: all those who are outside the strict physician-patient relationship with the plaintiff. …

In sum, the nondisclosure cause of action [is] not an adequate substitute, in my view, for the conversion cause of action….

Notes and Questions

Notice the role played by property in the majority's argument about the effect of a victory for Moore on research: property, the majority reasons, will stand as a barrier to research by interfering with second-comers. But the majority then states that patents – also property – provide an economic incentive to conduct research. Is this consistent? Why wouldn't property in body parts provide an incentive for people to offer themselves for research? Can you think of reasons patents might be legitimate despite standing as barriers to research by second-comers?

Contrast the majority's argument that there are already so many cell lines in use that it's too late to impose a property right with the arguments about ownership through conquest offered in *Johnson v. M'Intosh* and similar cases: is the majority endorsing the same view of the relationship between scientists and human bodies as the Supreme Court did between European colonizers and land occupied by Native Americans?

The majority argues that recordkeeping would be too difficult to provide researchers with the necessary certainty of title. As we will see, title systems where ownership is established through written records are quite important to other kinds of property, such as land. If ownership of land, cars, and stock can all be tracked with sufficient certainty with titling systems, why not cell lines? Patents, too, are intangible rights – how do you think researchers track whether the cell lines they're using are patented?

A Florida firefighter took a man's severed foot from an Interstate 95 crash scene and was charged with misdemeanor theft. She said she took it to train her cadaver dog. Under *Moore*, can she be prosecuted for theft? Does it matter whether it would have been possible to reattach the foot if she had not taken it? See Keyonna Summers, Fla. ex-firefighter sentenced for foot theft, Jun. 1, 2009. Under *Moore*, can she be prosecuted for theft?

Across the country, an even sadder story played out, worsened by racial and gender disparities.

In January 1951, a 31-year-old African-American woman named Henrietta Lacks was diagnosed with cervical cancer. She died, painfully, in October 1951, leaving five children. Without her knowledge or consent, or that of her family, doctors gave a sample of her tumor to Dr. George Gey, a Johns Hopkins researcher who was trying to find cells that would live indefinitely in culture so researchers could more easily experiment on them. Her cells were his first success, and the cell line developed from her body was known as HeLa (for Henrietta Lacks). Dr. Jonas Salk used HeLa cells to develop the first polio vaccine, and they also helped in the development of numerous other drugs, treating diseases as diverse as Parkinson's, leukemia and the flu. More than 60,000 articles have been written about research based on HeLa cells. Though Dr. Gey didn't make money from them, other researchers did. Selling HeLa cells has generated millions in profits, but none for the Lacks family, the members of which suffered from poverty and lack of education.

In fact, some Lacks family members suffered serious health problems, but they only found out about HeLa cells by accident, more than two decades later. Mrs. Lacks's daughter-in-law met someone who recognized her surname and said he was working with cells from "a woman named Henrietta Lacks." She then told Mrs. Lacks's son: "Part of your mother, it's alive!" The family was proud their mother's cells had saved

lives, but also felt exploited. Some members of the family had given blood to Johns Hopkins researchers, believing they were being tested for cancer, but in fact the researchers wanted to use their blood to determine whether HeLa cells were contaminating other cultures. Poverty, race, and education clearly increased the gap between the researchers and the Lackses, but – especially compared to Mr. Moore's story – are any of those the key?

> Ideas about informed consent have changed in the last 60 years, and the forms now given to people having surgery or biopsies usually spell out that tissue removed from them may be used for research. But … patients today don't really have any more control over removed body parts than Mrs. Lacks did. Most people just obediently sign the forms.
>
> Which is as it should be, many scientists say, arguing that Mrs. Lacks's immortal cells were an accident of biology, not something she created or invented, and were used to benefit countless others. Most of what is removed from people is of no value anyway, and researchers say it would be too complicated and would hinder progress if ownership of such things were assigned to patients and royalties had to be paid.
>
> But in an age in which people can buy songs with the click of a mouse, that argument may become harder to defend.

Denise Grady, A Lasting Gift to Medicine That Wasn't Really a Gift, N.Y. Times, Feb. 1, 2010. For more, see Rebecca Skloot, The Immortal Life of Henrietta Lacks (2010). Ultimately, the National Institutes of Health agreed with the Lacks family that her full genome data would only be available to researchers, in order to preserve the family's privacy; that two representatives of the Lacks family would serve on the NIH group responsible for reviewing biomedical researchers' applications for controlled access to HeLa cells; and that any researcher who uses that data would be asked to include an acknowledgement to the Lacks family in their publications. However, no one would provide any compensation to the Lacks family. Art Caplan, NIH finally makes good with Henrietta Lacks' family, Sept. 3, 2014, NBC News.com. Is this a good solution? Can you distinguish "property" interests from "privacy" or "dignity" interests in this story?

State and federal statutes implicitly recognize some kind of property rights in body parts, permitting gifts from both living persons and dead donors and even permitting sales except for sales for the purpose of transplantation. See, e.g., 42 U.S.C.A. §274e. Body parts are therefore alienable – title to them can be transferred – even though they can't be sold for some purposes.

Should we allow organs to be fully market-alienable, so that willing sellers could offer up a kidney for compensation? *See, e.g.*, Richard A. Epstein, The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation, 37 J. Legal Stud. 459, 485-497 (2008); Radhika Rao, Property, Privacy, and the Human Body, 80 B.U. L. Rev. 359 (2000); Julia D. Mahoney, The Market for Human Tissue, 86 Va. L. Rev. 163 (2000).

Consider the following arguments for market-alienability: There is currently a great shortage of transplantable organs such as hearts, lungs, livers, and kidneys, leading to tens of thousands of deaths a year. Each day, 79 people receive transplants, but 22 people die while waiting for a transplant. http://www.organdonor.gov/about/data.html. The U.S. has an opt-in system for organ donation at death, resulting in the fourth-highest organ donor rate (26 donors per million people in the population). Spain has the highest rate, with 35.3 donors per million people. Spain, like several other European countries, in theory has an opt-out regime in which organs will be donated at death in the absence of an opt-out, but in practice doctors will ask relatives for consent regardless, and that consent is often denied.

What if we allowed people to be paid during life for their agreement to be donors at death? What objections or obstacles do you foresee to such a scheme?

What about sales by living donors? People can already sell semen, skin tissue, and blood. Poor people would likely be most of the sellers, but proponents note that using the market to obtain a *supply* of organs doesn't mean that they need to be *distributed* only to those who can pay; Medicaid pays for dialysis, which is quite expensive, and could also pay for a kidney for poor patients. In Iran, which does allow payments for kidney donations to Iranian recipients, 84% of donors are poor, but 50% of recipients are also poor, and Iran eliminated its transplant list of people awaiting kidneys. Ahad J. Ghods & Shekoufeh Savaj, Iranian Model of Paid and

Regulated Living-Unrelated Kidney Donation, 1 Clinical J. Am. Soc. Nephrology 1136 (2006).

To those who say that such a system would coerce the poor to sell their organs, proponents respond that those sellers would be better off than they are in the present system, where they're still poor and have fewer options for earning money, many of which are equally or more dangerous and unpleasant. Sellers who later suffered kidney failure could get transplants.

Opponents note that there's evidence that donated blood is higher quality than paid-for blood, though the significance of those studies is contested. Donating bodily products, opponents argue, is an altruistic act that improves the human condition and provides a better guarantee of quality. Selling, by contrast, leads to attempts to sell shoddy products – here, unhealthy organs – for gain. Proponents of organ sales respond that poor-quality organs can be screened out. To this, opponents rejoin that there's evidence of "crowding out" of altruistic motives by commercial motives: when money enters a system, people who previously participated out of the goodness of their hearts may withdraw. They don't want to feel like suckers when they aren't getting paid and other people are. Payment, then, might even lead to a reduced supply of organs compared to the present system.

Opponents also argue that organ sales are degrading, reducing a person to the commodified sum of her parts. Proponents respond that dying of a curable illness is also degrading, and that Western societies used to consider surgery, artificial insemination, and autopsies degrading. Life insurance used to be rejected on the ground that it wrongly commodified the value of a human life. It's widely accepted now – did it degrade our humanity? Likewise, people can sell their time and the intellectual products of their minds.

But on this argument, we should be open to selling everything – why not let a living donor sell her heart to provide for her family? Why not let her sell her child? Not reassuringly, some proponents of organ sales believe that these options should at least be considered, with appropriate safeguards. They contend that proper boundaries between market and non-market activity can be maintained even if new aspects of life enter the market. The same society that came to accept life insurance

and artificial insemination also eventually outlawed slavery and child labor. In fact, it can be harder to get people to accept markets than it perhaps should be.

If you were a legislator, how would you decide? Suppose we decide to allow kidney sales by living donors. Does that make kidneys into property? If so, could a bankrupt person be forced to sell her property the way she can be forced to sell most of her other assets, to pay off her creditors? How might a proponent of such sales respond to these and similar concerns?

Consider the following anti-propertization argument, applied to rape:

Margaret Radin, *Market-Inalienability*
100 HARV. L. REV. 1849 (1987):

… In some cases market discourse itself might be antagonistic to interests of personhood. [Judge Richard] Posner conceives of rape in terms of a marriage and sex market. Posner concludes that "the prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women's persons." Calabresi and Melamed also use market rhetoric to discuss rape. In keeping with their view that "property rules" are prima facie more efficient than "liability rules" for all entitle ments, they argue that people should hold a "property rule" entitlement in their own bodily integrity. Further, they explain criminal punishment by the need for an "indefinable kicker," an extra cost to the rapist "which represents society's need to keep all property rules from being changed at will into liability rules." … [L]ike Posner's, their view conceives of rape in market rhetoric. Bodily integrity is an owned object with a price.

What is wrong with this rhetoric? The risk-of-error argument . . . is one answer. Unsophisticated practitioners of cost-benefit analysis might tend to undervalue the "costs" of rape to the victims. But this answer does not exhaust the problem. Rather, for all but the deepest enthusiast, market rhetoric seems intuitively out of place here, so inappropriate that it is either silly or somehow insulting to the value being discussed.

One basis for this intuition is that market rhetoric conceives of bodily integrity as a fungible object. A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can

pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange. To speak of personal attributes as fungible objects – alienable "goods" – is intuitively wrong. Thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property. Bodily integrity is an attribute and not an object. …

Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. For someone who conceives bodily integrity as "detached," the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after loss. Moreover, if my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing me in money. For all but the universal commodifier, that is inappropriate treatment of a person. . . .

D. Property for Personhood

What are the boundaries of the person? Can they extend past the physical body? Consider this account from Atul Gawande in Being Mortal, involving Keren Brown Wilson's mother, Jessie, who suffered a devastating stroke at the age of fifty-five:

> The stroke left her permanently paralyzed down one side of her body. She could no longer walk or stand. She couldn't lift her arm. Her face sagged. Her speech slurred. Although her intelligence and perception were unaffected, she couldn't bathe herself, cook a meal, manage the toilet, or do her own laundry – let alone any kind of paid work…. There was nowhere for Jessie but a nursing home. Wilson arranged for one near where she was in college. It seemed a safe and friendly place. But Jessie never stopped asking her daughter to "Take me home."
>
> "Get me out of here," she said over and over again.

Wilson wrote:

> She wanted a small place with a little kitchen and a bathroom. It would have her favorite things in it, including her cat, her unfinished projects, her Vicks VapoRub, a coffee-pot, and cigarettes. There would be people to help her with the things she couldn't do without help. In the imaginary place, she would be able to lock her door, control her heat, and have her own furniture. No one would make her get up, turn off her favorite soaps, or ruin her clothes. Nor could anyone throw out her "collection" of back issues and magazines and Goodwill treasures, because they were a safety hazard. She could have privacy whenever she wanted, and no one could make her get dressed, take her medicine, or go to activities she did not like. She would be Jessie again, a person living in an apartment instead of a patient in a bed.

Gawande continued: "The key word in her mind was *home*. Home is the one place where your own priorities hold sway. At home, *you* decide how you spend your time, how you share your space, and how you manage your possessions. Away from home, you don't." In the "assisted living" concept Wilson developed, residents would receive services similar to those provided by nursing homes. "But here the care providers understood they were entering someone else's home, and that changed the power relations fundamentally. The residents had control over the schedule, the ground rules, the risks they did and didn't want to take. If they wanted to stay up all night and sleep all day, if they wanted to have a gentleman or lady friend stay over, if they wanted not to take certain medications that made them feel groggy; if they wanted to eat pizza and M&M's despite swallowing problems and no teeth and a doctor who'd said they should eat only pureed glop – well, they could." Gawande reports that residents in assisted living, rather than being at greater risk from less supervision, had improved physical and cognitive functioning compared to similar people in nursing homes, and were less likely to suffer from major depression.

Also consider the following, from Kriston Capps:

> For the homeless, simply being able to store belongings can be transformative. Storage bins or storage units allow them to safeguard important documents, especially identification and other paperwork that can be hard or expensive to replace, as well as sentimental items and keepsakes, which can't be replaced at all. At the First United Church facility, users tend to check in sleeping

> equipment during the morning – things like blankets, sleeping bags, and pillows – and check them out again at night. This frees people to pursue medical check-ups, job interviews, and housing appointments during the day: normal activities that are off limits for anyone who has to protect his or her things around the clock.

See also Margaret Jane Radin, Property and Personhood 34 Stan. L. Rev. 957 (1982) (arguing that certain kinds of property are so centrally connected to full personhood that they deserve special legal treatment). Can you identify property that is part of your personhood in your own life? Your childhood home? A piece of jewelry? A book? Radin also argues that some kinds of emotional relationships with property are negative – property fetishism. A popular literary example would be Gollum's relationship with the One Ring in *Lord of the Rings*: his lust for an object leads him to do great harm to himself and others. Law, Radin suggests, should promote healthy connections with property and not respect unhealthy connections.

Gawande criticizes what he sees as the unnecessary and extreme deprivations of control over the external world imposed on older people by nursing homes. What is the relationship between privacy and property rights? Can you have privacy without property?

Other institutions require even more intense deprivations of property as part of an attempt to control the residents. Erving Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (1961):

> Once the inmate is stripped of his possessions, at least some replacements must be made by the establishment, but these take the form of standard issue, uniform in character and uniformly distributed. These substitute possessions are clearly marked as really belonging to the institution and in some cases are recalled at regular intervals to be, as it were, disinfected of identifications. … Failure to provide inmates with individual lockers and periodic searches and confiscations of accumulated personal property reinforce property dispossession. Religious orders have appreciated the implications for self of such separation from belongings. …

> On admission to a total institution, … the individual is likely to be stripped of his usual appearance and of the equipment and services by which he maintains it, thus suffering a personal defacement. Clothing, combs, needle and thread, cosmetics, towels, soap, shaving sets, bathing facilities – all these may be taken away or denied him ….
>
> [T]he institutional issue provided as a substitute for what has been taken away is typically of a "coarse" variety, ill-suited, often old, and the same for large categories of inmates. …

What effects will removing individual property and replacing it with institutional property likely have on the inmates? Involuntary dispossession is a method the institution uses to create a different person, and a different kind of person. But this reshaping can also occur voluntarily, as Goffman explains with the example of monasteries in the order of St. Benedict:

> The Benedictine Rule is explicit:
>
> For their bedding let a mattress, a blanket, a coverlet, and a pillow suffice. These beds must be frequently inspected by the Abbot, because of private property which may be found therein. If anyone be discovered to have what he has not received from the Abbot, let him be most severely punished. And in order that this vice of private ownership may be completely rooted out, let all things that are necessary be supplied by the Abbot: that is, cowl, tunic, stockings, shoes, girdle, knife, pen, needle, handkerchief, and tablets; so that all plea of necessity may be taken away. And let the Abbot always consider that passage in the Acts of the Apostles: "Distribution was made to each according as anyone had need."

Why is removing private property important for monks?

As Goffman points out (and as is implicit in the Benedictine Rule), it is very difficult for institutions to fight human desires for some sort of possessory interest. "Patients who had been on a given ward for several months tended to develop personal territories in the day room, at least to the degree that some inmates developed favorite sitting or standing places and would make some effort to dislodge anybody

who usurped them." Likewise, people usually have places to put the items they use for personal care (hairbrushes, soap, and the like), which keep them safe and private. "Where such private storage places are not allowed, it is understandable that they will be illicitly developed," and Goffman goes on to describe this process in great detail.

When we "personalize" our appearance, we regularly use property to do so, either to serve as decoration (jewelry, makeup) or as tool (for creating hairstyles, tattoos, etc.). How much of your own property is devoted to maintaining your personal appearance? How many items would you say are important to your self-presentation? Is this attachment to the property that produces your self-presentation merely vanity or object-fetishism, as some religious orders or political philosophies suggest? Would you be a different person without these items?

This is the Rifleman's Creed of the U.S. Marine Corps, a basic part of Marine Corps training:

> This is my rifle. There are many like it, but this one is mine.
>
> My rifle is my best friend. It is my life. I must master it as I must master my life.
>
> My rifle, without me, is useless. Without my rifle, I am useless. I must fire my rifle true. I must shoot straighter than my enemy who is trying to kill me. I must shoot him before he shoots me. I will….
>
> My rifle is human, even as I, because it is my life. Thus, I will learn it as a brother. I will learn its weaknesses, its strength, its parts, its accessories, its sights and its barrel. I will keep my rifle clean and ready, even as I am clean and ready. We will become part of each other. We will.

Is the rifle "property for personhood"? If so, who owns it?

4. Intangible Property

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

Kremen v. Cohen

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

KOZINSKI, Circuit Judge.

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

BACKGROUND

"Sex on the Internet?," they all said. "That'll never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The

year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

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

> Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation.[2]

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

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

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

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

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

Given his limited success with the bounty hunter approach, it should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name, invoking four theories at issue here. He argues that he had an implied contract with Network Solutions, which it breached by giving the domain name to Cohen. He also claims the transfer violated Network Solutions's cooperative agreement with the National Science Foundation – the government contract that made Network Solutions

the .com registrar. His third theory is that he has a property right in the domain name sex.com, and Network Solutions committed the tort of conversion by giving it away to Cohen. Finally, he argues that Network Solutions was a "bailee" of his domain name and seeks to hold it liable for "conversion by bailee."

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

CONVERSION

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

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." *Downing v. Mun. Court*, 198 P.2d 923 (1948). We apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." *G.S. Rasmussen*, 958 F.2d at 903. Domain names

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

satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name – whether by typing it into their web browsers, by following a hyperlink, or by other means – are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars, and they are now even subject to in rem jurisdiction, see 15 U.S.C. § 1125(d)(2).

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

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions wrongfully disposed of that right to his detriment by handing the domain name over to Cohen. The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. SEE PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 89, 91 (W. Page Keeton ed., 5th ed.1984). Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. Many courts ignore or expressly reject it. See *Kremen*, 325 F.3d at 1045-46 n. 5 (Kozinski, J., dissenting) (citing cases); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F.Supp.2d 609, 618 (S.D.N.Y.2003) (holding that the plaintiff could maintain a claim for conversion of his website); Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 B.Y.U. L. REV. 1681, 1682. Others reject it for some intangibles but not others. The Restatement, for example, recommends the following test:

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

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

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

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

[7] Intangible interests in real property, on the other hand, remain unprotected by conversion, presumably because trespass is an adequate remedy. See *Goldschmidt v. Maier*, 73 P. 984, 985 (Cal.1903) (per curiam) ("[A] leasehold of real estate is not the subject of an action of trover."); *Vuich v. Smith*, 35 P.2d 365 (1934) (same).

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

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

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

Some California cases also preserve the traditional exception for indefinite sums of money. See 5 Witkin *Torts* § 614.

California courts ignored the Restatement again in *A & M Records, Inc. v. Heilman*, 75 Cal.App.3d 554 (1977), which applied the tort to a defendant who sold bootlegged copies of musical recordings. The court held broadly that "such misappropriation and sale of the intangible property of another without authority from the owner is conversion." *Id.* at 570. It gave no hint that its holding depended on whether the owner's intellectual property rights were merged in some document. One might imagine physical things with which the intangible was associated –for example, the medium on which the song was recorded. But an intangible intellectual property right in a song is not merged in a phonograph record in the sense that the record represents the composer's intellectual property right. The record is not like a certificate of ownership; it is only a medium for one instantiation of the artistic work.

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

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

In short, California does not follow the Restatement's strict requirement that some document must actually represent the owner's intangible property right. On the contrary, courts routinely apply the tort to intangibles without inquiring whether they are merged in a document and, while it's often possible to dream up some document the intangible is connected to in some fashion, it's seldom one that represents the

owner's property interest. To the extent *Olschewski* endorses the strict merger rule, it is against the weight of authority. That rule cannot be squared with a jurisprudence that recognizes conversion of music recordings, radio shows, customer lists, regulatory filings, confidential information and even domain names.

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

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

The DNS also bears some relation to Kremen's domain name. We need not delve too far into the mechanics of the Internet to resolve this case. It is sufficient to observe that information correlating Kremen's domain name with a particular computer on the Internet must exist somewhere in some form in the DNS; if it did not, the

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

database would not serve its intended purpose. Change the information in the DNS, and you change the website people see when they type "www.sex.com."

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

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

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

Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different

from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "creat[ed] new tort duties" in reaching this result. *Cf. Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (1990). We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property.

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network Solutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

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

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

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

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

Notes and Questions

20. Is your name your property? What is it about a domain name that makes it "work" as property?

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

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

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

24. The Internet Corporation for Assigned Names and Numbers (ICANN) has promulgated a system of mandatory arbitration for domain-name registrants, the Uniform Domain Name Dispute Resolution Policy (UDRP). Under the

UDRP, a trademark owner can bring an expedited proceeding against anyone who has registered a domain name that is "identical or confusingly similar" to their trademark if the domain name "has been registered and is being used in bad faith." If the arbitrator finds a violation, the remedy is transfer of the domain name to the trademark owner. What does this system of protection for trademark owners' property in their trademarks do to the security of domain-name registrants' property in their domain names? Both are systems of property in names, but can they coexist?

Tribune Co. v. Oak Leaves Broadcasting Station

68 Cong. Rec. 218 (Cook Cty. Cir. Ct. Ill. Nov. 17, 1926)

DECISION OF JUDGE WILSON ON DEFENDANTS' MOTION TO DISSOLVE TEMPORARY INJUNCTION

… The bill very briefly charges that the complainant is and has been for some time a corporation organized under the laws of the State of Illinois. with its principal place of business in the city of Chicago, and is engaged in the publication of a newspaper known as the Chicago Daily Tribune. and that it has an average daily paid circulation of several hundred thousand subscribers.

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

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

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

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

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

The bill further charges that for several years the broadcasting in the United States and Canada has been done on sending wave lengths varying from 201 meters to 550 meters, inclusive, the United States Government. by an enactment of Congress, having forbidden to private and commercial broadcasters the use of wave lengths from 601 meters to 1.000 meters, and the use of wave lengths under 200 meters because of the impracticability of the use of said wave lengths under 200 meters by reason of natural causes and because of the fact that the field is open to amateurs and used by a large number of the same.

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

The bill further charges that the sending waves used by broadcasting stations are also classified by the number of kilocycles denoting the frequency of vibration per second

characteristic of each wave. The higher the wave length the less is the number of kilocycles, and a definite number of kilocycles is characteristic of each wave.*

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

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

The bill also charges that knowledge of this particular wave length by a broadcaster is of great value to the broadcaster because the person receiving through the radio has been educated to know when to place his dials or indicators in order to receive a particular station and that the public generally in the locality of the complainant line become familiar with the wave length of the complainant and that its loss by interference would work great damage to the complainant. The complainant further charges that on the 14th of December, 1925, it did, and ever since then has, broadcast on a sending wave length of 302.8 meters (the kilocycles characteristic of such wave length being 990) and that it broadcasts from both the Drake Hotel and from its Elgin broadcasting station and that, at that time, no other broadcasting station in the city of Chicago or in the entire State of Illinois was using said wave length or any wave length sufficiently near to interfere with complainant's broadcasting and that this fact was generally known to the public and that the public had access by reason thereof to the programs of the complainant as broadcast over the same wave length from the two broadcasting stations and which programs were announced at different periods of time by arrangement of the complainant.

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

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

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

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

The bill further charges that said station of the defendants had originally used a wave length of 220 meters (1,350 kilocycles) … and that, later, it changed its wave length to 249.9 meters (1,200 kilocycles), which it continued to use until on or about September 7, 1926, and further charges that the defendants had never enjoyed any considerable degree of the good will of the public, nor was it popular with the users of radio receiving sets, but was comparatively unknown in Chicago or its vicinity.

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

The bill further charges that the defendants have, since September 7, 1926, used the said new wave length during the hours of the day when complainant is broadcasting,

and that by reason thereof said broadcasting by the said defendants has interfered with and destroyed complainant's broadcasting to the public in the city of Chicago and throughout the region where complainant's newspaper circulates, and that by reason thereof radio receivers have been unable to hear the programs of the complainant, and that if it is allowed to continue it will work incalculable damage and injury to the good will of the complainant's broadcasting, and consequently will injure the circulation of the complainant so far as its newspaper is concerned and deprive it of great profits.

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

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

The answer … admits that where a broadcasting station is operating on a wave length the frequency of which is within 50 kilocycles per second of the number of kilocycles per second characteristic of the wave length of the first station, that some interference will result but that such interference is natural where stations are operating in close proximity one to the other, but that where two broadcasting stations in the same locality are properly constructed and operated and the wave length employed sharply defined and the power of sold stations substantially equal there will be no appreciable interference by the stations if they are separated by 40 kilocycles. …

The answer admits that on September 7, 1926, the said defendants' station changed its wave length, but denies that they are broadcasting over the same wave length as that of the complainant, but state that they are sending over a wave length which is

removed 40 kilocycles from the wave length used by the complainant, and that said wave being used is 315.6 meters with a frequency of 950 kilocycles.

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

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

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

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

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

It is a matter of general knowledge that in the last few years there has grown up in the United States, as well as abroad, a well recognized calling or business known as broadcasting which consists in sending from a central station, electrically equipped, programs of music and amusement. speeches by men of prominence, news of the day

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

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

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

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

make use of a field which had been built up by the complainant at a considerable cost in money and a considerable time in pioneering. …

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

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

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

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

that it has become generally recognized as the property of such person. The courts have held that persons who attempt to imitate or to make use of such trade name or names or words evidently do so for the purpose of enriching themselves through the efforts of some other person who by the investment of money and time has created something of value. Equity has invariably protected the rights of such persons in the use of said names.

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

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

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

In regard to the water cases, counsel for the defendants call our attention to the rule in this State, as set forth in the case of *Druley v. Adam* (102 Ill. 177), where the court says in its opinion, page 193, "The law has been long settled in this State that there can be no property merely in the water of a running stream. The owner of laud over which a stream of water flows has, as incident to his ownership of the land, a property right in the flow of the water at that place for all the beneficial uses that may result from it, whether for motive power in propelling machinery or in imparting fertility to the adjacent soil, etc. ; in other words, he has a usufruct in the water while it passes; but all other riparian proprietors have precisely the same rights in regard to it and, apart from the right of consumption fur supplying natural wants, neither can, to the injury of the other, abstract the water or divert or arrest its flow."

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

distinguished them on the ground that it is apparent that the law necessarily arose in those eases by reason of the peculiar circumstances and necessities existing in those countries at the time.

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

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

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

It is difficult to determine at this time how a radio station should be properly run, but it is, also, true that the science of broadcasting and receiving is being subject every day to change and it is possible that within it short time this may be accomplished, although it is the opinion of the court from an examination of the affidavits and exhibits in the cause that 40 kilocycles is not at this time recognized as a safe limitation for the prevention of interference between stations located in the same

locality. It is true that stations sufficiently removed from each other can broadcast even over the same wave length, but it necessarily follows that they must be so far apart that the wave lengths do not reach or come in contact with each other to the extent of creating interference.

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

Notes and Questions

25. *Oak Leaves* is a road not taken. This report of the case comes from the *Congressional Record*. Senator Clarence Dill (D-WA) had it read into the record on December 10, 1926 (i.e. the month after it was decided) because of its bearing on a radio regulation bill he co-sponsored.** That bill became the Radio Act of 1927, which established the licensing system whose essentials are still in force today. Broadcasters require a license from the Federal Communications Commission; those licenses specify, in some detail, the frequency on which they can broadcast, the locations of their transmitters, and the power they can use. The licenses started out being heavily regulated to

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

ensure that each broadcaster's programs served the public interest, but over time the licensing process has become far more ministerial. Subject to some concentrated-ownership restrictions and a few miscellaneous content rules (e.g. compliance with the Emergency Broadcasting System and some rules on children's programming), a broadcaster is free to transmit whatever programming it wants as long as it complies with the FCC's technical requirements. The result is a system that divides the airwaves into geographic and frequency blocks, and gives each of these blocks an exclusive licensee. Anyone else broadcasting on these frequencies in these places is violating the law. Similar systems hand out the right to use other frequencies for other purposes (e.g. mobile phone towers, police radios, satellite communications, etc.). In effect, any unauthorized use of someone else's assigned spectrum is illegal.

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

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

mobile phone calls, why should the FCC care? Does calling broadcasting licenses "property" do anything to answer these questions?

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

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

> What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. Earlier we discussed a case in which it had to be decided whether a confectioner had the right to use machinery which caused noise and vibrations in a neighboring house. It would not have facilitated our analysis of the case if it had been discussed in terms of who owned sound waves or vibrations or the medium (whatever it

> is) through which sound waves or vibrations travel. Yet this is essentially what is done in the radio industry. The reason why this way of thinking has become so dominant in discussions of radio law is that it seemed to have developed by using the analogy of the law of airspace. In fact, the law of radio and television has been commonly treated as part of the law of the air. It is not suggested that this approach need lead to the wrong answers, but it tends to obscure the question that is being decided. Thus, whether we have the right to shoot over another man's land has been thought of as depending on who owns the airspace over the land. It would be simpler to discuss what we should be allowed to do with a gun. … The problem confronting the radio industry is that signals transmitted by one person may interfere with those transmitted by another. It can be solved by delimiting the rights which various persons possess.

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

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

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

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

    These can be high-stakes fights. The company LightSquared wanted to build a nationwide wireless network using a mixture of cell towers and satellites. It had FCC permission to use frequencies between 1525 and 1559 megahertz, but the next spectrum band up, from 1559 to 1610 megahertz, was allocated to "radionavigation satellite services" – i.e., GPS. Technical reports agreed with the arguments of GPS makers that LightSquared's proposed transmissions would cause many GPS units, including some on airplanes, to stop working. LightSquared argued that this was not because it would be improperly transmitting outside its assigned band, but because GPS units would be improperly *listening* to transmissions outside of their assigned band. According to LightSquared, inexpensive filters in GPS units would have fixed the problem – but there are millions of GPS units already out there in the world without those filters. In the end, the FCC scrapped LightSquared's plan. Would you have? LightSquared spent three years in bankruptcy following the FCC's decision, and racked up nearly $2 billion in losses. Could a better system of property rights in spectrum have avoided the conflict entirely?

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

United States v. Turoff

701 F. Supp. 981 (E.D.N.Y. 1988)

GLASSER, District Judge:

Defendants have moved to dismiss the indictment in this case on the ground that … it fails to allege a violation of the mail fraud statute, 18 U.S.C. § 1341.
For the reasons stated below, defendants' motion is denied.

FACTS …

According to the indictment, in late 1978, the TLC, which regulates the City's medallion taxicabs, authorized the issuance of 100 temporary taxi medallions to a corporation ("Research Cab Corporation") to be formed by defendant Donald Sherman. The purpose of the temporary medallions was to test the feasibility of diesel engines in New York City taxicabs.

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

Allegedly, defendants never paid the TLC the annual license renewal fees for the unauthorized medallions. In connection with the conspiracy, the defendant Turoff allegedly gave false and misleading information to the TLC Commissioners and the Mayor's office, and destroyed TLC records on the Tulip Cab Corporation and all the defendants allegedly gave false and misleading information to the New York State Commission of Investigation. The indictment alleges fourteen instances in which the mails were used to effectuate the scheme.

DISCUSSION

I.

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

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

Defendants move to dismiss the indictment on the ground that it does not state a cognizable violation of the mail fraud statute as interpreted in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court reversed the mail fraud convictions of Charles J. McNally and James E. Gray on the ground that the mail fraud statute does not reach schemes which violate "the intangible right of the citizenry to good government." The case involved a scheme devised by Gray, who held two top government posts in the Kentucky state government, and Howard P. "Sonny" Hunt, a state Democratic party chairman who had been given de facto power by the governor to select the insurance agencies from which the state would buy its policies. Hunt selected a certain agency as the state's agent for securing a workmen's compensation policy, on the condition that that agency would share any resulting commissions in excess of $50,000 a year with twenty-one other insurance agencies specified by Hunt. Among the designated agencies was one controlled by Hunt and Gray (who had formed it for the exclusive purpose of obtaining the excess commissions). McNally served as the agency's front man. …

[McNally and Gray were convicted of mail fraud.]

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

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

> The issue is thus whether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions. We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.... We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341[2] …

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

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

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

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

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

The Second Circuit, affirming the district court's dismissal of the mail and wire fraud counts against defendants, held that the government had not shown that it had some property interest in the arms. Furthermore, the court rejected the government's contention that "the right of the United States Government to prevent the resale or retransfer of U.S. military weaponry from foreign nations to other, unacceptable

foreign powers" constituted "an interest in, and a right to exercise control over, property" for purposes of the mail fraud statute. *Id.*, 844 F.2d at 40.

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

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

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

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

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

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

> The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the Law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin; ...

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

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

In a footnote at that point, the author observed:

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

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

A franchise is property. It is assignable, taxable and transmissible. *Hatfield v. Straus*, 82 N.E. 172 (1907). A mere license, on the other hand, is nothing more than a personal, revocable privilege. See, e.g., *Brooklyn Heights R.R. Co. v. Steers*, 106 N.E. 919 (1914). It would not be seriously disputed that a taxicab "license" is, accurately speaking, a special franchise which is not revocable at will and may not be taken away except by

due process. *Hecht v. Monaghan*, 121 N.E.2d 421 (1954). *See also*, *Wignall v. Fletcher*, 303 N.Y. 435 (1952). The resolution of this motion will not be dependent, however, upon the technically correct characterization of the matter in issue as being either a franchise, license, or easement.

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

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

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

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

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

In *Evans*, upon which the defendants so heavily rely, the defendants were charged with making false statements to United States agencies to obtain approval to export arms. Here, the defendants are accused of taking 23 items of tangible personal property (the metal plates) from the City of New York in which the City did have a

possessory interest. This is not a case where it is alleged that the citizenry is merely deprived of the honest services of a public official. This is a case where the public official is accused of conspiring with others to misappropriate tangible personal property. To view this case otherwise would be to hold, in effect, that a City cashier who embezzled money merely deprived the City of her honest and faithful services to which the embezzled money is an inconsequential appurtenance. …

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

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

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

> ... the Queen remarked ... "I'm just one hundred and one, five months and a day."

> "I can't believe *that*" said Alice.
>
> "Can't you?" the Queens said in a pitying tone. "Try again; draw a long breath and shut your eyes."
>
> Alice laughed. "There's no use trying," she said: "one *ca'n't* believe impossible things."
>
> "I daresay you haven't had much practice," said the Queens. "When I was your age, I always did it for half-an-hour a day, why, sometimes I've believed as many as six impossible things before breakfast."

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

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

The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that *it is originally public property, comes from the state, and may be withheld completely*. But this need not be an obstacle. *Traditional property also comes from the state, and in much the same way*. Land,

for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group. Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts. Many other natural resources – water, minerals and timber, passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws "give" the property to one who performs certain actions. Even the man who catches a wild animal "owns" the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.

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

The salutary fact that, in modern times, courts have recognized the property rights of licensees[5] need not blind us to the equally compelling fact that licenses, like other forms of public largess, originate in the state and are "public property," in the first instance. …

Notes and Questions

29. Reich's article is closely linked with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that welfare benefits could not be terminated without notice and a hearing. In a footnote, the Court quoted *The New Property* and added, "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8. Two years later, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564

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

(1972), the Court held that a state college professor on a renewable one-year contract did not have a "property" interest in continued employment, so he had no Fourteenth Amendment right to a statement of reasons for the nonrenewal of his contract.* The court had this to say about the nature of "property":

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law –rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

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

30. Money is property because it is "concrete and tangible," says the court in *Turoff*. Really? What if medallion owners pay their license renewal fees by check? By credit card? Is it more or less tangible than the "piece of tin" that is

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

a taxicab medallion, the public's right to honest services, or the franchise of operating a taxicab?

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

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

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

rights in your franchise? What if the fraudster forges a medallion using an unassigned number?

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

5. Intellectual Property

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

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

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

copyright's model But there are other systems of intellectual property law as well. Here are a few of the most important ones:

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

Left: Sarah Scurr. Right: Marisol Ortiz Elfeldt

- Federal **patent law** protects "any new and useful process, machine, manufacture, or composition of matter." Examples include mechanical devices like tractor plows and can openers, chemical processes used to refine oil, pharmaceutical products like anti-HIV drugs, and, a little infamously, a "Method and apparatus for automatically exercising a curious animal" by encouraging it to chase a laser pointer. *See* U.S. Pat. No. 6,701,872. To obtain a patent, an inventor must go through a detailed and expensive application process, which involves convincing the U.S. Patent and Trademark Office (USPTO) that her invention is genuinely new ("novel"), that it represents a sufficient advance on previous inventions (that it be "nonobvious"), and that it has some practical use in the world, however

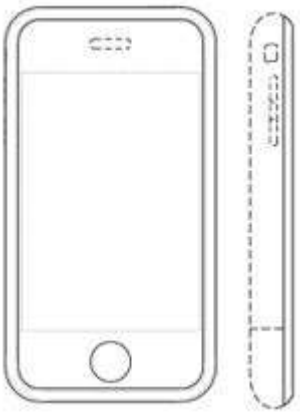
slight ("utility"). She must also disclose to the public, in detail, how her invention works and how best to use it. Once the USPTO issues a patent, it gives the owner the exclusive right for twenty years (from the date she filed her application with the USPTO) to make, use, offer to sell, or sell the invention. (This means that anyone is free to copy or to study the *patent* on a new kind of steering wheel, but they cannot make, use, or sell *steering wheels* as described in the patent.)

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

- State-created **rights of publicity**, discussed in more detail in the section on property in people, protect against the commercial use of one's name, picture, voice, or other indicia of identity without permission. For example, photoshopping a celebrity's face onto a model wearing one of your company's sweaters and using the photograph in an ad for those sweaters is likely to trigger the right of publicity. Some states require that one's identity have "commercial value" to bring a right of publicity suit, others do not. (How would one build up

commercial value in one's identity? It is something one can do deliberately, or does it just happen to some people and not others?) The federal trademark law, the Lanham Act, provides a closely related cause of action for false claims about endorsement: quoting a person as saying "I always shop at Acme Hardware" is actionable if the person didn't say it and you don't have their permission to quote them as saying it.

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



- In addition to the patents discussed above (technically, "utility patents"), the federal government also issues **design patents** on "any new, original, and ornamental design for an article of manufacture" and **plant patents** for "any distinct and new variety of plant." Design patents have become big business, particularly in the technology world where the shape of a device and its user interface are crucial aspects in selling it to consumers. Apple, for example, has sued Samsung for infringing several design patents on elements of the iPhone design; the saga of this litigation is ongoing, but as of now, Apple is defending a $400 million damage award on appeal.

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

6. Allocation

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

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

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

A. Initial Allocation of Chattels

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

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

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

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

TOMPKINS, J. delivered the opinion of the court.

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

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

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

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

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

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

occupancy, and the latter *ratione soli.* Little satisfactory aid can, therefore, be derived from the *English* reporters.

Barbeyrac, in his notes on *Puffendorf,* does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, *describe* the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf's* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. *Barbeyrac* seems to have adopted, and had in view in his notes, the more accurate opinion of *Grotius,* with respect to occupancy. That celebrated author, lib. 2. c. 8. s. 3. p. 309. speaking of occupancy, proceeds thus: "R*equiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*"* But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*"† This qualification embraces the full extent of

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

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

Barbeyrac's objection to *Puffendorf's* definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by *Barbeyrac* in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by *Puffendorf,* or *Grotius,* or the ideas of *Barbeyrac* upon that subject.

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

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ,* within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.
However uncourteous or unkind the conduct of *Pierson* towards *Post,* in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J.

My opinion differs from that of the court.

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* [This citation, and the following citation to *Salk.*, both refer to the case of *Keeble v. Hickeringill*, which we will come to later in this Chapter.—*eds.*]

† [Translation: "by reason of the soil"—*eds.*]

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

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

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac,* or *Blackstone,* all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard** would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana.* But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "*hostem humani generis,*"† and although "*de mortuis nil nisi bonum,*"‡ be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "*sub jove frigido,*"§ or a vertical sun,

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

† [Translation: "enemy of the human race." — *eds.*]

‡ [Translation: "Of the dead say nothing but good." — *eds.*]

§ [Translation: "Under frigid Jove" (*i.e.*, under a cold sky). — *eds.*]

pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of *Roman* poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur;** and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of *Barbeyrac,* as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to

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* [Translation: "times change." Part of a well-known Latin aphorism, *tempora mutantur, nos et mutamur in illis*: "times change, and we change with them." — *eds.*]

whom the palm of victory belonged. He ordained, that if a beast be followed with *large dogs and hounds,* he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only,* then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

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

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

Judgment of reversal.

Notes and Questions

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

    - Administrability: Is the rule easy to apply? Does it give clear and ready answers? Does it make judges' and litigants' jobs easier or harder? Does it minimize the cost and time involved in resolving disputes? Can it be applied without resort to ambiguous or hard-to-obtain evidence?

- Fairness: Does the rule comport with well-considered notions of fairness? Does it treat similarly situated people similarly? Does it favor some claimants over others based on criteria that seem irrelevant, arbitrary, or beyond the claimants' control?
- Morality: Does the rule reward moral behavior and punish—or at least refrain from rewarding—immoral behavior? (This assumes of course that we have a standard for moral and immoral behavior.)
- Reliance: Does the rule respect the reasonable expectations of those with an interest in contested resources? Does it result in a forfeiture of their investment of time, money, or effort premised on such expectations? Does it comport with tradition?
- Pragmatism: Does the rule roughly comport with the moral intuitions of those who are subject to it? Do we expect the rule to be obeyed?
- Ecology: Is the rule consistent with responsible stewardship of resources? Does it ensure that an exhaustible resource will remain available for the benefit of future generations?
- Incentives: Does the rule encourage or discourage the conversion of idle resources to productive use? Does it encourage excessive, duplicative, or wasteful efforts to exploit resources? Does it encourage or discourage disputes or violence among rival claimants? Does it encourage would-be claimants to expend resources on protecting themselves *against other* would-be claimants, instead of on more productive pursuits? When weighing these incentives in the aggregate, is the rule *efficient*? That is, does it extract the greatest possible value from available resources at the lowest possible cost?

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

Even if we agree as to which of these arguments matter in disposing of a particular dispute, are we sure to agree whether a particular type of argument favors a particular party? For example, is Justice Livingston correct in claiming that the decision in Pierson's favor will provide insufficient incentive for

hunters to capture foxes? Is Justice Tompkins correct in claiming that a decision in Post's favor would lead to increased disputes over the trophies of the chase? Does either opinion clearly establish which outcome would be the most fair? How could we know the answer to these questions?

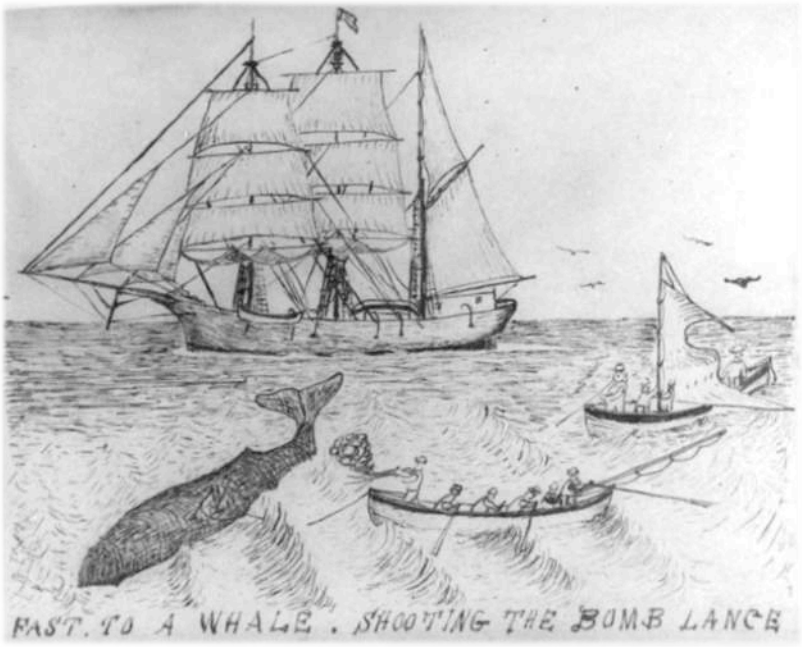
36. **Alternatives to First Possession.** Is the rule of first possession the best available rule for allocating unowned resources? Consider some possible alternative allocation principles:

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

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

37. Recall the first type of justification we discussed in Note 1 above: administrability. Do you think it will always be obvious that one claimant of a

chattel has achieved possession and another has not? Consider the following case.



Source: "Fast to a whale, shooting the bomb lance." New Bedford Free Public Library. *Digital Commonwealth*, http://ark.digitalcommonwealth.org/ark:/50959/sb398z14j

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

NELSON, D.J.

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

In the early spring months the easterly part of Massachusetts Bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach

usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

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

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

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

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

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

He doubted whether a usage set up but not proved by the respondents, that a whale found adrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that 'there would be great difficulty in upholding a custom that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit.' Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In Swift v. Gifford, 2 Low, 110, Judge Lowell decided that a custom among whalemen in the Arctic seas, that the iron holds the whale was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in

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

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

In Swift v. Gifford, Judge Lowell also said:

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

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in Taber v. Jenny and Bartlett v. Budd. If the fisherman does all that is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary.

Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the libelant.

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

Decree for libellant for $71.05, without costs.

Notes and Questions

38. **Primary and Secondary Rules.** Is the rule of *Ghen v. Rich* different from the rule of *Pierson v. Post*? If so, how? Are the justifications for the rule, or for the outcome, the same in each case? If not, how do they differ?
    To answer this question, it may be helpful to distinguish between what leading legal philosopher H.L.A. Hart called *primary rules* and *secondary rules*. In Hart's account, *primary rules* are those that prescribe standards of conduct, and set forth consequences for failure to act accordingly. Statutes defining and setting forth punishments for crimes provide a straightforward example. *Secondary rules* are basically everything else, but in particular they include rules that give actors within the legal system the power to create, alter, or abolish their own primary rules. For example, contract law is largely a body of secondary rules: parties to a contract acting within those rules have the power to create legal rights and obligations that will bind them; the contract itself embodies the applicable primary rules. (For more on this distinction—and more of Hart's monumental contributions to jurisprudence—see H.L.A. HART, THE CONCEPT OF LAW.)

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

39. **Whose Custom?** In *Aberdeen Arctic Co. v. Sutter*, 4 McQ. H.L. 355 (1862), the House of Lords heard the appeal of a case involving a hired Eskimo harpooner aboard an English whaling vessel in Cumberland Inlet, a traditional

native fishing ground in what is now Canada. The harpooner, one Bullygar, struck a whale with a harpoon and line, at the end of which was attached an inflated sealskin, or "drog," which the native fishermen had a custom of using to tire the harpooned animal and to make it easier to track while it swims below the surface. The whale dove immediately, so deep that Bullygar was forced to release his line, and it did not surface again until it had traveled several miles. Before Bullygar and his ship could retrieve it, another ship—the *Alibi*—came upon the wounded whale, killed it, and took it. Bullygar's captain (Sutter) sued the owners of the *Alibi* for "compensation and damages" in the amount of £1,200.

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

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

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

40. Imagine you are counsel to either Pierson or Rich, and your adversary makes you an offer of settlement: to sell the contested chattel and split the proceeds evenly. What would you advise your client to do? Consider the following case.

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

Popov v. Hayashi

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

MCCARTHY, J.

FACTS

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood

the importance of the ball. It was worth a great deal of money* and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

… When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. [The evidence is insufficient] to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.
Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful

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* It has been suggested that the ball might sell for something in excess of $1,000,000.

act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

... It is important to point out what the evidence did not and could not show. Neither the camera [of a local news team fortuitously recording the incident] nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

LEGAL ANALYSIS

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another. … If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

… Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came in possession of the ball became its new owner.

… Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. Various courts have condemned the term as vague and meaningless.

This level of criticism is probably unwarranted.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

…We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent intent to the world.[23] The question is whether he did enough to reduce the the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition[:] "A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has

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[23] Literally.

achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor."[24]

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.[25] Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.[27] Moreover, such efforts must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.

This rule is applied in cases involving the hunting or fishing of wild animals[29] or the salvage of sunken vessels. The hunting and fishing cases recognize that a mortally

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[24] This definition is hereinafter referred to as Gray's Rule.

[25] *Pierson v. Post*, 3 Caines R. (N.Y.1805).

[27] The degree of control necessary to establish possession varies from circumstance to circumstance. "The law ... does not always require that one who discovers lost or abandoned property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit." *Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* 640 F.2d 560, 571 (1981).

[29] …*Ghen v. Rich* 8 F. 159 (D.Mass.1881); *Pierson v. Post* 3 Caines R. (N.Y.1805)….

wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.

In the salvage cases, an individual may take possession of a wreck by exerting as much control "as its nature and situation permit". Inadequate efforts, however, will not support a claim of possession. Thus, a "sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party."

These rules are contextual in nature. They are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The "nature and situation" of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap one's arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

The central [tenet] of Gray's Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of

incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.[34]

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen.

…The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can[.] An action for conversion may be brought where the plaintiff has title, possession or the right to possession.

… Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

… Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

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[34] Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier, this is impossible.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. … Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, [but] the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

…The concept of equitable division has its roots in ancient Roman law. As Helmholz points out, it is useful in that it "provides an equitable way to resolve competing claims which are equally strong." Moreover, "[i]t comports with what one instinctively feels to be fair".

…The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

…Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. … Their legal claims are of equal quality and they are equally entitled to the ball.

…The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained

only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties….

Notes and Questions

Source: Raphael, Judgment of Solomon. Vatican Museums.

41. **Splitting the Baby.** The cynical lawyer would call Judge McCarthy's ruling in *Popov v. Hayashi* a classic example of "splitting the baby." The implication is that ordering the division of the disputed chattel is wishy-washy, or a cop-out. This assumes that there is a "right" answer that will make one party perfectly happy and utterly disappoint the other, but for whatever reason the judge has decided to ignore that answer and instead issue a ruling that tries to give something to everybody and therefore satisfies nobody.*

    Is that a fair critique? Come to think of it, why don't we resolve *all* disputes over initial ownership of chattels this way? Should Pierson and Post have split the value of the fox pelt? Should Ghen and Rich (or perhaps Ellis) have shared the value of the whale oil? (Wouldn't they have done so under the

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* In the Old Testament parable from which the idiom is derived, King Solomon supposedly used this device to suss out the true facts of the case he was called on to decide—that is, to identify the true mother of a disputed child. (He did not, in the event, actually split the baby.) (1 KINGS 3:16-28.) Why might a judge in a modern court of law issue a ruling that makes nobody happy? Why do you think Judge McCarthy did so in *Popov*?

custom supposedly enforced by the court in that case?) Are there good reasons *not* to compel competing claimants of a resource to *share*? What would your kindergarten teacher say?

Your casebook authors would never dare contradict your kindergarten teacher, but we might venture a few questions: How would you expect competing claimants to a single, indivisible resource to behave under a rule that requires them to share that resource? How do adults who share a household usually share the resources of that household? Does it matter if the people sharing like or respect each other? How would you expect courts to resolve their disputes under a rule requiring sharing? What do you expect the reactions to such resolutions would be? What would be the effect on the value and productive use of such resources?

Finally, which of the justifications for allocation rules discussed in Note 1 on page 80 are implicated by these questions?

42. **Precedent.** In common-law systems, courts rely on *precedent*—earlier decided cases presenting similar facts and legal issues—to guide their decisions. Precedent may be either *binding authority*—if it issues from a court with direct appellate jurisdiction over the court deciding an identical issue—or *persuasive authority*—if it issues from a different court in an opinion the deciding court finds well-reasoned and analogous.

    In *Popov* Judge McCarthy cited and relied on our two earlier chattels cases, *Pierson v. Post* and *Ghen v. Rich*, to justify his ruling. Do you agree with Judge McCarthy's interpretation of these precedents? Do you think he applied them correctly to the facts of the case before him? Do you think he should have relied on these two decisions as persuasive authority in the *Popov* case?

43. **Escape and Return.** The common law developed particular rules to deal with a captured wild animal that later escaped. In general, once such an animal is free of the control of its captor, that captor loses their property right in the animal—in becomes once again *ferae naturae*, and a new captor can become its owner by killing or capturing it, free of any claim by the original captor. If,

however, the animal in question has *animus revertendi*—a natural tendency to return to its place of captivity (like, say, homing pigeons, hived bees, or trained hawks)—its temporary departure from the possession of the original owner does not diminish that owner's property right. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *392-93.

Might the rule of escape have any application to *Popov v. Hayashi*? Or are there other factors at work in the case that make the rule unhelpful?

44. **Postscript.** Recall Question 40 on page 173, above. Patrick Hayashi claims that before this case went to trial, he made a settlement offer to Alex Popov whereby the two men would essentially do what the court ended up ordering them to do—selling the ball and dividing the proceeds. Popov, confident in his right to sole ownership, allegedly countered with a lowball offer of $5,000 in exchange for return of the ball.* This turned out to be…ill advised.

Despite speculation that Barry Bonds's record-setting home-run ball might sell for a million dollars or more, the controversy over its ownership appears to have negatively affected its market value. At auction, the ball sold for $450,000.† Split according to the court's order, that came out to $225,000 for each party—not a bad haul. But don't forget: this case was bitterly litigated for over a year—including a trial that proceeded over several weeks—and that ain't cheap.

Patrick Hayashi's attorneys ultimately agreed to waive most of their fee following the resolution of the case, leaving him enough from the proceeds of

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* Jay Posner, *Possessing 73rd HR ball first made his life a hassle, then movie*, SAN DIEGO UNION-TRIBUNE (June 14, 2005), *available at* http://www.utsandiego.com/uniontrib/20050614/news_1s14bondball.html.

† Ira Berkow, *73rd Home Run Ball Sells for $450,000*, N.Y. TIMES (June 26, 2003), *available at* http://www.nytimes.com/2003/06/26/sports/baseball-73rd-home-run-ball-sells-for-450000.html

the sale to cover the cost of his graduate education. He left San Francisco and began a happy new life and career in San Diego.*

Alex Popov was not so lucky. The day after the ball went under the auction hammer, Popov's attorney, Martin Triano, obtained a temporary restraining order freezing Popov's share of the proceeds.† Mr. Triano claimed that Popov still owed him attorney's fees in the amount of $473,500.‡ Alex Popov eventually filed for bankruptcy,§ but not before suing his attorney for malpractice and fraud.** The litigation between Messrs. Popov and Triano was last before a judge in September 2011, nearly 10 years after Popov had his fateful brush with a piece of sports (and legal) history. At that appearance, Mr. Popov was ordered to pay Mr. Triano an additional $22,241 in legal fees arising from their decade of litigation against one another††—though one suspects Mr. Triano may have some difficulty collecting the award. (There is a lesson here for lawyers, not just litigants.)

To learn more about the saga of *Popov v. Hayashi*, and to see video of the infamous home run itself, we highly recommend the 2004 feature-length documentary *Up for Grabs*.

45. **Review and Application.** On September 21, 2008, José Molina hit what would be the last home run at the old Yankee Stadium (which was demolished following the end of the season to make way for a new, glitzier facility). The

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* Gwen Knapp, *Finally, in Bonds ball case, someone shows some class*, S.F. CHRON. (Dec. 30, 2003) at A1, *available at* http://www.sfgate.com/sports/article/Finally-in-Bonds-ball-case-someone-shows-some-2507738.php.

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

‡ *Id.*, Petition filed by Martin F. Triano (June 20, 2003); *see also* David Kravets, Attorney sues fan over Bonds ball case, USA Today (July 8, 2003), *available at* http://usatoday30.usatoday.com/sports/baseball/nl/giants/2003-07-08-bonds-ball-legal-fees_x.htm.

§ Bankruptcy Petition #: 05-32929 (N.D. Cal. Sept. 6, 2005).

** Popov v. Triano, Case No. CGC 04 427956, Complaint, Jan. 12, 2004 (Cal. Super. Ct. San. Francisco Cty.).

†† In re Martin Triano, Case No. CPF 03 503194, Minute Entry, Sept. 16, 2011 (Cal. Super. Ct. San. Francisco Cty.) (granting in part Triano's motion for attorney's fees, in the amount of $22,241).

ball sailed into the left-field stands, and was stopped by a net hung over the seating area specifically for the purpose of protecting fans from incoming fly balls. Several fans attempted to reach through the net to grab the ball, and one—Steve Harshman—managed to get his hand around it. But the net was still between him and the ball. Harshman told reporters he had intended to rip the ball through the net, but was interrupted by staff at the stadium, who instructed him to release it while giving assurances that they would return it to him. Harshman followed the staff's instructions, and the ball rolled down the net and into an adjacent seating area, where Bronx schoolteacher Paul Russo caught it. Yankee Stadium staff immediately confronted Russo and instructed him to turn over the ball. Russo complied, he claimed, because he thought the staff was offering to secure the ball on his behalf. Instead, to Mr. Russo's surprise and chagrin, they delivered the ball to Mr. Harshman.*

Imagine Mr. Russo sues Mr. Harshman for return of the last home-run ball hit at the House that Ruth Built. What result? Would it matter if Yankee Stadium had a long-established policy of having its staff deliver game-play balls to fans who grasp them through protective netting on condition that the fan release the ball when instructed? Would it matter *why* the organization implemented such a policy?

46. **First Possession? Really?** We have now examined three different cases that purport to resolve a property dispute between an earlier pursuer and a later captor by reference to the rule of first possession. But each of them appears to come out a different way. *Pierson* awards the chattel (or its value) to the captor; *Ghen* to the pursuer; *Popov* to both in equal shares. Are these three cases really applying the same rule? If so, what nuances should we add to the maxims "first in time is first in right" or "title goes to the first possessor" in order to explain the outcomes of these three cases and help us to resolve factually similar cases we may encounter in the future? And if not, what are the *multiple*

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* James Barron, *At the Stadium, Possession Is Some Tenths of the Law*, N.Y. TIMES (Sept. 24, 2008) at B3, *available at* http://www.nytimes.com/2008/09/24/nyregion/24ball.html.

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

B. Allocation of Land

William Blackstone, ***Commentaries on the Laws of England***
Vol. 2, p. 59 (1765).

[A]ll the land in the kingdom is supposed to be holden, mediately or immediately, of the king; who is stiled the lord paramount, or above all.

Source: Bayeux Tapestry. Left: Harold the King Is Slain. Right: William the Conqueror seated, center.

***

Unlike foxes, whales, and baseballs, *real property*—that is, land and structures and other improvements attached to land—isn't subject to the physical control of an individual in the same way chattels are. So what might be the legal basis for allocating private rights in real property?

Claims to ownership of land in England trace back as much as a thousand years. In 1066, William, Duke of Normandy, invaded England and defeated the Anglo-Saxon King Harold at the battle of Hastings—as immortalized in the Bayeux Tapestry. William—now William the Conqueror—promptly set about parceling out rights to possess land in his new kingdom. William allocated these rights according to his political and military needs: affirming the rights of Anglo-Saxon landholders who supported him, while expropriating the land of his opponents and reallocating it to his loyal Norman nobles. These nobles received their rights of *tenure* (from the Latin word *tenere* and Norman French word *tenir*, "to hold") under obligations of *fealty*

(from the Norman French *fedelité* or *fealté*, meaning fidelity or loyalty); the land each nobleman held was referred to as his *fé,* (variations: *fief*, *fee*, *feud*). Hence the name historians have applied to the resulting social system: *feudalism*. Feudal obligations typically included payment of taxes in cash or kind and rendering of services (primarily military services) to the *tenant's* (holder's) lord and king. This system of feudal grants of possessory and usufructary rights from the crown evolved over the centuries into the modern system of land ownership—a historical process we will revisit later in our chapter on Estates in Land.

Can there be any justification for the allocation of rights in land beyond the whims of a long-dead warlord and his cronies? In early modern England this was not merely an academic question. Huge changes in the legal regime governing rights to land were underway: lands in England long held as "commons" were being progressively "enclosed" (i.e., appropriated) by noble families for their private use, the personal loyalty relationships underlying feudal land tenure were being supplanted by a more self-consciously economic approach to land rights, and the colonization of the Americas brought European settlers into contact—and often conflict—with native Americans. In this period of rapid change, Britain's leading thinkers turned to the problem of justifying private property rights in land.

Thomas Hobbes, *Leviathan*

pp. 188-190 (Oxford 1909) [1651]

The NUTRITION of a Common-wealth consisteth, in the *Plenty*, and *Distribution* of *Materials* conducing to Life: In *Concoction*, or *Preparation*; and (when concocted) in the *Conveyance* of it, by convenient conduits, to the Publique use.

…The Distribution of the Materials of this Nourishment, is the constitution of *Mine*, and *Thine*, and *His*, that is to say, in one word *Propriety*; and belongeth in all kinds of Common-wealth to the Soveraign Power. For where there is no Common-wealth, there is, (as hath been already shewn) a perpetuall warre of every man against his neighbour; And therefore every thing is his that getteth it, and keepeth it by force; which is neither *Propriety* nor *Community*; but *Uncertainty*. … Seeing therefore the Introduction of *Propriety* is an effect of Common-wealth; which can do nothing but by the Person that Represents it, it is the act onely of the Soveraign; and consisteth in

the Lawes, which none can make that have not the Soveraign Power. And this they well knew of old, who called that *Νόμος*, (that is to say, *Distribution*,) which we call Law; and defined Justice, by *distributing* to every man *his own*.

… In this Distribution, the First Law, is for Division of the Land it selfe: wherein the Soveraign assigneth to every man a portion, according as he, and not according as any Subject, or any number of them, shall judge agreeable to Equity, and the Common Good. … And though a People comming into possession of a land by warre, do not alwaies exterminate the antient Inhabitants … but leave to many, or most, or all of them their Estates; yet it is manifest they hold them afterwards, as of the Victors distribution; as the people of *England* held all theirs of *William the Conquerour*.

William Blackstone, Commentaries on the Laws of England

vol. 2, p. 2 (1765)

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them.

John Locke, *Second Treatise of Civil Government*

Ch. 5 (1690)

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. No body can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him….

But the chief matter of property being now not the fruits of the earth, and the beasts that subsist on it, but the earth itself; as that which takes in and carries with it all the rest; I think it is plain, that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common. Nor will it invalidate his right, to say every body else has an equal title to it; and therefore he cannot appropriate, he cannot inclose, without the consent of all his fellow-commoners, all mankind. God, when he gave the world in common to all mankind,

commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e. improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use….

God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour: if he did, it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his industry could reach to.

… To which let me add, that he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common. And therefore he that incloses land, and has a greater plenty of the conveniencies of life from ten acres, than he could have from an hundred left to nature, may truly be said to give ninety acres to mankind: for his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common. I have here rated the improved land very low, in making its product but as ten to one, when it is much nearer an hundred to one: for I ask, whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a

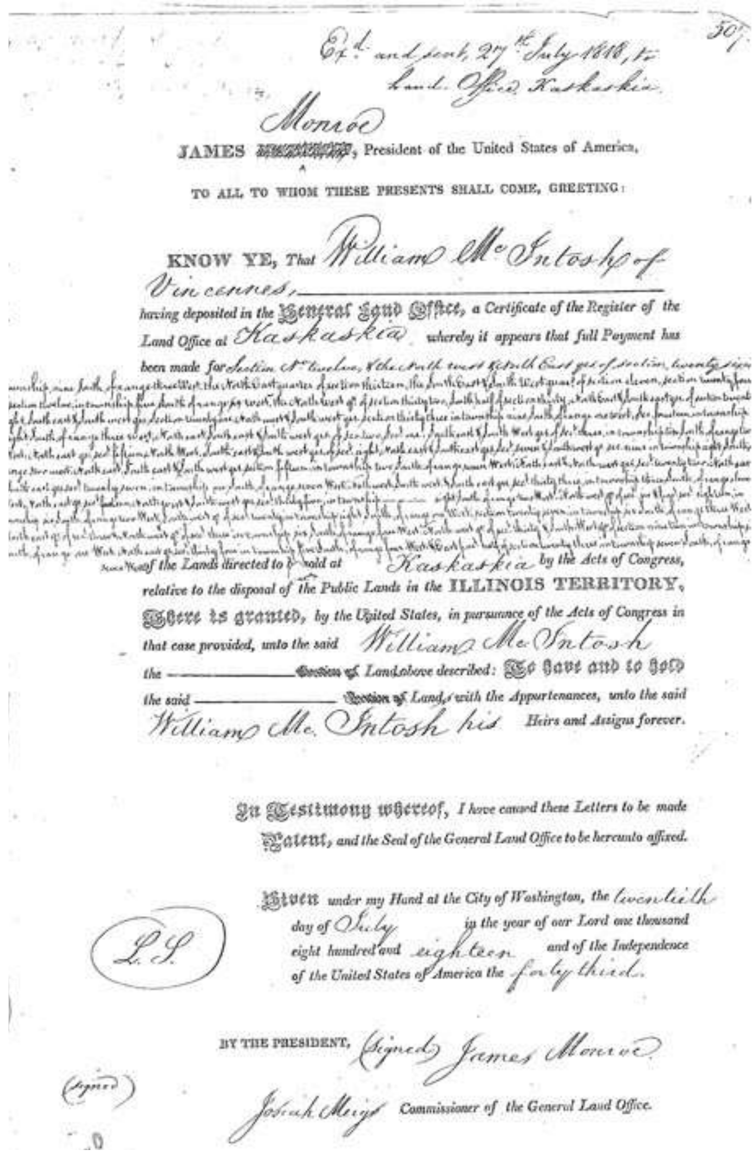
thousand acres yield the needy and wretched inhabitants as many conveniencies of life, as ten acres of equally fertile land do in Devonshire, where they are well cultivated?

…Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it upon what was common, which remained a long while the far greater part, and is yet more than mankind makes use of. Men, at first, for the most part, contented themselves with what unassisted nature offered to their necessities: and though afterwards, in some parts of the world, (where the increase of people and stock, with the use of money, had made land scarce, and so of some value) the several communities settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began; and the leagues that have been made between several states and kingdoms, either expresly or tacitly disowning all claim and right to the land in the others possession, have, by common consent, given up their pretences to their natural common right, which originally they had to those countries, and so have, by positive agreement, settled a property amongst themselves, in distinct parts and parcels of the earth…

… Thus in the beginning all the world was America….

Herman Melville, *Moby-Dick*
p. 375 (1922) [1892]

What was America in 1492 but a Loose-Fish, in which Columbus struck the Spanish standard by way of waifing it for his royal master and mistress? What was Poland to the Czar? What Greece to the Turk? What India to England? What at last will Mexico be to the United States? All Loose-Fish.


Ent.d and sent, 27th July 1818, to Land Office Kaskaskia

JAMES Monroe, President of the United States of America,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That William McIntosh of Vincennes, having deposited in the General Land Office, a Certificate of the Register of the Land Office at Kaskaskia whereby it appears that full Payment has been made for Section No. twelve, the north west & south east qrs of section twenty six [illegible] of the Lands directed to be sold at Kaskaskia by the Acts of Congress, relative to the disposal of the Public Lands in the ILLINOIS TERRITORY,

There is granted, by the United States, in pursuance of the Acts of Congress in that case provided, unto the said William McIntosh the Section of Land above described: To have and to hold the said Section of Land, with the Appurtenances, unto the said William McIntosh his Heirs and Assigns forever.

In Testimony whereof, I have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my Hand at the City of Washington, the twentieth day of July in the year of our Lord one thousand eight hundred and eighteen and of the Independence of the United States of America the forty third.

L.S.

BY THE PRESIDENT, (Signed) James Monroe

(Signed) Josiah Meigs Commissioner of the General Land Office.

Federal Land Patent to William McIntosh

Johnson v. M'Intosh

21 U.S. 543 (1823)

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States [dated July 20, 1818]. It came up on a case stated, upon which there was a judgment below for the defendant. …

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should

acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

… No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. … Thus has our whole country been granted by the crown while in the occupation of the Indians. These [royal] grants purport to convey the soil as well as the right of dominion to the grantees. … In all of them, the soil, at the time the

grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. … It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

…Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her 'exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the Commonwealth.' The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

…In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation,' &c. 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.'

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

…The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in

themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

…Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

... After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

Mabo v. Queensland (No. 2) ["Mabo's Case"]

High Court of Australia, (1992) 175 C.L.R. 1

BRENNAN J.

The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of 9 square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. … The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. … The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a

strong sense of identity with their Islands. The plaintiffs are members of the Meriam people. In this case, the legal rights of the members of the Meriam people to the land of the Murray Islands are in question.

… It may be assumed that on 1 August 1879 the Meriam people knew nothing of the events in Westminster and in Brisbane that effected the annexation of the Murray Islands and their incorporation into Queensland and that, had the Meriam people been told of the Proclamation [of annexation] made in Brisbane on 21 July 1879, they would not have appreciated its significance. The legal consequences of these events are in issue in this case. Oversimplified, the chief question in this case is whether these transactions had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands. The defendant submits that that was the legal consequence of the Letters Patent and of the events which brought them into effect. If that submission be right, the Queen took the land occupied by Meriam people on 1 August 1879 without their knowing of the expropriation; they were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.

…In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies…. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if

the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

… International law [at the time of colonization of Australia by Britain] recognized conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty…. Various justifications for the acquisition of sovereignty over the territory of "backward peoples" were advanced. The benefits of Christianity and European civilization had been seen as a sufficient justification from mediaeval times. Another justification for the application of the theory of *terra nullius* to inhabited territory—a justification first advanced by Vattel at the end of the 18th century—was that new territories could be claimed by occupation if the land were uncultivated, for Europeans had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants.

… The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country…. Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.… It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. It was such a rule which evoked from Deane J.[, in] Gerhardy v. Brown (1985) 159 CLR 70, at p. 149[,] the criticism that—

> "the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in Johnson v. McIntosh, accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to retain the occupancy of their traditional lands".

However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.…

The land law of England is based on the doctrine of tenure. In English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term "tenure" is used to signify the relationship between tenant and lord, not the relationship between tenant and land…. When the Crown acquired territory outside England which was to be subject to the common law, there was a natural assumption that the doctrine of tenure should be the basis of the land law. Perhaps the assumption did not have to be made….

By attributing to the Crown a radical title* to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. … But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.… Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants….

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the

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* [Eds.—"Radical title" is a subtle and unsettled concept; it may refer here to the common-law principle that the government—i.e., the crown—is the ultimate source of property rights in land within the territory subject to its jurisdiction.]

fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.

…. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners.… Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. … Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown.

… Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot

review the merits, as distinct from the legality, of the exercise of sovereign power. … However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive…. A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title…. Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose - at least for a time - and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. … [W]here the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[The Court declared that the Murray Islands are not crown lands, that the Meriam people were entitled to "possession, occupation, use and enjoyment" of the island of Mer (excluding certain parcels leased or physically used by the Australian, provincial, or local governments), and that the Meriam people's right to Mer is subject to the power of the Queensland government to extinguish it by law.]

MASON C.J. and McHUGH J.

We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

In the result, six [out of seven] members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional

lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, … neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.

We are authorized to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.

[Opinions of Toohey and Gaudron JJ. and Dawson J. omitted.]

Notes and Questions

47. A system of land ownership founded on violent conquest strikes us as arbitrary and unjustifiable today. Both cases you read seem to reflect this view in their rhetoric. But do they implement such a view in their dispositions of the claims before them? Or do they follow Blackstone's advice to "obey the laws when made, without scrutinizing too nicely into the reasons of making them"?

    Chief Justice Marshall seems almost embarrassed to confirm the "extravagant…pretension" that European discovery and conquest is not only a legitimate source of land titles in the United States, but the *only* legitimate source of such titles. But he does so anyway. Why?

    Justice Brennan is even more forceful, finding the European doctrine of "an unjust and discriminatory doctrine of that kind can no longer be accepted." But is the rule he announces any different than the rule of *Johnson v. M'Intosh*? If so, how?

Can we think of a better justification for allocating ownership of land? What allocation rule would result from such a better justification? If we could come up with a better justified principle for allocating initial ownership of land than violent conquest, could we simply implement a system based on that principle tomorrow? If not, what has become of Judge McCarthy's defiant assertion in *Popov v. Hayashi* that "[w]e are a nation governed by law, not by brute force"? Is there something different about land that makes allocation by "brute force" more acceptable?

48. **Wrong + Time = Right?** Perhaps the distinction between *Popov v. Hayashi* and *Johnson v. M'Intosh* has to do with how much time has passed since the violent dispossession of the aggrieved plaintiff. Does the fact that a thousand years have passed since William the Conqueror make his expropriation of land from the Anglo-Saxons any less unjust? What about the five hundred years since European discovery of the Americas? The two hundred years since the British colonization of Australia? If the United States invaded a foreign country—say, somewhere in the Middle East—tomorrow, and purported to sell to an American corporation legal title to land in that country that was in possession of natives claiming ownership under the laws of the conquered nation, would you expect the dispossessed natives to have a legal remedy? In what court?

    Note that the major split between the Justices in *Mabo* was not over the *existence* of native title, but on its scope. Three (of seven) Justices would have held that "If common law native title is wrongfully extinguished by the Crown, … compensatory damages can be recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions," and that extinguishment by inconsistent grant in the absence of an Act of Parliament is wrongful. Opinion of Toohey and Gaudron JJ., ¶ 64-65. We will consider how the passage of time can affect an owner's ability to assert their rights in our units on Found and Stolen Property and on Adverse Possession.

49. **Historical Injustices and Reparations.** Should injuries to persons long dead, inflicted by persons long dead, be remediable? Are the descendants of the

wronged individuals the proper recipients of such a remedy? Should the descendants of the inflicters of the injury be held liable?

In the United States, these are recurring issues that arise in discussions of the dispossession and genocide of Native Americans and the enslavement of kidnapped Africans and their descendants. *See, e.g.,* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), *available at* http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/(citing early American examples of reparations of former slaves, cataloguing the continued injuries inflicted on African-Americans by the discrimination they face in American society, and laying out the case for a more comprehensive reparations program). Reparations are also the subject of serious philosophical, political, and legal discussion. Consider the following excerpt from Carol Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1906-07 (2006) (footnotes omitted):

> Property, as an institution, requires stability in people's expectations about their own and other people's claims. This is why property law has several claims-clearing devices that substitute Owner #2 for Owner #1 when the claims of Owner #1 have not been sufficiently publicized, and when most people think that Owner #2 is the true owner even though she is not. Adverse possession is a classic example of this sort of claims-clearing device.* Unfortunately, Owner #2's claims may have arisen in dubious circumstances or even through force or fraud, and that fact can undermine confidence in the entire institution. Contemporary Russia is a case in point, where major capitalist figures are widely regarded as the beneficiaries of insider favoritism and horrifically shady practices. Should their great wealth be recognized, simply for the sake of getting on with things and letting a modern economy unroll? Or would some kind of redistribution actually lead to greater stability?

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* [*Eds.*—We will discuss adverse possession in a subsequent chapter.]

> Historic injustices create another source of unease: Palestinians vis-à-vis Israelis, former East European landowners vis-à-vis the newcomers under Soviet rule, numerous indigenous groups vis-à-vis the settler societies that displaced them, descendants of slaves vis-à-vis the descendants of slave-owners. Settling all those scores could be hugely disruptive, and the passage of time itself makes proposed settlements morally ambiguous, because the original victims and perpetrators often are no longer on the scene. Why charge A in favor of B, when neither A nor B were personally involved in the past injustice? Moreover, settlements could leave open the origins of the displaced persons' own prior claims, as in the case of former aristocrats' plantations in East Germany. Just whom did their ancestors displace, far back in the Middle Ages? And so on back in time.
>
> The age-old acquisition problem is not very salient to most property regimes, however, even though it bubbles hotly at the center in some locales. Issues of this kind usually become peripheral because we basically follow Blackstone's advice: we forget about the questionable origins of title. … By forgetting about origins we can keep on acquiring, investing, trading, and generally making ourselves wealthier. The larger public good of stable claims normally outweighs the private lapses that were entailed in some of those claims. But not surprisingly, on occasion the situation is reversed: unjust acquisitions may seem so gross as to eat away even the middle ground morality that makes property regimes possible. If you think that all those who succeed are thieves, why not be a thief yourself? That rhetorical question turns tit-for-tat practitioners into larcenists. Under such circumstances, public morality—even in quest of stability for property—could require some kind of restitutionary gesture, or at least some acknowledgment of past injustice.

For further philosophical treatments of reparations and responsibility for ancient wrongs, see George Sher, *Transgenerational Compensation*, 33 PHILOS. & PUB. AFF. 181 (2005) (attempting to justify reparations); Christopher W.

Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 AM. PHILOS. Q. 175 (1984) (casting doubt on the moral argument for reparations); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (addressing both philosophical and legal issues in reparations programs).

50. Is the United States' dispossession of Native Americans really a "historical" injustice? Professor Joseph Singer has long faulted the American legal system for its continued mistreatment of Native Americans:

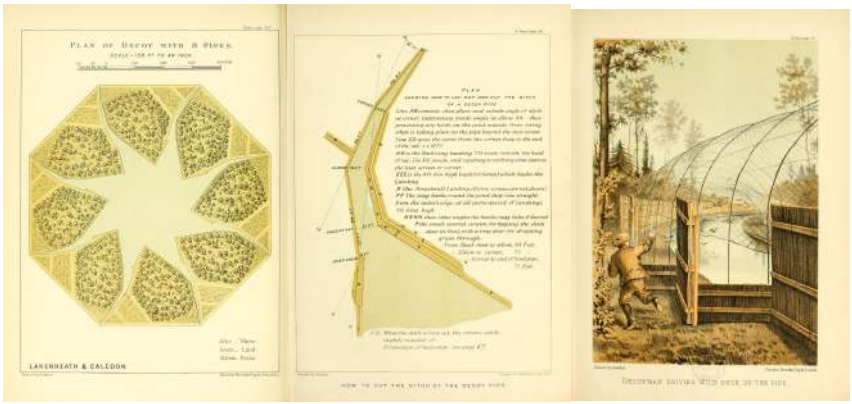
> [T]itle to land in the United States rests on the forced taking of land from first possessors – the very opposite of respect for first possession. Conquest is a mode of original acquisition that we cannot sweep under the rug by pretending that it accords with any recognizable principle of justice. And conquest, unfortunately, is where American history starts – as does the title to almost every parcel of land in the United States. This is a highly inconvenient (not to say stunningly demoralizing) fact, not least of all to the Indian nations that continue to inhabit the North American continent….
>
> Many of us protect ourselves from having to think too deeply about conquest by distancing ourselves from it. … If we can relegate conquest to the distant past, we can concentrate instead on the fact that the United States was founded on respect for property rights. We do not acquire property by conquest today.
>
> This comforting story is misleading at best and false at worst. We cannot comfort ourselves with the idea that conquest became a thing of the past with the American Revolution, independence from Great Britain, and the adoption of the U.S. Constitution.

Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 766-67 (2011) (reproduced with permission of the author). As Professor Singer explains, *id.* at 767-68, most of the federal government's dispossession of Native American land

occurred during the 19th century. During the early 20th century—while the Supreme Court was gaining a reputation for striking down state economic legislation in the name of protecting freedom of contract and private property (the so-called "*Lochner* era"*)—the United States forcibly took two-thirds of the remaining lands of the Indian nations. The Supreme Court held in 1955 that Alaska natives possessed merely a license to live on the land – revocable permission from whites to occupy Alaskan territory. As recently as 2009, the Supreme Court held that the Navajo Nation had no right to sue the federal government for damages where the Secretary of the Interior was alleged to have colluded with a mining company to undercompensate the tribe for mining rights on lands held under "joint title" between the Navajo and the United States (by law, the Secretary must approve any leases of tribal land for mining purposes). *United States v. Navajo Nation*, 556 U.S. 287 (2009). As Professor Singer reminds us, the conquest is not over.

C. *Ratione Soli* and Fugitive Resources: When Chattels Meet Land

1. Wild Animals on Owned Land



* Lochner v. New York, 198 U.S. 45 (1905).

Source: RALPH PAYNE-GALLWEY, THE BOOK OF DUCK DECOYS 34, 36, 166 (1886), *available at* https://archive.org/details/bookofduckdecoyss00payn

Keeble v. Hickeringill

(1707) 103 Eng. Rep. 1127, 11 East 574 (Q.B.)

Action upon the case. Plaintiff declares that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, [where he maintained] a decoy pond, to which divers wildfowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them: the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond: and on the 11th and 12th days of November the defendant, with design to damnify the plaintiff, and fright away the wildfowl, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frighted away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages.

HOLT C.J.

I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. … Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him.…

[W]here a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage

by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. ...

There was an objection that did occur to me, though I do not remember it to be made at the Bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frighted away by the defendant's shooting. … Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. … The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill, that he uses thereby. … And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expence of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason is that this action is not brought to recover damage for the loss of the fowl, but for the disturbance.

Notes and Questions

1. What was Keeble suing Hickeringill for, and why did he prevail? Was his claim a property claim? (A related question: what is an "[a]ction on the case"? Did you look it up?) If a property claim, what was the *res*—the thing that Keeble claimed as his property? If not a property claim, what might this case be doing in your Property casebook?

2. Whether *Keeble* is a property case or not, where did the 20£ damages measure come from?

3. You may recall that *Keeble* was discussed by Justice Tompkins in *Pierson v. Post*, though not by name. (See page 161 note *, *supra*.) Justice Tompkins referred to different **reports** of the case than the one you read. The existence of multiple, sometimes conflicting, reports is fairly common for earlier English cases and even for some early American cases. In earlier days, judges would announce their opinions from the bench, and **reporters**—usually entrepreneurial lawyers—would take notes of these opinions (often along with the arguments of counsel), collect them, and publish them as a reference for the bar. These days judges issue written opinions, which are collected and published in "official" reporters as written. But for earlier cases, the content of a precedential authority depended on the transcription of the reporter, and reporters could be unreliable. The Modern King's Bench ("Mod.") and Salkeld ("Salk.") reports cited by Justice Tompkins are today believed to be less reliable than the East report you just read, which the reporter claimed to have based on a copy of Lord Chief Justice Holt's own manuscript. Unfortunately for Justice Tompkins, the East report of *Keeble* was not published until 1815 (ten years after *Pierson*). Had this report been available to the New York Supreme Court in 1805, do you think *Pierson* would have come out differently?

A Note on Ratione Soli

Lord Holt, who decided *Keeble*, is also a key—if perhaps slightly confusing—expositor of the related and peculiarly English doctrine of *ratione soli* (Latin for "by reason of the soil"), also referred to in *Pierson*. *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,* which is that the captor of a wild animal

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* 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

acquires property rights in the animal wherever captured, though he may be liable in trespass to the owner of the real property on which the animal was pursued or taken. This distinction affects not only the right to possession of the animal itself, but also the measure of damages, because the damages from the trespass may be less than the value of the animal.

A strong principle of *ratione soli* was consolidated in mid-19th century England as part of the class wars between the landed gentry—who passionately defended game hunting as an exclusive sport for the aristocracy—and the upwardly-mobile merchant classes and more desperate farmers and poachers—who saw game as a token of luxury and a means of sustenance, respectively. *See generally* Chester Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240 (1933). The aristocrats won a decisive victory in a suit by a game merchant against certain servants of the Marquis of Exeter, who had forcibly seized several dozen rabbits purchased by the merchant for resale, on grounds that they had been poached from the Marquis's lands. Blades v. Higgs, (1865) 11 Eng. Rep. 1474, 11 H.L.Cas. 621. The Law Lords ruled that wild animals are the property of the owner of the land on which they are taken, and that the Marquis's servants were therefore within their rights in repossessing the rabbits.

Ratione soli was initially rejected by the newly independent American states, in favor of a rule of "free taking." This made some sense in the America of John Locke's imagination: a vast, naturally bountiful, largely undeveloped, and sparsely populated continent. Moreover, "[i]n the New World, game was no sporting matter, but rather a source of food and clothing." Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976). Thus, for the first century of the new Republic's life, landowners for the most part enjoyed no special privileges to wild animals on their otherwise idle land; hunters were presumed to be free to enter or cross unenclosed and undeveloped land in pursuit of game, even where that land was privately owned. Landowners could defeat this presumption by posting notices of their intent to exclude hunters at the boundaries of their property, but in practice posting was

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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 42 on page 94, *supra*.)

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, as *Keeble* makes clear, there are other legal remedies available against those who interfere with landowners' efforts to exploit wild animals on their land? Is there any other principled justification for either *ratione soli* or free taking, or are the rules merely sops to particular political interests? In light of all this history, what do you think *ought* to be the legal rights of landowners with respect to wild animals that happen to be on their land? Why? Is there any reason landowners should have a superior claim to anyone else?

7. 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 opinon.]

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 water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right….

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they

have no title to the flow of the stream beyond the water actually and legally appropriated to the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights, to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. There is no doubt, that in point of law or fact, there may be a right to water of a very limited nature, and subservient to the more general right of the riparian proprietors.… But the presumption of an absolute and controlling power over the whole flow, a continuing power of exclusive appropriation from time to time, in the riparian proprietor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions. The general presumption appears to me to be that which is laid down by Mr. Justice Abbott in Saunders v. Newman, 1 Barn. & Ald. 258: 'When a mill has been erected upon a stream for a long period of time, it gives to the owner a right, that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill (i.e. by requiring more water), the case would be different.'

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any

surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

…My opinion accordingly is, that the trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water. But the trench owners have no right to increase that flow; and whatever may be the mills or uses, to which they may apply it, they are limited to the accustomed quantity, and may not exceed it…. [I]f there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights … and that the plaintiffs to this extent are entitled to have their general right established, and an injunction granted.

It is impracticable for the court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity with the suggestions in the opinion of the court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

… The decree of the court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c. Decree accordingly.

Coffin v. Left Hand Ditch Co.

6 Colo. 443 (1882)

HELM, J.

Appellee, who was plaintiff below, claimed to be the owner of certain water by virtue of an appropriation thereof from the south fork of the St. Vrain creek. It appears that such water, after its diversion, is carried by means of a ditch to the James creek, and thence along the bed of the same to Left Hand creek, where it is again diverted by lateral ditches and used to irrigate lands adjacent to the last named stream. Appellants are the owners of lands lying on the margin and in the neighborhood of the St. Vrain below the mouth of said south fork thereof, and naturally irrigated therefrom.

In 1879 there was not a sufficient quantity of water in the St. Vrain to supply the ditch of appellee and also irrigate the said lands of appellant. A portion of appellee's dam was torn out, and its diversion of water thereby seriously interfered with by appellants. The action is brought for damages arising from the trespass, and for injunctive relief to prevent repetitions thereof in the future. … [T]rial was had before a jury…, and verdict and judgment given for appellee. Such recovery was confined, however, to damages for injury to the dam alone, and did not extend to those, if any there were, resulting from the loss of water.

... It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

… We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial

purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

… It is urged, however, that even if the doctrine of priority or superiority of right by priority of appropriation be conceded, appellee in this case is not benefited thereby. Appellants claim that they have a better right to the water because their lands lie along the margin and in the neighborhood of the St. Vrain. They assert that, as against them, appellee's diversion of said water to irrigate lands adjacent to Left Hand creek, though prior in time, is unlawful.

In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed. And the disastrous consequences of our adoption of the rule contended for, forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one.

The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil. And it would be an ungenerous and inequitable rule that would deprive one of its benefit simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. It might be utterly impossible, owing to the topography of the country, to get water upon his farm from the adjacent stream; or if possible, it might be impracticable on account of the distance from the point where the diversion must take place and the attendant expense; or the quantity of water in such stream might be entirely insufficient to supply his wants. It sometimes happens that the most fertile soil is found along the margin or in the neighborhood of the small rivulet, and sandy and barren land beside the larger stream. To apply the rule contended for would prevent the useful and profitable cultivation of the productive soil, and sanction the waste of water upon the more sterile lands. It would have enabled a party to locate upon a stream in 1875, and destroy the value of thousands of acres, and the improvements thereon, in adjoining valleys, possessed and cultivated for the preceding decade. Under the principle contended for, a party owning land ten miles from the stream, but in the valley thereof, might deprive a prior appropriator of the

water diverted therefrom whose lands are within a thousand yards, but just beyond an intervening divide.

…The judgment of the court below will be affirmed.

Notes and Questions

51. **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*?

52. **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), available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/rs2015_0032_with_adopted_regs.pdf.

53. **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. Consider the following summary of how the law responded to demand for this scarce resource when it suddenly became economically important.

Edward Greer, *The Ownership of Petroleum and Natural Gas In Place*
1 TEX. L. REV. 162 (1923)

It has always been the boast of common-law lawyers that the system was so flexible and adaptable to new conditions that it afforded an adequate remedy in any case or state of facts, however novel and complicated. This claim has been put to a severe test in determining the rights of the owner of land to petroleum oil and natural gas underlying the same. At the first the courts established the obvious proposition that these substances are minerals, since the term "minerals" embraces all inorganic substances in or under the surface of the earth; and hence it was argued that any such component parts of the surface, or underlying strata, were parts of the land; and that any disposition thereof would be a disposition of a part of the land. … Having so determined, it was an easy conclusion, if no consideration was given to the peculiar attributes of these substances, that they belonged absolutely to the owner of the land, since the land owner's title extended *ad caelum ad inferno.*

…This line of reasoning, however, was not allowed to go unchallenged and among the early decisions are some which question it and seek to point out its fallacy, and, indeed, hold that, notwithstanding these substances are minerals, owing to their peculiar nature they are incapable of ownership *in situ.* It was shown in these early cases that there was a very substantial and radical difference between oil and gas and solid minerals, in that the former had, or were assumed to have, the power of moving from place to place—of migrating, so to speak, from one tract of land to another, and that by such movement the title of one land owner, if he had any, was lost without his consent and against his will. Now, since such condition was entirely inconsistent with the legal concept of true or absolute ownership, the question of such ownership was raised and has been debated by the courts ever since with somewhat varying and conflicting conclusions. The title of the land owner was compared, by those courts taking the view that oil and gas are migratory, with his title to wild animals (*ferae naturae*) that came on his land; and while the analogy was admitted to be incomplete it was insisted that the land owner's title was much more

like his title to wild animals than like his title to solid minerals. Likewise, the earliest cases held that the title of the land owner to oil and gas was entirely similar to his title to running or percolating water under the surface of his land; that the extent of the right in either case, percolating water or oil and gas, was the exclusive right to capture, to take and to use such minerals while on or under his land. The right as to wild animals was known at common law as *ratione soli*; and the right to take water practically the same.* This was declared to be the extent of the right possessed as to oil and gas. Of course such right falls far short of the rights of an owner, or ownership, and under this view no conveyance transferring title or reserving title could be made. Likewise, it was pointed out, that from the conclusion that oil and gas are minerals, it does not follow that the land owner owns them, because percolating underground water is conceded on all hands to be a mineral, and yet it is universally held that the land owner does not own such water, but only has the exclusive right on his land to capture and take possession of such water and thus acquire title thereto; he cannot convey it or reserve it distinct from the surface, because he does not own it.

Again, the doctrine of *ad caelum ad inferno* does not give to a riparian owner, title to water passing over one's land in a stream, notwithstanding he owns the fee to the center of the stream; nor to shell fish, mollusks or oysters not planted by the land owner.

These considerations were sufficient in the minds of many of the courts, and perhaps a majority of them, to upset the whole theory of absolute ownership of petroleum oil and natural gas in place. Just here it may be well to say that perhaps the courts went too far in assuming that these substances possessed the power of self-propulsion and movement in a state of nature. Such fact has not been and never could be proven; but the general belief among practical operators and geologists now is that these substances, generally speaking, have been confined for ages in pools, porous rocks, and sands where we now find them, and would so remain for ages to come if not allowed to escape or move by an earthquake breaking up the stratum, or some similar occurrence, or by the act of man in drilling into the pool, sand or rock. …[I]t is

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* [*Eds.*—Is this right, in light of the water rights cases you just read?]

conceded on all hands by practical operators and geologists that oil and gas will move to an opening into the pool or stratum and through such opening—the substances being always found under pressure; and hence by drilling a well on his own land, one can get possession of oil or gas which *was under his neighbor's land*, and thereby secure *the* title to the same. When the natural pressure is not sufficient, the oil and gas can be drawn by pumps from under another's land, and thus its *situs* changed from one tract to another; also by exploding dynamite in wells, the process being known as "shooting the well."

Assuming, then, a condition which is admitted to exist on all hands, and which is demonstrably true, to wit, that the oil and gas underlying A's land may be withdrawn therefrom by the drilling of a well on B's land, and that B acquires full and complete title) to such oil or gas when he brings it to the surface through a well drilled on his land, the question is, what is the character of title which A had to the oil before it was withdrawn? And, if it is contended that he had full and complete ownership, how can his title be lost in harmony with recognized legal principles, without his consent and against his will?

We cannot conclude that the land owner has not title to oil and gas in *situ* because he has not such title to wild animals, or to percolating underground water, because it must be conceded that there are substantial differences between the land owner's dominion over wild animals, which come at will on his land and leave when they please, and oil and gas in place, and percolating water. The title to wild animals, before capture, is in the public or state at large, subject to be vested in the land owner on capture or reduction to possession; whereas the title to oil and gas is not in the public but is, in the view of some courts, in the land owners in common whose lands cover or overlie the pool or producing rock or sand containing the oil, subject to being individualized or perfected by reduction to actual possession by each.… There is another difference between oil and gas in place and percolating water, and that is in the case of water the supply is replenished by surface rains, the water finding its way to the subterranean sands and thus there is more or less a continuation of the supply and not a permanent, complete exhaustion by the extraction of the water. This is also true of wild animals, of course, since after some are captured others come. So far as known, this is not true of oil or gas. There is no steady, constant supply, and when

the oil in the sand, rock or pool, as the case may be, is once exhausted, it will probably never be replaced.…

The differences, therefore, between the dominion of the surface owner over wild animals, percolating underground water and oil and gas, though important and considerable, do not seem to be sufficient to put oil and gas in a class entirely by themselves, and to make different rules of law applicable to the ownership of such substances from those applicable to wild animals and percolating water. Indeed, the differences between the dominion of the surface owner over wild animals which come on his land, and underground percolating water, are greater than the differences between such dominion over water on the one hand and oil and gas on the other. As before stated, the title to wild animals is in the state or the public at large before capture; whereas the title to percolating underground water is never in the state or public at large. The one common attribute of all three of these classes is that *title may be acquired lawfully by a person other than the owner of the land where such substances for the time are situated or abide, by inducing or causing a movement thereof by an adjacent owner to his land.* Also the rule that the land owner has the exclusive right to take such substances, reduce them to possession and thereby acquire title while they are on his land, is applicable to all three; and any one going on the land of another and reducing any of these things to possession there, is a trespasser and he acquires no title to them; but the reduction to possession by such trespasser perfects the title in the land owner.

If A goes on to B's land and captures or kills wild animals or birds, such birds or animals belong to B. If he goes on B's land and drills a well and brings water to the surface, such water belongs to B. If he goes on B's land, drills a well and brings oil or gas to the surface, such oil or gas belongs to B; but if A entices wild animals away from B's land, in any way not constituting a trespass, on to his own land and there captures them, they belong to A. So if he excavates a reservoir on his land and thereby entraps and causes a flow of underground water from B's land to his own, it belongs to him; also if he drills an oil or gas well on his land and oil or gas which was under B's land comes up through his well, he has full title thereto. Substantially, therefore, it would appear that the rules of law governing the title as to wild animals, percolating underground water and oil and gas, should be the same, notwithstanding the different attributes of these things above pointed out.

The true and absolute test of the ownership of a thing on all sound legal principles, must be *whether the party claiming such ownership has such right or title to the thing that no one can lawfully take it from him, without his consent*. If this rule is made the test, then unquestionably a land owner has no ownership of the oil and gas underlying his land. It is demonstrable, as above shown, that the land owner loses all semblance of the title to oil and gas which were under his land if they come to the surface through a well drilled by his neighbor on his land. He can not enjoin or stop the drilling of such well, no matter how evident it is that some part of the production of that well is from oil and gas underlying his land, nor can he sustain any claim for damages for such act.

Notes and Questions

54. **I Drink Your Milkshake.*** Imagine A and B are neighboring landowners in an oil-rich region. A drills an oil well at an angle, such that the wellhead is on A's land, but the bottom of the well, from which the pipe draws oil, is under B's land. B sues A to enjoin the continued operation of the well and recover the value of the oil already extracted. What result and why? *See* 1 SUMMERS OIL AND GAS § 2:3 (3d ed.) ("[I]f a well deviates from the vertical and produces oil or gas from under the surface of another landowner, that is a trespass for which the adjacent owner is entitled to damages, an accounting and injunction."). Why might it be acceptable to use a well on your land to draw the oil from under your neighbor's land, but not to drill the bottom of your well under the surface owned by your neighbor to extract the very same oil?

55. **Subject Matter Redux.** Mr. Greer's primary concern appears to be whether oil and gas in place (i.e., prior to extraction) are "property." Given our discussion in the previous chapter on the Subject Matter of Property, what do you think? Has he convinced you that, until extracted, oil and gas are not the "property" of the owner of the land in which they are embedded?

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* THERE WILL BE BLOOD (Paramount Vantage/Miramax Films 2007).

56. **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:

Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, http://www.loc.gov/pictures/resource/pan.6a17401/

This 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? Based on Mr. Greer's article, 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 the law of fugitive resources be playing a role?

57. **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:*

> "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 may refrain from an activity that would confer large benefits on many people at only moderate cost to myself. The trouble is that I have no *incentive* to weigh the cost of your dying crops, your starving animals, or your dried-up well.

The economist's solution to this problem is to *internalize the externalities* that result from resource use. That is, to find some way to make the effects of a person's actions hit that person in the pocketbook, for good or for ill. One way to internalize the externalities that generate the tragedy of the commons is to convert the commons to private ownership. Knowing that pasturing too many animals today would leave nothing for his animals to eat tomorrow, a rational *owner* of the pasture would calibrate the number of animals he keeps to maximize their number today while ensuring a stable supply of fodder into the future. Indeed, Professor Harold Demsetz famously argued that property rights arise precisely when the benefits of exploiting a scarce resource have increased in value (due to increasing demand or decreasing supply) to the point where the right to control that value would be a sufficient incentive to undertake the costs of responsibly managing the resource (i.e., where an owner would be willing to internalize the externalities of using the resource). *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

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

58. **The Comedy of the Commons.** Beyond these practical questions of allocation, we might question whether the absence of property rights over a scarce resource necessarily results in tragedy. Some resources, in particular societies, under particular conditions, may have characteristics of a "comic" commons—characteristics that militate *against* private property rights. *See generally, e.g.*, Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). 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 gone towards showing how commons-based resource management can actually work surprisingly well in contexts as diverse as Swiss mountain farms, Filipino irrigation canals, and Turkish fisheries. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS (1990).

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 common 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?

8. Property Torts and Crimes

A. Real Property

The name of the most familiar tort protecting real property, **trespass**, was originally the name of an entire family of actions that first emerged in the 12th and 13th centuries. A plaintiff would commence his case by going to the royal Chancery and purchasing a writ commanding the defendant to come before the courts and explain why he had done such-and-such a thing against the plaintiff's rights. The Latin phrases used by the Chancery clerks who filled out the writs – and which the royal courts insisted on when hearing a case – came to define individual forms of action.

One of the earliest such formulaic phrases, and one with one of the longest careers in the common law, was trespass *quare clausum fregit* (literally, "why he broke the close," and often abbreviated to "trespass q.c.f."). The gist of the action was that the defendant, wrongfully, with force and arms (in Latin, *vi et armis*) and against the King's peace, had broken into the plaintiff's enclosed lands and caused injury. As in a trespass action for intentional battery, a plaintiff bringing an action for trespass q.c.f. could obtain money damages to the extent of his injuries. Trespass q.c.f. was the natural cause of action for damaging the plaintiff's crops or destroying his buildings.

Another early formula, trespass *de ejectione firmae* (literally, "of ejection from his term," and often simply "**ejectment**"), protected a lessee against being wrongfully evicted from his lands by an intruder. To the extent that the medieval legal mind made such a distinction, ejectment protected not against injury as such but against disposession; by the sixteenth century, the common-law courts would put a victorious plaintiff back in posession. This development made ejectment a potentially attractive way to litigate competing claims to land – in modern terms, to "try title." Among other things, ejectment (like the other trespass writs) led to a trial before a jury; a defendant sued under an older "writ of right" could elect trial by battle. There was only one problem: ejectment was only available to lessees. The result was one of the great legal fictions of the common law: the fictitious lessee.

> When two parties wished to try the title to a piece of land, one of them leased it to an imaginary person (John Doe) and the other similarly leased to another

> (William Styles). One lessee ejects the other (this will be all fiction), and in order to try the rights of the lessees the court has to enter into the question of the rights of the lessors.

THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 374 (5th ed. 1956). This fictional use of ejectment crossed the Atlantic and survived in the captions of famous cases like *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1823) and *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). There were no actual lessees in these cases; they were simply fictitious parties required by the formula of ejectment.

Today, the distinctions between trespass (q.c.f.) and ejectment are far less significant but not gone entirely. Courts can generally reach any legal issues necessary to resolve a case, regardless of the plaintiff's initial choice of cause of action, and they have far more freedom to select appropriate legal and equitable remedies, such as money damages for injuries to land or lost income from being out of possession, injunctions to order a defendant to cease trespassing or execute a conveyance to the plaintiff, or declaratory judgments about the state of title.

One remaining hole in the common-law system was that both trespass and ejectment required some interference with possession, but there are many cases of disputed title in which the parties are civilized enough not to be constantly elbowing each other off the land. The action to **quiet title** provides a remedy here; it is brought by a plaintiff objecting that another's claims amount to a "cloud" on her title. Other claimants must either defend and prove their competing title or be estopped from asserting them. Quiet title, for example, is typically the appropriate cause of action to establish that one has acquired title to land through adverse possession, or that an easement has been abandoned through non-use, or that a deed sitting in the land records is void as a forgery. Although frequently quiet title actions are brought *in personam* against specific claimants, state statutes can authorize *in rem* quiet title actions that extinguish the rights of all parties, known and unknown, unless they appear to defend their claims. *See Arndt v. Griggs*, 134 U.S. 316, 327 (1890) ("[A] State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication … ."). Particularly in view of the long-standing "situs rule" giving state courts exclusive

jurisdiction over land located within their states, the *in rem* quiet title action probably survives the Supreme Court's 20th-century Due Process revolution.

Originally, the assize of **nuisance** protected plaintiffs' rights to use land they did not themselves own (such as a right to pasture cows on another's land, much like a modern easement) or to be free from some specific harms caused by a neighbor (such as straying cows). In the fourteenth century, plaintiffs began to be able to use writs of trespass to allege a nuisance without needing to plead that the defendant had acted *vi et armis*, and this new formula developed into a general action for what we would today recognize as nuisnaces: unreasonable interferences with the use and enjoyment of land. (Nuisance was thus an "action on the case"; it belonged to the same branch of non-forcible trespasses as the one from which the modern tort of negligence developed.) In keeping with its origins in actions "on the case," nuisance has become an extremely versatile cause of action, encompassing a variety of injuries to interests in real property and a variety of potential remedies for those injuries.

Trespass is also a crime, but it is a surprisingly mild one. Vermont's basic trespass offense is typical:

> A person shall be imprisoned for not more than three months or fined not more than $500.00, or both, if, without legal authority or the consent of the person in lawful possession, he or she enters or remains on any land or in any place as to which notice against trespass is given by:
>
> > (A) actual communication by the person in lawful possession or his or her agent or by a law enforcement officer acting on behalf of such person or his or her agent;
> > (B) signs or placards so designed and situated as to give reasonable notice …

VT. STAT. tit. 13, § 3705. Many states' laws contain exceptions relaxing the notice requirement in specified cases where the lack of permission ought to be obvious in context. *See, e.g.,* MD. CODE ANN., CRIM. LAW § 6-408 (making trespass a crime even without specific notice not to enter if the trespass is committed "for the purpose of invading the privacy of an occupant of a building or enclosure located on the property by looking into a window, door, or other opening.").

Given the harshness of civil trespass remedies, as in *Jacque*, what explains the leniency of criminal trespass law? In many states, this mild baseline is supplemented with more severe penalties for certain sorts of trespasses. New York, for example, treats criminal trespass (ordinarily a violation) as a class B misdemeanor when it involves entry onto fenced land, a school or children's overnight camp, a public housing project, or a railroad yard. N.Y. PENAL L. § 140.10. Are these principled attempts to distinguish among trespasses, or special favors for particular landowners?

B. Personal Property

One of the early variants of writs for forcible trespasses, trespass *de bonis asportatis* (literally, "of taking away goods," and often abbreviated to "trespass d.b.a") was available when the defendant carried away the plaintiff's property, and its remedy was damages. But beyond this simple core, the personal property actions were a confused mess that defies easy description and took many centuries to clean up. The hard part was to determine just what kinds of facts ought to entitle a plaintiff to recover when he could not allege a taking from his possession, perhaps because he had voluntarily parted with possession (e.g. in a bailment) or perhaps because the defendant had not taken them (e.g. for found property).

One approach was the older writ of detinue, which was available against a bailee who "detained" the goods from the plaintiff. The courts extended detinue so that it ran against other parties (at first the executor of the estate of a deceased bailee, and then anyone) as long as there had been an initial bailment. But since a defendant could defeat detinue by disproving the allegations in the writ, detinue was really only safe when the plaintiff could trace with confidence the chain from his hands to the defendant's. As a result, detinue "on a bailment" was gradually supplanted by detinue "*sur trover*" (literally, "upon finding"): the plaintiff alleged that he had lost the property and the defendant had found it but refused to return it. The defendant could show that he had the property rightfully (e.g. through a sale tracing back to the plaintiff), but otherwise "lost and found" was a conveniently broad formula that could cover actual cases of missing property, bailments gone wrong, and even cases of suspected theft. All the plaintiff needed to show was that the property was his and that the defendant now had it. Even so, detinue in its trover variation still was frequently unsatisfactory:

> A *praecipe* action [the general name of a category of writs including detinue] was barred by performance, even imperfect performance, and so in detinue damages could not be awarded if the goods were restored. The bailee who starved a horse to death, or who rode it further than agreed, or who returned other goods in a damaged state, was not liable in detinue. The plaintiff in detinue could not count on a bailment or loss of the thing demanded if it was no longer the same thing as he had bailed or lost, as where it had been made part of something else or fashioned into something new. And on the same principle, it was arguable that he could not allege a detaining of something which no longer existed at all.

J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 394 (4th ed. 2007).

The solution lay, yet again, in trespass. The road to reform is paved with legal fictions. The royal courts had no difficulty treating outright theft as satisfying the requirement of trespass d.b.a that the taking be forcible. But plaintiffs soon started pleading claims of trespass d.b.a for injuries to horses against defendants named Smith, and claims for the forcible chopping up of lumber against defendants described as carpenters. These were garden-variety contract actions (for defectively shoeing a horse or for botching a construction job) – or would have been, if the common law had had an effective form of action for breach of contract. It didn't, and so plaintiffs who could stretched the facts to fit within trespass d.b.a. The royal courts solved this particular problem around 1350 by abandoning the need to plead *vi et armis* in trespass, as long as the plaintiff could set forth in more detail the special facts entitling him to recover. This was the origin of actions on the case, mentioned above; it had the effect of kickstarting a burst of creative experimentation with new variation of trespass.

One approach, reflecting bailments' place on the border between property and contract, was to plead that the defendant had negligently or deceitfully violated a promise to keep the goods safe. Another was to plead that a bailee had intentionally converted goods to his own use – as with a bailee who drinks a bottle of wine or spends the silver coins in a strongbox. This latter idea had staying power; by the 16th century, trespass on the case for conversion was regularly used against bailees. Then history repeated itself: just as detinue was extended from bailees to third parties by alleging the fictitious finding called trover, so was conversion. A plaintiff could even plead that he had "lost" his ship and that the defendant had "found" it in London.

The final stage in conversion's triumph was to treat a wrongful withholding itself – the old "detinue" – as a form of conversion to the defendant's own use. And with that, the modern tort of **conversion** or **trover** took shape: the plaintiff claimed that the property was his and that the defendant had treated it as his own. The defendant might still have the property, or might not; the property might still exist, or it might have been destroyed; what mattered was the defendant's use in a manner inconsistent with the plaintiff's ownership resulting in the plaintiff's dispossession. As the Restatement puts it, "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." RESTATEMENT (SECOND) OF TORTS § 222A (1965).

What if the defendant merely damages the plaintiff's property, or interferes with its use, but stops short of converting it – as by breaking the headlights on the plaintiff's car, or taking it for a forty-eight-hour joyride? Conversion traditionally did not quite work here; instead the plaintiff's remedy lay in **trespass to chattels**, which evolved from the original action for trespass d.b.a. Its use in a case of forcible misuse (like smashing headlights or temporary taking) was straightforward enough. Over time, courts extended its use to other cases involving indirect or non-forcible harms. But unlike with trespass to land – which as *Jacque* shows is actionable even without harm to the property – the Restatement says that trespass to chattels requires that the defendant deprive the plaintiff of possession, impair the value of the property, or deprive the plaintiff of its use. RESTATEMENT (SECOND) OF TORTS § 218. *See also Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003) (no trespass to chattels for sending emails addressed to Intel employees to Intel computers over Intel's objections).

A final member of the property torts family is **replevin**. Initially, it was a purely feudal form of action. If a tenant failed to perform the feudal services due to his lord, the lord could "distrain" the tenant's personal property by taking possession of it. The tenant's remedy for a wrongful distraint was replevin: by posting a bond of twice the value of the property, the tenant was entitled to possession immediately while the suit over the underlying dispute proceeded. As the feudal character dropped out of the landlord-tenant relationship, replevin became a general-purpose action to recover possession of property wrongfully withheld. Its immediate-recovery remedy made it attractive to plaintiffs who just wanted their stuff back, particularly in the United

States. ("Mattie Ross: The saddle is not for sale. I will keep it. Lawyer Dagget will prove ownership of the gray horse. He will come after you with a writ of replevin." TRUE GRIT (Paramount Pictures 2010)). Today in some states it remains at least the name of the action to recover possession, although it has often been superseded by procedures to recover possession in state civil procedure codes.

The Major Common-Law Property Torts: A Summary

		Preferred Remedy		
		Damages	Possession	Declaration of Rights
Type of Property	Real Property	Trespass	Ejectment	Quiet Title
	Chattels	Conversion (or Trover); Trespass to Chattels	Replevin	

Criminal law also protects personal property ownership and possession. The menu of common-law personal property crimes bore the same confused stamp of history as the menu of personal property torts. Larceny required a felonious carrying away from possession; over time, both the carrying away and the possession became thin shadows of their former selves, but not quite fictional. Larceny by trick, at least in theory, plugged the gap for owners who parted with possession voluntarily under the influence of fraudsters' lies; embezzlement covered faithless bailees and employees who abused their positions of trust to steal from the cash register, literally or metaphorically. Robbery was theft achieved by a threat of violence. Looking back on the fine distinctions courts contrived to distinguish these various crimes (e.g., in *Bazely's Case*, (1799) 168 Eng. Rep. 517 (Cent. Cr. Ct.), the court held it was embezzlement for a teller to put money in a bank drawer and then put it in his pocket, but not embezzelement for the teller to put the money in his pocket directly), it is hard not to concur with historian S.F.C. Milsom's assessment: "The miserable history of crime in England can shortly be told. Nothing worth-while was created." S.F.C. MILSOM, HISTORICAN FOUNDATIONS OF THE COMMON LAW 353 (1969). Many states, influenced by the Model Penal Code, have tried to reform their theft statutes

to create a single, integrated law of theft. *See generally* STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 4 (2012) (arguing that "theft law reformers threw out the baby with the bathwater"). But hard problems remain, such as defining the kinds of property that can be "stolen" at all – e.g., is it theft to sneak into a movie without paying or to download that movie on BitTorrent, or is "theft" simply the wrong word to describe conduct that deprives no one else of their possession and enjoyment?

9. Found and Stolen Property

Finders keepers, losers weepers?

Armory v. Delamirie

(1722) 1 Strange 505, 93 Eng. Rep. 664 (K.B.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Notes and Questions

1. One way of describing the holding of *Armory* is that it sets out the rights of finders. Suppose that the "rightful owner" of the jewel, Lord Hobnob, had shown up in the shop while the chimney-sweep and the apprentice were arguing over the jewel. Who would have been entitled to the jewel? If the

chimney-sweep is not the "rightful owner," why does he still win the case? What kind of interest does he have in the jewel?

2. A second way of describing of describing the holding of *Armory* is that it illustrates "relativity of title." As between the plaintiff and the defendant, the party with the relatively better claim to title wins, even if their title is in some sense defective in an absolute sense. Relativity of title is intimately connected to the idea of "chains of title": competing claimants to a piece of property each do their best to trace their claims back to a rightful source. What is the source of the chimney-sweep's claim to the jewel? And the jeweler's? Does this explain the outcome of the case? What result if the jeweler had proven that he had signed a contract to purchase the jewel from Lord Hobnob but that Lord Hobnob had lost the jewel before delivering it?

3. A third way of describing the holding of *Armory* is that it rejects the jeweler's attempt to assert a *jus tertii* (Latin for "right of a third party") defense. The defendant cannot defeat the plaintiff's otherwise-valid claim to the jewel by arguing that a third party – Lord Hobnob – has an even better claim. Put differently, we might say that "as against a wrongdoer, possession is title." *Jeffries v. Great W. Ry. Co.*, (1856) 119 Eng. Rep. 680, 681 (Q.B.). Does this narrowing of focus to the parties before the court make sense?

   Here is one way to think about it. Suppose that Lord Hobnob shows up in court while *Armory* is being argued and explains that the jewel slipped from his finger while he was strolling in Lincoln's Inn Fields. Who is entitled to the jewel? What if Lord Hobnob shows up and explains that he tossed the jewel aside in the mud, saying "I have become tired of this bauble; it bores me and I no longer wish to have it." What if he explains that he handed it to the chimney-sweep, saying "I wish you to have this jewel; may it serve you better than it has me." But recall that in the actual case, Lord Hobnob was nowhere to be found; no one even knew his identity. Does it matter to the outcome of *Armory v. Delamirie* how the jewel passed from Lord Hobnob's hands to the chimney-sweep's?

If you are still not convinced, consider this. If the jeweler could set up Lord Hobnob's title to show that the chimney-sweep's title was defective, would the chimney-sweep be entitled to present evidence that Lord Hobnob's title was defective, say because Lord Hobnob stole the jewel from a visiting Frenchman in 1693? Cutting off inquiry into third parties' claims also helps cut off inquiry into old claims. Can you see why this might be an appealing choice for a system of property law?

4. We are not quite done with Lord Hobnob. Consider the remedy the plaintiff obtains: an award of the value of the jewel, rather than the jewel itself. This is in effect a forced sale of the jewel, which the defendant can keep after paying the plaintiff's damage award. *Now* who owns the jewel? What if Lord Hobnob shows up now? Can he also bring trover, and if so, will the jeweler be forced to pay out a second time? In fact, why is Paul de Lamerie, the goldsmith whose name the court mangles, on the hook for his apprentice's wrongdoing? What if the apprentice pocketed the jewel and never turned it over to the master?

5. About that damage award. Why is the jury instructed to presume that the jewel was "of the finest water?" (i.e. highest quality)?

Other Variations on *Armory*

Just how far does the holding of *Armory v. Delamirie* ("That the finder of [property], though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner") go? Consider three nineteenth-century cases about lost lumber. Are they required by *Armory*? Consistent with *Armory*? Consistent with each other? Which is most persuasive?

In *Clark v. Maloney*, 3 Del. 68 (1840), the plaintiff found ten logs floating in a bay after a storm. He tied them up in the mouth of a creek, but they (apparently) got free again and the defendants (apparently) found them floating up the creek. *Held*, the plaintiffs were entitled to the logs:

> Possession is certainly prima facie evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner*. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

In *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), the defendants took ninety-three logs from the plaintiff's mill. The defendants claimed that the plaintiff had cut the logs on their land, but the plaintiff replied (and a jury agreed) that he had actually cut the logs by trespassing on the land of a third party. *Held*: the plaintiff was entitled to the logs:

> Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood,

> this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Anderson states what is overwhelmingly the majority rule. Seven years after *Anderson*, North Carolina took the opposite course. In *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), two different people held what appeared to be state grants to the same tract of land, and the plaintiff cut timber on the land with the wrong one's permission. While the logs were floating in a river, the defendants – unconnected with either of the purported landowners – took them away and sold them. *Held*: the defendants were entitled to the logs (internal quotation marks omitted):

> In some of the English books, and in some of the Reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Armory v. Delamirie*. There a chimney sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner, because of having it in possession, unless the true owner should become known. That owner was not known, and it was properly decided that trover would lie in favor of the finder against the defendant, to whom he had handed it for inspection, and who refused to restore it. But the court said the case would have been very different if the owner had been known.

Is this an accurate reading of *Armory*? The court also expressed concern about the defendant's potential liability to the true owner:

> It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession. … But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property;

> for the real owner may forthwith bring trover against the defendant, and force him to pay the value the second time, and the fact that he paid it in a former suit would be no defense. Consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant.

Is the fear of double liability sufficient reason to allow the defendant to escape liability entirely? Based on a review of the court records in the case, John V. Orth writes that the true owner in *Russell v. Hill* was "no bodiless abstraction but had in fact a name and identity: [Fabius Haywood] Busbee, one of the state's leading lawyers, a man well known to every member of the supreme court that decided the case." John V. Orth, Russell v. Hill *(N.C. 1899): Misunderstood Lessons*, 73 N.C. L. REV. 2031, 2034 (1995). Does this help explain *Russell*?

Professor Orth, arguing for a middle ground between *Anderson* and *Russell*, argues that *Armory* should protect only prior possessors who took the property in good faith: "A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell,* in other words, deserved a new trial at which to show, not his title, but his *bona fides*" *Id.* at 2060. Is this a better rule?

McAvoy v. Medina

93 Mass. (11 Allen) 548 (1866)

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

[I]t appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a

transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. …

DEWEY, J.

It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State,* 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Notes and Questions

1. In *Lawrence v. State*, on which *McAvoy* relies, the customer did come back for his lost pocketbook containing $480 in bank notes, which he had left on a table while the barber went out to make change. To quote the court: "The barber left the shop to get the bill changed, and, a fight occurring in the streets, the [customer's] attention was arrested thereat and he left the shop, his pocket-book lying on the table." When he returned, the barber "denied all knowledge of the pocket-book" but then "expended [the bank notes] in the purchase of confections, etc." A criminal prosecution for grand larceny followed, and the barber argued that the pocketbook had been lost because larceny only applies when the defendant takes property from the possession of the victim. The court held that because the pocketbook on a table was merely **mislaid**, rather than "lost," it was still within the customer's "constructive possession." First of all, is this plausible? And second, is this a good fit for the facts of *McAvoy*?

2. By way of contrast, in *Bridges v. Hawkesworth*, which *McAvoy* distinguishes, the plaintiff found a small parcel on the floor of the defendant's shop and immediately showed it to the defendant's employee. The parcel contained bank notes; the plaintiff "requested the defendant to deliver them to the owner." Three years later, with no owner having returned, the court held the plaintiff as finder was entitled to the notes. "If the notes had been accidentally kicked into the street, and then found by someone passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been dropped in his shop? … Certainly not. The notes were never in the custody of the defendant, nor within the protection of his house before they were found, as they would have had they been intentionally deposited there, and the defendant has come under no responsibility." First, what do you make of the *Bridges* court's argument that the shopkeeper's entitlement to the notes should turn on whether he would have been held responsible to the true owner for losing them? And second, is this any better a fit for the facts of *McAvoy*?

3. What do you make of the argument that awarding the pocket-book to the shopkeeper is "one better adapted to secure the rights of the true owner?"

4. In addition to lost and mislaid property, there is also abandoned property: property which the owner has voluntarily relinquished with no intent to reclaim. Since abandoned property is again unowned, the usual rules of first possession apply. (As you have seen, these rules themselves are not as simple as "first possessor wins."). How easy is it to tell the three apart? Why?

5. In *Benjamin v. Lindner Aviation*, 534 N.W.2d 400 (Iowa 1995) in which an airplane inspector found $18,000 in cash inside the wing of an airplane in 1992 while the plane was parked in his employer's hangar for maintenance. The money, which consisted primarily of $20 bills dating to the 1950s and 1960s, was in two four-inch packets wrapped in handkerchiefs and tied with string and then wrapped again in aluminum foil. The packets were inserted behind a panel on the underside of the plane's wing; the panel was secured with rusty screws that had not been removed in several years. The inspector, the employer, and the bank that owned the plane (after repossessing it from a prior owner who had defaulted on a loan) all made claims to the money. Was it lost, mislaid, or abandoned, and who was entitled to it?

6. Another category sometimes mentioned in the found-property caselaw is treasure trove: money, gold, or silver intentionally placed underground, which is found long enough later that it is likely the owner is dead or will never return for it. At common law in England, treasure trove belonged to the King. Most American states now treat treasure trove like any other found property. Is this a sensible rejection of an archaic and pointless quirk of the common-law, or was there something to the doctrine?

7. In *Hannah v. Peel*, [1945] K.B. 509, the British government requisitioned Gwernhaylod House in 1940 for use during World War II and paid the owner, Major Hugh Edward Ethelston Peel £250 per year. The house had been conveyed to Major Peel in 1938 but it was unoccupied from then until when it was requisitioned. Duncan Hannah, a lance-corporal with the Royal Artillery, was stationed in the house and was adjusting a blackout curtain in August

1940 when he found something loose in a crevice on top of the window-frame. It turned out to be a brooch covered in cobwebs and dirt; he informed his commanding officer and then turned it over to the police. Two years later, the police gave it to Major Peel, who sold it for £66. Lance-Corporal Hannah sued and was awarded the value of the brooch. The court discussed numerous cases, including *Bridges v. Hawkesworth* and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, which awarded two rings found by a workman embedded in the mud at the bottom of a pool to the company that owned the land. From them, it extracted a rule that "a man possesses everything which is attached to or under his land." Since Major Peel "was never physically in possession of these premises" and hence had no "prior possession" of the brooch, Lance-Corporal Hannah was entitled to it as a finder. Is this possession-based approach a better way of analyzing found-property cases than the categorical lost-vs-mislaid American approach exemplified by *McAvoy*? Or is *Hannah* an oddball outlier driven by the court's desire to do right by a wartime serviceman "whose conduct was commendable and meritorious," especially as against an absentee landlord from the local gentry?

10. Adverse Possession

Few doctrines taught in the first year of law school make a worse first impression than adverse possession. Adverse possession enables a non-owner to gain title to land (or personal property, but we will focus here on land) after the expiration of the statute of limitations for the owner to recover possession. That sounds bad, and the thought of "squatters" becoming owners gets its share of bad press. But historically the doctrine has performed, and continues to serve, important functions.

The basic requirements, if not their wording and application, are common from state to state. As one treatise summarizes, an adverse possessor must prove possession that is:

> (1) hostile (perhaps under a claim of right);
>
> (2) exclusive;
>
> (3) open and notorious;
>
> (4) actual; and
>
> (5) continuous for the requisite statutory period.

16 POWELL ON REAL PROPERTY § 91.01. States routinely add to the list. California law, for example, requires that

> the claimant must prove: (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.

Main St. Plaza v. Cartwright & Main, LLC, 124 Cal. Rptr. 3d 170, 178 (Cal. App. 2011) (citations and quotations omitted).

A. Adverse Possession Rationales

But why allow adverse possession? One court summarized the doctrine's history and purposes as follows:

> … a brief history of adverse possession may be of assistance. After first using an amalgamation of Roman and Germanic doctrine, our English predecessors in common law later settled upon statutes of limitation to effect adverse possession. See Axel Teisen, *Contributions of the Comparative Law Bureau*, 3 A.B.A. J. 97, 126, 127, 134 (1917). In practice, the statutes eliminated a rightful owner's ability to regain possession after the passing of a certain number of years, thereby vesting de facto title in the adverse possessor. For example, a 1623 statute of King James I restricted the right of entry to recover possession of land to a period of twenty years. Essentially, in England, the "[o]riginal policy supporting the development of adverse possession reflected society's unwillingness to take away a 'right' which an adverse possessor thought he had. Similarly, society felt the loss of an unknown right by the title owner was minimal." William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 83 (1996).…
>
> In the United States, although the 1623 statute of King James I "came some years after the settling of Jamestown (the usual date fixed as the crystalizing of the common law in America), its fiat is generally accepted as [our] common law. Hence 'adverse possession' for 20 years under the common law in this country passes title to the adverse possessor with certain stated qualifications." 10 *Thompson on Real Property* § 87.01 at 75. Today, all fifty states have some statutory form of adverse possession ….
>
> ….Courts and commentators generally ascribe to "four traditional justifications or clusters of justifications which support transferring the entitlement to the [adverse possessor] after the statute of limitations runs: the problem of lost evidence, the desirability of quieting titles, the interest in

discouraging sleeping owners, and the reliance interests of [adverse possessors] and interested third persons." Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. Rev. 1122, 1133 (1984). Effectively, our society has made a policy determination that "all things should be used according to their nature and purpose" and when an individual uses and preserves property "for a certain length of time, [he] has done a work beneficial to the community." Teisen, 3 A.B.A. J. at 127. For his efforts, "his reward is the conferring upon him of the title to the thing used." Id. Esteemed jurist Oliver Wendell Holmes, Jr. went a step further than Teisen, basing our society's tolerance of adverse possession on the ideal that "[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1016 (10th Cir. 2004) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897)).

Regardless of how deeply the doctrine is engrained in our history, however, courts have questioned "whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society." *Finley*, 160 Cal. Rptr. at 427. Commentators have also opined that, along with the articulated benefits of adverse possession, numerous disadvantages exist including the "infringement of a landowner's rights, a decrease in value of the servient estate, and the encouraged [over]exploitation and [over]development of land. In addition, they … [include] the generation of animosity between neighbors, a source of damages to land or loss of land ownership, and the creation of uncertainty for the landowner."* Ackerman, 31 Land & Water L. Rev. at 92. In reality, "[a]dverse possession '[i]s nothing more than a person taking someone else's private property for his own private use.' It is hard to imagine a notion more in contravention of the ideals set forth in the U.S. Constitution

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* [*Eds.*—The modifications to the quotation from Ackerman are ours, not the court's.]

> protecting life, liberty and property." Ackerman, 31 Land & Water L. Rev. at 94-95 (quoting 2 C.J.S. Adverse Possession § 2 (1972)).
>
> Although this Court duly recognizes its role as the judicial arm of government tasked with applying the law, rather than making law, it is not without an eyebrow raised at the ancient roots and arcane rationale of adverse possession that we apply the doctrine to this modern property dispute.

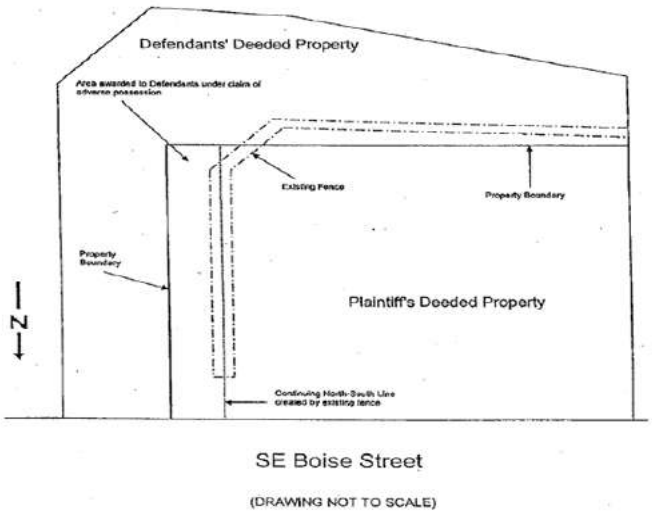
Cahill v. Morrow, 11 A.3d 82, 86-88 (R.I. 2011). Do you share the court's skepticism? Consider the rationales discussed above against the following case.

Tieu v. Morgan

265 P.3d 98 (Ore. App. 2011)

HADLOCK, J.

The parties dispute ownership of a strip of land that runs parallel to defendants' driveway. Plaintiff, who owns residential property adjoining that strip of land, filed suit seeking (1) a declaration that he owns the disputed strip and (2) an injunction prohibiting defendants from trespassing on that property. Defendants counterclaimed, asserting that they acquired the disputed strip through adverse possession, and subsequently moved for summary judgment on that counterclaim. The trial court granted defendants' motion and entered a judgment declaring that defendants had acquired the strip through adverse possession. Plaintiff appeals, and we affirm.…



The two parcels subject to this appeal are adjoining residential tax lots in a Portland subdivision. Tax lot 3100 is rectangular, with its north side fronting Southeast Boise Street. Tax lot 3200 is a flag lot that is situated largely south of lot 3100; its driveway (the "flagpole") runs north from the main portion of the lot (the "flag") to Southeast Boise Street, parallel to the eastern edge of lot 3100. The disputed three-foot-wide strip lies between lot 3200's driveway and lot 3100. Defendants own lot 3200. Plaintiff owns lot 3100 and also is the record owner of the disputed strip.

A north-south stretch of fence on plaintiff's property runs along the western boundary of the disputed strip, parallel to defendants' driveway. The fence starts roughly halfway down the driveway from Southeast Boise Street, running south, then turns 45 degrees to the southwest, cutting off the southeast corner of lot 3100, then makes another 45-degree turn before continuing west, roughly following the east-west boundary between lots 3100 and 3200. The diagonal portion of the fence that cuts the corner of lot 3100 includes a gate wide enough to accommodate a boat trailer. As noted, the disputed three-foot-wide strip lies between defendants' driveway and the north-south fence on lot 3100; its practical effect is to widen the "flagpole" portion of lot 3200.

The fencing that separates the two properties has existed for decades. As of 1984, the two lots were owned by Robert Stevens, who installed most of the fencing that year, including about half of the north-south stretch located west of lot 3200's driveway. In 1994, Robert Stevens sold lot 3200 to his son, James Stevens, believing that the deed

he conveyed to James included all property on the east side of a north-south line defined by that portion of the fence, *i.e.*, the disputed strip. Although he never specifically discussed the issue with his father, James also believed that his purchase of the flag lot included the disputed strip along his driveway. James explained that he had "no reason to know—to think [that the fence] would be in the wrong location."

During the four years that James owned the flag lot, he granted Robert permission to occasionally use James's driveway and the disputed strip, so that Robert could drive a large vehicle and boat trailer through the diagonal gate into Robert's back yard. In 1996, James installed a sewer line in the center of the disputed strip, running all the way from Southeast Boise Street to the house on lot 3200. When James later put lot 3200 on the market, he advertised it as having a "fully fenced yard," based on his belief that his ownership included the disputed strip.

James sold lot 3200 to defendants in 1998. The lot was not surveyed in conjunction with that sale; nor did the parties to the sale discuss the lot's recorded boundaries, review paperwork or maps, or perform any investigation specifically related to that subject.

Defendants have made use of the disputed strip since they purchased lot 3200. Defendant Francine Morgan runs a daycare business from her home, and parents regularly use the disputed strip when dropping off and picking up their children. In 1999, defendants extended the fence paralleling the strip north by roughly 40 feet, choosing not to extend the fence all the way to Southeast Boise Street after Robert suggested that they leave that area unfenced to accommodate maneuvering large vehicles in and out of their driveways. Defendants have laid gravel and bark dust on the disputed strip a number of times and have maintained the fence by replacing posts and fence boards. While Robert still owned lot 3100, he specifically asked defendants' permission each time he wanted to use the disputed strip to access or move his boat, and defendants granted that permission.

Plaintiff bought lot 3100 from Robert in early 2006. Before purchasing the property, plaintiff had it surveyed and learned that the north-south fence was not located on the deeded boundary between lots 3100 and 3200. A survey pin marking the recorded boundary was placed at that time. Plaintiff claims that he told defendant Francine Morgan soon after the survey was completed that he planned to move the fence to

the deeded property line within two years. According to plaintiff, Francine neither disputed plaintiff's right to move the fence nor claimed ownership of land between the survey marker and the fence. Defendants deny that such a conversation occurred.

In 2008, plaintiff attempted to remove the north-south portion of the fence. After defendants protested, plaintiff initiated this action, seeking a declaration that he owned the disputed strip. As noted, defendants asserted in a counterclaim that they had acquired the strip through adverse possession. The trial court ultimately granted summary judgment to defendants, ruling that the undisputed facts established that defendants had acquired the disputed strip through adverse possession.…

ORS 105.620 codifies the common-law elements of adverse possession, requiring a claimant to prove by clear and convincing evidence that the claimant or the claimant's predecessors in interest maintained actual, open, notorious, exclusive, hostile, and continuous possession of the property for ten years. In addition to those common-law elements, the statute also requires the claimant to have had an honest belief of actual ownership when he or she entered into possession of the property.

Plaintiff makes arguments related to each of the statutory elements, first claiming that defendants did not establish actual, open, notorious, exclusive, or continuous possession of the entire disputed strip. We recently summarized what proof is required to satisfy those elements of an adverse-possession claim:

> "The element of actual use is satisfied if a claimant established a use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited. To establish a use that is open and notorious, plaintiffs must prove that their possession is of such a character as to afford the owner the means of knowing it, and of the claim. The exclusivity of the use also depends on how a reasonable owner would or would not share the property with others in like circumstances. A use is continuous if it is constant and not intermittent. The required constancy of use, again, is determined by the kind of use that would be expected of such land."

Stiles v. Godsey, 233 Or. App. 119, 126, 225 P.3d 81 (2009) (internal quotations and citations omitted).

Here, the land in question is a three-foot-wide strip, covered mostly with gravel or bark dust, adjacent to a narrow driveway. Defendants and their predecessor have used the strip as an extension of that driveway since 1994, both to accommodate wide vehicles and to provide additional loading room for defendant Francine Morgan's daycare clients. That use is consistent with ownership and with the land's character. Moreover, that use was "open" and "notorious," particularly when considered together with James's act of locating his sewer line on the strip and, later, defendants' maintenance of and improvements to the fence. Finally, defendants and their predecessor used the strip continuously from 1994 (when James bought the lot) to at least 2006 (when plaintiff bought lot 3100 from Robert), *i.e.*, for longer than the statutory 10-year adverse-possession period. Thus, the undisputed facts establish defendants' actual, open, notorious, exclusive, and continuous use of the property.

Plaintiff's contrary argument rests on the fact that the disputed strip is not completely separated from his residential lot by a fence; he emphasizes that the fence at issue does not extend all the way to Southeast Boise Street, but starts partway down the driveway.… Here, even though the fence does not extend to the street, it adequately defines the entire disputed strip, indicating that it is separate from the land that abuts it to the west.

Plaintiff also contends that defendants' use of the disputed strip was not "exclusive" because Robert sometimes used the property even after the fence was built. But adverse-possession claimants are allowed the freedom to allow others to occasionally use their property, in the manner that neighbors are wont to do, without thereby abandoning their claim. In this case, Robert asked permission of defendants and their predecessors each time that he used the disputed strip; that permissive use was consistent with defendants' ownership of the land and does not defeat their claim to it.

We also reject plaintiff's argument that defendants' use of the disputed strip was not "hostile" because, he claims, defendants had a conscious doubt regarding the property line. Under ORS 105.620(2)(a), a claimant "maintains 'hostile possession' of property if the possession is under claim of right or with color of title." A "claim of right" may be established through proof of an honest but mistaken belief of ownership, resulting, for example, from a mistake as to the correct location of a

boundary. The mistaken belief must be a "pure" mistake, however, and not one based upon "conscious doubt" about the true boundary. Furthermore, ORS 105.620(1)(b) requires that the claimants (or their predecessors) have had an "honest belief" of actual ownership that (1) continued through the vesting period, (2) had an objective basis, and (3) was reasonable under the circumstances.

In *Mid-Valley Resources, Inc. v. Engelson*, 170 Ore App 255 (2000), we concluded that the defendants had failed to establish pure mistake about the location of a boundary line because one of the defendants had a conscious doubt on that subject. That *Mid-Valley* defendant had testified that she had not known where the property line was when she was a child, and she still did not know at the time of trial whether a particular fence was located on that boundary. That defendant's uncertainty about the property line's location defeated the defendants' adverse-possession claim.

Here, by contrast, the undisputed evidence clearly establishes that defendants and their predecessor, James, always believed that the fence marked the north-south line between lots 3200 and 3100. James assumed when he bought lot 3200 in 1994 that the fence was on the property line, and he perpetuated that belief in defendants by telling them, when they bought the property, that it was "fully fenced." Robert, then the record owner of the disputed strip, confirmed those mistaken beliefs when he did not object to installation of the sewer line, to defendants' use of the strip, or to defendants' extension of the fence. No evidence in the record supports plaintiff's assertion that defendants had a "conscious doubt" about whether the fence was actually located on the line separating their property from plaintiff's. Defendants did suggest in their depositions that they had not given much thought to the property line's location until the dispute arose with plaintiff. Read in context, however, those statements simply confirm defendants' *certainty* that the property line was the same as the fence line; the statements do not indicate that defendants had any conscious doubt as to the boundary's location.

Moreover, no evidence calls into question the reasonableness of defendants' belief that they owned the disputed strip. That strip of land is small in relation to the size of lots 3200 and 3100, it regularly has been used as an extension to the width of an existing driveway, it is well suited to that purpose, and it is partly fenced off from

plaintiff's property. Under the circumstances, defendants' belief that they owned the disputed strip was reasonable.

In sum, the undisputed evidence establishes clearly and convincingly that defendants and their predecessor, James, had an "honest belief" that the disputed strip was part of lot 3200 and that they continuously maintained actual, open, notorious, exclusive, and hostile possession of that strip for well over 10 years, from 1994 at least until plaintiff bought lot 3100 in 2006.[6] We conclude that defendants' adverse-possession claim to the disputed strip vested in 2004, giving them title and extinguishing any claim that plaintiff might otherwise have had to that land.

Notes and Questions

1. Does the result in *Tieu* jibe with the rationales for adverse possession recited in the note preceding it? Which ones? *Cahill* suggests that these rationales are less relevant today than in the past. Do you agree? Should the defendants in *Tieu* have been without recourse?

2. *Tieu* involves an error in a conveyance. The parties' predecessors in interest thought they had bargained to transfer land that they didn't. This is a common source of adverse possession litigation. Other recurring fact patterns include mistaken deed descriptions, surveying errors, and accidental encroachments by neighbors. Adverse possession claims may also follow the souring of relationships, perhaps between cotenants or one involving permissive land use. None of these cases necessarily involve bad faith actors; although the doctrine may indeed be applied in favor of the mere trespasser, depending on the jurisdiction's interpretation of the state of mind required to satisfy the "hostility" element. We will discuss this issue further below.

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[6] We reject plaintiff's argument that defendants cannot satisfy the 10-year adverse-possession period by tacking their possession to that of James. An adverse-possession claimant may tack his possessory interests to those of a predecessor "if there is evidence that the predecessor intended to transfer whatever adverse possessory rights he or she may have acquired." Fitts v. Case, 243 Ore App 543, 549, 267 P3d 160 (2011). Here, James clearly intended his transfer of lot 3200 to defendants to include the disputed strip, given his belief that the fence marked the boundary line and his advertisement of lot 3200 as "fully fenced."

3. Title based on adverse possession is as good as any. To think through the implications of that observation, imagine the following facts. Neighbor A mistakenly builds a fence on her neighbor's land and gains title to the enclosed land by adverse possession. Neighbor B then notices the encroachment and demands that A move the fence. She agrees, but changes her mind two years later and rebuilds it. B sues for trespass. Who wins?

4. **Open and notorious possession**. Whatever its merits, adverse possession is strong medicine. The doctrine therefore provides safeguards to prevent a title owner from losing her property without adequate notice by, for example, requiring that the possession be open and notorious—it has to be the kind of act that an owner would notice.

   But even overt acts may not be obvious threats to ownership rights. A fence on someone else's property certainly seems open and notorious, but what if it is just an inch or two over the border? What about the three-foot incursion at issue in *Tieu*? What if it had been built while the plaintiff was in occupation of his lot? Do we expect owners to commission surveys anytime a neighbor builds near the property line?

   For some courts, the answer is no. *Mannillo v. Gorski*, 255 A.2d 258, 264 (N.J. 1969), for example, holds that minor encroachments are not open and notorious without actual knowledge on the part of the title owner. But where would that leave an innocent encroacher, whose trespass may be costly to remedy? In *Mannillo*, the court balked at placing the trespasser, whose steps and concrete walk extended 15 inches into the plaintiffs' property, at her neighbor's mercy.

   > It is conceivable that the application of the foregoing rule may in some cases result in undue hardship to the adverse possessor who under an innocent and mistaken belief of title has undertaken an extensive improvement which to some extent encroaches on an adjoining property. In that event … equity may furnish relief. Then, if the innocent trespasser of a small portion of land adjoining a boundary line

> cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception. Of course, such a result should eventuate only under appropriate circumstances and where no serious damage would be done to the remaining land as, for instance, by rendering the balance of the parcel unusable or no longer capable of being built upon by reason of zoning or other restrictions.

Id.[*] Is this result—a forced transaction in which the innocent trespasser becomes the owner, but must pay—the best accommodation of the relevant

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[*] As *Manillo*'s resort to equity shows, adverse possession is not the only way to address boundary disputes. Other options include the equitable doctrine of acquiescence, *see, e.g.*, Hamlin v. Niedner, 955 A.2d 251, 254 (Me. 2008) ("To prove that title or a boundary line is established by acquiescence, a plaintiff must prove four elements by clear and convincing evidence: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years[.]"); the doctrine of agreed boundaries, Finley v. Yuba Cnty. Water Dist., 160 Cal. Rptr. 423, 428 (Cal. App. 1979); estoppel, *see, e.g.*, Douglas v. Rowland, 540 S.W.2d 252 (Tenn. App. 1976), and laches. *See generally* L. C. Warden, *Mandatory injunction to compel removal of encroachments by adjoining landowner*, 28 A.L.R.2d 679 (Originally published in 1953) (discussing factors influencing issuance of an injunction).

Laches raises a conceptual difficulty, as it seems to cover some of the same ground as adverse possession. Laches is an equitable defense analogous to the legal defense provided by a statute of limitations: if a plaintiff unreasonably delays in bringing suit and the defendant is prejudiced by the delay, laches will bar the suit as a matter of equity. But if an owner tries to recover land within the limitations period, doesn't that imply that there has been no unreasonable delay? Clanton v. Hathorn, 600 So. 2d 963, 966 (Miss. 1992) (observing that the adverse possession statute "would seem to occupy the field"); Kelly v. Valparaiso Realty Co., 197 So. 2d 35, 36 (Fla. Dist. Ct. App. 1967) (where adverse possession was unavilable due to failure to pay taxes on the land "we do not feel that equity can be invoked to circumvent the statutory law of adverse possession"); *see generally* 27A Am. Jur. 2d Equity § 163 ("Only rarely should laches bar a case before the statute of limitations has run."). *But see* Pufahl v. White, No. 2050-S, 2002 WL 31357850, at *1 (Del. Ch. Oct. 9, 2002) (although laches claim cannot lead to title, the "laches defense may, however, be applicable to the plaintiffs' request to enjoin the defendants to remove the encroachment").

interests? If the true owner wasn't on notice of the incursion, why can she be forced to surrender her land, even for payment?

5. **Adverse possession and the property owner**. State-to-state variation about whether encroachments need to be obvious may reflect a deeper question about the purpose of adverse possession. Some authorities view the doctrine as having an object of punishing inattentive owners who sleep on their rights. If so, then perhaps it makes sense to require an incursion to be sufficiently obvious that a property owner would not need to conduct a survey to determine the existence of a violation.

   But should sleeping owners be the target of the doctrine? Are property owners who fail to assert their rights also less likely to develop their property (or sell it to someone who will)? And if that is the underlying end, are there any problems with using adverse possession doctrine as a means to it?

6. **Adverse possession as reward**. The reciprocal view—that adverse possession exists to reward the possessors—has two flavors. One is externally focused. The possessor, by putting the land to productive use, "has done a work beneficial to the community." Axel Teisen, 3 A.B.A. J. 97, 127 (1917). The other is more internal:

   > A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another.

   Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 477 (1897). Do either of these views resonate? What does this rationale tell you about what the state of mind of the adverse possessor should be?

7. **Third-party interests.**

> The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (footnotes omitted). By providing stability to existing property arrangements after the passage of time, adverse possession simplifies transactions by relieving purchasers and mortgagees of the risk that they are dealing with title founded on a long-ago mistake or trespass. The doctrine is a healing mechanism that realigns possession and paperwork when they've gotten too badly out of sync. The benefit extends to the legal system as well by relieving courts of the need to delve into the details of long-forgotten events.

8. **Adverse possession's information function**. Adverse possession also enables rights that exist as a matter of custom (e.g., "the Smiths always farm that strip of land") to receive legal status. A banker in a distant city may not understand (or trust) allocations based on local understandings, but that doesn't matter if the claims are translated into recordable title.* The land may now serve as the object of a sale or collateral for a loan for an expanded audience, enhancing its value. Adverse possession's role in converting informal understandings into formal rights illustrates law's ability to facilitate the aggregation and dissemination of information across society. Can you think of others?

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* "Quiet title" suits perform this function. They are actions that establish the claimant's title to land and foreclose the ability of others to contest it. Although quiet title suits are not necessary to gain rights under adverse possession doctrine, they are very important to adverse possessors. Do you see why? If you cannot answer the question, ask yourself whether you would ever buy property from an adverse possessor.

9. **Tacking**. What happens if a series of possessors occupy a property, but none of them are present long enough for the limitations period to run? *Tieu* notes in passing the concept of tacking, which enables a succession of adverse possessors to collectively satisfy the statutory period. The usual approach is to allow tacking so long as the successive possessors are in "privity": a relationship in which the prior possessor knowingly and intentionally transfers whatever interest she holds to the subsequent possessor. *See, e.g.*, Stump v. Whibco, 715 A.2d 1006 (N.J. Super. Ct. App. 1998) ("Tacking is generally permitted "unless it is shown that the claimant's predecessor in title did not intend to convey the disputed parcel.") (citations and quotation omitted). So the clock continues to run if one possessor sells or leases the occupied land, but there is no privity if one trespasser wanders onto the lot after another leaves (or worse, dispossesses the earlier trespasser by force).

   Recall the question of whether adverse possession doctrine is more properly focused on rewarding deserving possessors or punishing inattentive owners. Does the U.S. approach to tacking shed light on our answer? The English view is to allow tacking without privity. *Cf.* James Ames, LECTURES ON LEGAL HISTORY 197 (1913) ("English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide . . . not that the adverse possessor shall acquire title, but that the one who neglects for a given time to assert his right shall thereafter not enforce it.").

10. **Adverse possession and the environment**. An underlying premise of the rationales discussed above is that land should be used. For an argument that this tilt makes adverse possession doctrine environmentally harmful, *see* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (arguing that "American adverse possession law is fundamentally hostile to the private preservation of wild lands" and proposing exemption to doctrine for privately held wild lands).

B. "Hostility" and Intent

Adverse possession requires possession that is "hostile" and, often, "under a claim of right." Hostility is not animosity. "Hostile possession can be understood as possession that is opposed and antagonistic to all other claims, and that conveys the clear message that the possessor intends to possess the land as his or her own." 16 POWELL ON REAL PROPERTY § 91.01[2]. The requirement thus prevents permissive occupancy from ripening into ownership; a lessor need not worry that the tenant will claim title by adverse possession. *See, e.g.*, Rise v. Steckel, 652 P.2d 364, 372 (1982) ("[T]he ten-year statutory period for adverse possession did not begin to run until defendant asserted to plaintiff that he was possessing the property in his own right, rather than as a tenant at sufferance."). A "claim of right," sometimes called claim of title,* means that the possessor is holding the property as an owner would. This could be seen as synonymous with the hostility requirement, but not all jurisdictions treat the concept this way. The Powell treatise states that the predominant view in the United States is that good faith is not required for adverse possession, 16 POWELL § 91.01[2], but as you may have already noticed in the *Tieu* case above, intent often matters.

Cahill v. Morrow
11 A.3d 82 (R.I. 2011)

INDEGLIA, J.

The property in dispute is located on Gooseberry Road in the Snug Harbor section of South Kingstown, Rhode Island. Identified as lot 19 on assessor's plat 88-1, the land is sandwiched between lot 20, currently owned by Cahill, and lot 18, formerly coowned by members of the Morrow family. Morrow is the record owner of the subject property, lot 19.

In 1969, Morrow's husband, George Morrow, purchased lot 19, and the same year George and his brothers jointly purchased lot 18. At the time of lot 19's purchase, it was largely undeveloped, marked only by a preexisting clothesline, grass, and trees.

* Which is not the same thing as "color of title," as discussed below.

Since that time, the Morrows have not improved or maintained lot 19, but have paid all property taxes assessed to it. As such, instead of vacationing on their lot 19, the Morrows annually spent two weeks in the summer at the cottages on the adjacent lot 18. During these vacations, the Morrow children and their cousins played on lot 19's grassy area. Around 1985, the Morrows ceased summering on Gooseberry Road,[3] but continued to return at least once a year to view the lot. Morrow stopped visiting lot 19 in October 2002, after her husband became ill, and she did not return again until July 2006.

In 1971, two years after George Morrow purchased lot 19, Cahill's mother bought the land and house designated as lot 20 as a summer residence. Between 1971 and 1975, Cahill and her brother did some work on lot 19. They occasionally cut the grass, placed furniture, and planted trees and flowers on it.

Cahill's mother passed away in 1975, and in 1977, after purchasing her siblings' shares, Cahill became the sole record owner of the lot 20 property. Once she became lot 20's owner, Cahill began living in the house year-round. From that time through 1991, she and her boyfriend, James M. Cronin, testified that they continued to mow lot 19's grass on occasion. In addition, she hung clothing on the clothesline, attached flags to the clothesline pole, used the picnic table, positioned a bird bath and feeder, and planted more flowers and trees. Cahill placed Adirondack chairs on lot 19 and eventually replaced the clothesline and picnic table. In 1987, Cahill held the first annual "cousins' party" allowing her relatives free rein with respect to her property and lot 19 for playing, sitting, and car parking. She also entertained friends and family on lot 19 during other summer days. Mary Frances McGinn, Cahill's cousin, likewise recalled that lot 19 was occupied by Cahill kindred during various family functions throughout this time period. Cahill admitted that she never objected to neighborhood children using lot 19, however.

During the period of 1991 through 1997, Cahill testified that she planted more flowers and trees, in addition to cutting the grass occasionally. Cahill also stored her gas grill and yard furniture on the lot and had her brother stack lobster pots for

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[3] In 1991, George Morrow and his joint-owner brothers sold lot 18.

decorative purposes. In 1991 or 1992, she began hosting the annual "Cane Berry Blossom Festival," another outdoor event that used both her lot and lot 19 as the party venue. Like the other gatherings, the festival always took place on a day during a warm-weather month. In 1997 or 1998, she installed a wooden border around the flower beds.

On July 22, 1997, Cahill wrote to George Morrow expressing an interest in obtaining title to lot 19. In the 1997 letter, Cahill stated: "I am interested in learning if your narrow strip of property is available for sale. If so, I would be interested in discussing purchasing it from you." Cahill continued: "If there is a possibility that you would like to sell it, could you please either call me or send me a note?" Cahill did not receive a response.

In the "late 1990s," though Cahill is unclear whether this occurred before or after the 1997 letter, a nearby marina sought permission to construct and elevate its property. Cahill attended the related zoning board hearings and expressed her concerns about increased flooding on lot 19 due to the marina elevation. She succeeded in having the marina developer grade part of lot 19 to alleviate flooding. Additionally, Cahill instituted her own trench and culvert drainage measures to divert water off of lot 19 and then reseeded the graded area. By Cahill's own admission, however, her trenching and reseeding work occurred in 1999 or 2000.

Subsequent to 2001, the new owners of lot 18[5] stored their boat on lot 19 and planted their own flowers and small trees on the property. In 2002, when the town (with approval from George Morrow) erected a stone wall and laid a sidewalk on the Gooseberry Road border of lot 19, Cahill loamed and planted grass on that portion of the lot. Also in 2002, Cahill asked Morrow's two sisters on separate occasions whether George Morrow would be interested in selling lot 19. The Morrows gave no response to her 2002 inquiries. In 2003, George Morrow passed away.

After making her third inquiry concerning the purchase of lot 19 in 2002, Cahill testified, she continued using the property in a fashion similar to her prior practice

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[5] In approximately 2001, new owners purchased lot 18 from the Morrow brothers' successor.

until December 2005, when she noticed heavy-machinery tire marks and test pits on the land. Thereafter, she retained counsel and authorized her attorney to send a letter on January 10, 2006 to Morrow indicating her adverse possession claim to a "20-foot strip of land on the northerly boundary" of lot 19. According to a survey of the disputed property, however, the width of lot 19 from the northerly boundary (adjacent to Cahill's property) to lot 18 is 49.97 feet and therefore, more than double what Cahill originally claimed in this letter. Nonetheless, on April 25, 2006, Cahill instituted a civil action requesting a declaration that based on her "uninterrupted, quiet, peaceful and actual seisin and possession" "for a period greater than 10 years," she was the true owner of lot 19 in its entirety. On July 25, 2007, the trial justice agreed that Cahill had proved adverse possession under G.L. 1956 § 34-7-1 and vested in her the fee simple title to lot 19.…

In Rhode Island, obtaining title by adverse possession requires actual, open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years.

Here, the trial justice recited the proper standard of proof for adverse possession and then found that Cahill had

> "met her burden of establishing all of the elements of an adverse possession claim to lot 19 by her and her mother's continuous and uninterrupted use of the parcel for well in excess of ten years. She maintained the property, planted and improved the property with shrubs, trees, and other plantings, sought drainage control measures, and used the property as if it were her own since 1971. She established that use not only by her own testimony, but as corroborated by other witnesses, photographs, and expert testimony relative to the interpretation of aerial photographs."

At trial, as here on appeal, Morrow argued that Cahill's offers to purchase the property invalidated her claim of right and the element of hostile possession. To dispose of that issue, the trial justice determined that "even assuming that [Cahill's] inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently Margaret [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." The trial justice relied upon our opinion in *Tavares*, 814 A.2d at 350, to support his conclusion. Recalling that this

Court stated in *Tavares* that "even when the claimants know they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim [of] right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period," the trial justice found that Cahill's outward acknowledgement of Morrow's record title did not alone "negate her claim of right." He further found that "even if somehow the expression of interest in purchasing lot 19, made initially in 1997, stopped the running of the ten[-]year period under * * * § 34-7-1, the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971."

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On appeal, Morrow challenges the trial justice's legal conclusion that Cahill's offers to purchase lot 19 did not extinguish her claim of right, hostile possession, and ultimately, the vesting of her title by adverse possession. Morrow also contends that the trial justice erred in finding that Cahill's testimonial and demonstrative evidence was sufficient to prove adverse possession under the clear and convincing burden of proof standard. We agree that as a matter of law the trial justice failed to consider the impact of Cahill's offers to purchase on the prior twenty-six years of her lot 19 use. As a result, we hold that this failure also affects his factual determinations.

1. 1997 Offer-to-Purchase Letter

In *Tavares*, this Court explained that "requir[ing] adverse possession under a claim of right is the same as requiring hostility, in that both terms simply indicate that the claimant is holding the property with an intent that is adverse to the interests of the true owner." *Tavares*, 814 A.2d at 351 (quoting 16 Powell on Real Property, § 91.05[1] at 91-28 (2000)). "Thus, [we said] a claim of right may be proven through evidence of open, visible acts or declarations, accompanied by use of the property in an objectively observable manner that is inconsistent with the rights of the record owner." Here, the first issue on appeal is how an offer to purchase has an impact on these elements.…

…[I]n *Tavares*, 814 A.2d at 351, with regard to "establishing hostility and possession under a claim of right," we explained that "the pertinent inquiry centers on the claimants' *objective manifestations* of adverse use rather than on the claimants' *knowledge*

that they lacked colorable legal title." (Emphases added.) Essentially, *Tavares* turned on the difference between the adverse possession claimant's "knowledge" regarding the owner's title and his "objective manifestations" thereof. In that case, the adverse-possession claimant surveyed his land and discovered "that he did not hold title to the parcels in question." After such enlightenment, however, the claimant objectively manifested his claim of ownership to the parcels by "posting no-trespass signs, constructing stone walls, improving drainage, and wood cutting." This Court explained that simply having knowledge that he was not the title owner of the parcels was not enough to destroy his claim of right given his objective, adverse manifestations otherwise. In fact, we went so far as to state that "even when claimants know that they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim of right to do so if they use it openly, notoriously, and in a manner that is adverse to the true owner's rights for the requisite ten-year period." This statement is legally correct considering that adverse possession does not require the claimant to make "a good faith mistake that he or she had legal title to the land." 16 Powell on Real Property § 91.05[2] at 91-23. However, to the extent that *Tavares*'s reference to "black-hearted trespassers" suggests that this Court endorses an invade-and-conquer mentality in modern property law, we dutifully excise that sentiment from our jurisprudence.

In the case before this Court, Cahill went beyond mere knowledge that she was not the record owner by sending the offer-to-purchase letter. As distinguished from the *Tavares* claimant who did not communicate his survey findings with anyone, Cahill's letter objectively declared the superiority of George Morrow's title to the record owner himself. *See also* Shanks v. Collins, 1989 OK 115, 782 P.2d 1352, 1355 (Okla. 1989) ("A recognition by an adverse possessor that legal title lies in another serves to break the essential element of continuity of possession.").

In the face of this precedent, Cahill contends that the trial justice accurately applied the law by finding that an offer to purchase does not automatically negate a claim of right in the property. While we agree that this proposition is correct with respect to offers made in an effort to make peace in an ongoing dispute, we disagree that this proposition applies in situations, as here, where no preexisting ownership dispute is evident.… Her offer was not an olive branch meant to put an end to pending litigation with the Morrows. Rather, it was a clear declaration that Cahill "wanted title

to the property" from the record owner. By doing so, she necessarily acknowledged that her interest in lot 19 was subservient to George Morrow's.…

Accordingly, the trial justice erred by considering any incidents of ownership exhibited by Cahill after the 1997 letter to George Morrow interrupted her claim.…

2. The Impact of Cahill's Offer to Purchase on her Pre-1997 Adverse-Possession Claim

Furthermore, we also conclude that the trial justice should not have assumed that even if Cahill's "inquiry is circumstantial evidence of her knowledge that George Morrow, and subsequently [Morrow], were the legal title holders of [lot] 19, that does not destroy the viability of this adverse possession claim." We agree that an offer to purchase does not automatically invalidate a claim already vested by statute, but we nonetheless hold that the objective manifestations that another has superior title, made after the statutory period and not made to settle an ongoing dispute, are poignantly relevant to the ultimate determination of claim of right and hostile possession during the statutory period.…

3. Questions of Fact Remain

Despite the significant deference afforded to the trial justice's findings of fact, such findings are not unassailable. Here, we find clear error in the trial justice's conclusion that "even if somehow the expression of interest in purchasing [lot] 19, made initially in 1997, stopped the running of the ten[-]year period * * * the evidence was overwhelming that [Cahill] and her predecessor in title had commenced the requisite ten-year period beginning in 1971." Given our opinion that some of Cahill's lot 19 activities cannot be considered because of the time frame of their occurrence, we disagree that the trial record can be classified as presenting "overwhelming" evidence of adverse possession.

…. On remand, the trial justice is directed to limit his consideration to pre-1997 events and make specific determinations whether Cahill's intermittent flower and tree planting, flag flying, clothesline replacing, lawn chair and beach-paraphernalia storing, and annual party hosting are adequate. Furthermore, given our ruling today, the trial court must evaluate the nature of Cahill's and her predecessor's twenty-six-year acts

of possession in the harsh light of the fact that Cahill openly manifested the existence of George Morrow's superior title on three occasions.…

FLAHERTY, J., dissenting.

…. Simply put, I do not agree that the correspondence between plaintiff and defendant in which plaintiff offers to purchase defendant's interest in lot 19 is the smoking gun the majority perceives it to be. As is clear from a fair reading of plaintiff's testimony, she believed that she owned the property as a result of her longtime use of and dominion over it. But her testimony also demonstrates that she drew a crisp distinction between whatever ownership rights she may have acquired and record title, which she recognized continued to reside in the Morrows…. Even if that letter were as significant as the majority contends, there is no doubt that it was sent after the statutory period had run. It is beyond dispute that plaintiff's correspondence could not serve to divest her of title if she had already acquired it by adverse possession…. There certainly was credible evidence for the trial justice to find that plaintiff had used the property as her own for well over twenty years before she corresponded with Mr. Morrow in 1997.…

Dombkowski v. Ferland

893 A.2d 599 (Me. 2006)

DANA, J.

.…Although "some courts and commentators fail to distinguish between the elements of *hostility* and *claim of right,* or simply consider *hostility* to be a subset of the *claim of right* requirement[,] *see, e.g., Johnson v. Stanley,* 96 N.C. App. 72, 384 S.E.2d 577, 579 (1989)[,] … under Maine law, the two elements are distinct." *Striefel,* 1999 ME 111, P13 n.7, 733 A.2d at 991.

"'Hostile' simply means that the possessor does not have the true owner's permission to be on the land, and has nothing to do with demonstrating a heated controversy or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." *Id.* P13, 733 A.2d at 991 (quotation marks and citation omitted). "Permission negates the element of hostility, and precludes the acquisition of title by adverse possession." *Id.* "'Under a claim of right' means that the claimant is in possession as owner, with intent to claim the land as [its] own, and not in

recognition of or subordination to [the] record title owner." *Id.* P14, 733 A.2d at 991 (quotation marks omitted).

Under Maine's common law, as part of the claim of right element, we have historically examined the subjective intentions of the person claiming adverse possession. *See Preble v. Maine C. R. Co.,* 85 Me. 260, 264, 27 A. 149, 150 (1893). Under this approach, which is considered the minority rule in the country, "one who by mistake occupies … land not covered by his deed with no intention to claim title beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line." *Preble,* 85 Me. at 264, 27 A. at 150; *see also McMullen,* 483 A.2d at 700 ("[If] the occupier intend[s] to hold the property only if he were in fact legally entitled to it[, the] occupation [is] 'conditional' and [cannot] form the basis of an adverse possession claim."). The majority rule in the country is based on *French v. Pearce,* 8 Conn. 439 (1831), and recognizes that the possessor's mistaken belief does not defeat a claim of adverse possession. [The court then interpreted legislation to overrule Maine precedents and allow mistaken possession to meet the claim of right requirement.]

Notes and Questions

1. **Doctrine v. practice**. Richard Helmholz has argued that though adverse possession doctrine generally does not require the adverse possessor to plead good faith, judicial practice is to disfavor those who know they are trespassing compared to those acting out of a good faith mistake. Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L. Q. 331, 332 (1983). Is *Cahill* an example of this dynamic?

   In recent decades, state legislatures have increasingly demanded good faith on the part of the possessor (the Oregon statute in *Tieu* requiring honest belief in ownership, for example, was passed in 1989). *See* 16 POWELL ON REAL PROPERTY § 91.05 (collecting examples).

2. Should good faith be required? And if so, what is good faith? Is it an honest belief about the facts on the ground (e.g., whether the fence builder is correct that his fence is on the right side of the boundary line)? Or is it an attitude

about one's potential adversary (a willingness to move the fence if wrong)? Either view creates evidentiary difficulties.

Even when good faith is not part of the analysis as a formal matter, Helmholz argues that judges and juries often cannot help but "prefer the claims of an honest man over those of a dishonest man." Helmholz, *supra*, at 358. Might this be a satisfactory middle ground? Are there advantages to having courts officially ignore intent while applying a de facto bar to the bad faith possessor when there is evidence of dishonesty? Or is it problematic to have legal practice depart from official doctrine?

Perhaps another way to reconcile the benefits of adverse possession with the distaste for bad faith possessors would be to allow dishonest possessors to keep the land, but pay for the privilege. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1126 (1984) (suggesting "requiring indemnification only in those cases where the [true owner] can show that the [adverse possessor] acted in bad faith."). As Merrill notes, a California appellate court required such payment in a case concerning a prescriptive easement (which is similar to adverse possession except that it concerns the *right to use* someone else's land rather than its ownership), only to be overturned by the state supreme court. *Id.* (discussing Warsaw v. Chicago Metallic Ceilings, Inc., 676 P.2d 584 (Cal. 1984)). The proposal may remind you of the *Manillo* case discussed above. How does it differ?

3. A minority of states, as Dombkowski indicates, require adverse possessors to prove their subjective intent to take the land without regard to the existence of other ownership interests. This is sometimes referred to as the "aggressive trespass" standard: "I thought I did not own it [and intended to take it]." Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746 (1986) (brackets in the original). Is there a reason to prefer it? Lee Anne Fennell argues for a knowing trespass requirement that requires the adverse possessor to document her knowledge:

> [A] documented knowledge requirement facilitates rather than punishes efforts at consensual dealmaking. One of the most definitive ways of

> establishing that a possessor knew she was not the owner of the disputed land is to produce evidence of her purchase offer to the record owner. Currently, such an offer often destroys one's chance at adverse possession because it shows one is acting in bad faith if one later trespasses; one does far better to remain in ignorance (or pretend to) and never broach the matter with the record owner. Under my proposal, such offers would go from being fatal in a later adverse possession action to being practically a prerequisite. As a result, it would be much more likely that any resulting adverse possession claim will occur only where a market transaction is unavailable. A documented knowledge requirement would also reduce litigation costs and increase the certainty of land holdings. Actions or records establishing that the trespass was known at the time of entry, necessary if the possessor ever wishes to gain title under my approach, would serve to streamline trespass actions that occur before the statute has run. Moreover, an approach that refuses to reward innocent mistakes would be expected to reduce mistake-making.

Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1041-44 (2006) (footnotes omitted). One's position on these matters may depend on which scenarios one believes are most common in adverse possession cases and adjust the state of mind required to include or exclude them accordingly. Should the state of mind required depend on the context? A state might, for example, require good faith for encroachments, but bad faith or color of title if the possessor seeks to own the parcel as a whole. Is this a good idea?

C. Finer Points of Adverse Possession Law

1. **Actual and Continuous Possession**. Adverse possessors are not required to live on the occupied property, what matters is acting like a true owner would. That use, however, must be continuous, not sporadic. *Compare, e.g.*, Lobdell v. Smith, 690 N.Y.S.2d 171, 173 (N.Y. App. Div. 3d Dep't 1999) (although undeveloped land "does not require the same quality of possession as residential or arable land," no adverse possession where claimant "seldom

visited the parcel except to occasionally pick berries or hunt small game"), *with* Nome 2000 v. Fagerstrom, 799 P.2d 304, 310 (Alaska 1990) (claimants of a rural parcel suitable for recreational and subsistence activities "visited the property several times during the warmer season to fish, gather berries, clean the premises, and play.… That others were free to pick berries and fish is consistent with the conduct of a hospitable landowner, and undermines neither the continuity nor exclusivity of their possession."). Regular use of a summer home may constitute continuous use. *See, e.g.*, Nechow v. Brown, 120 N.W.2d 251, 252 (Mich. 1963).

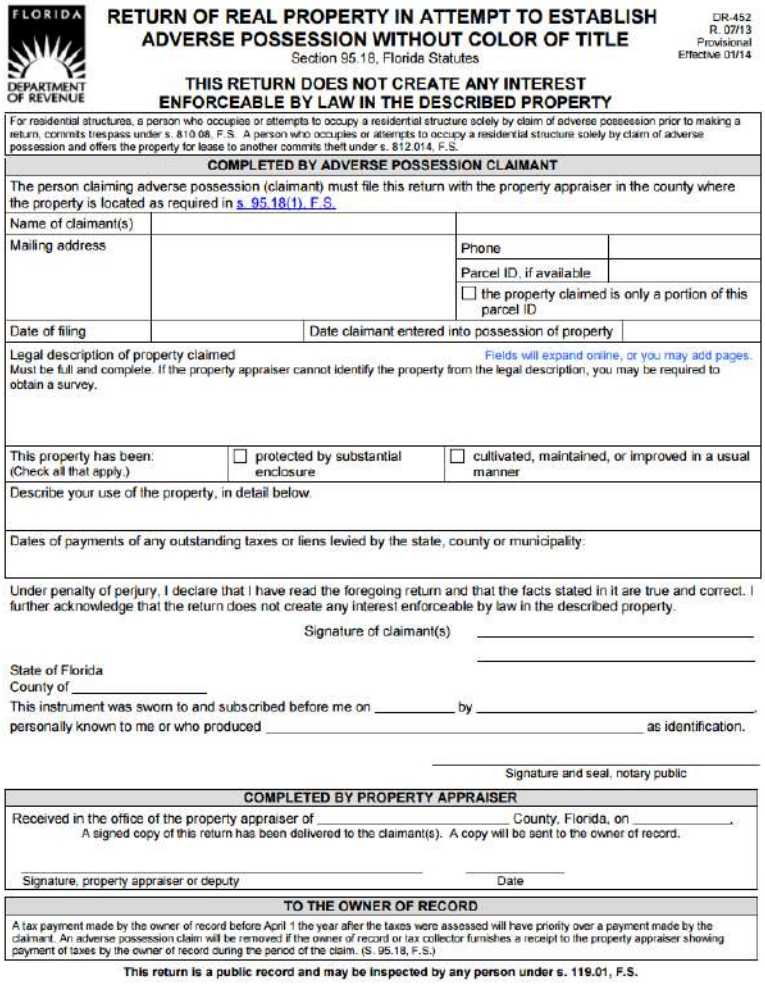
2. **Color of title**. Claim of title, an intent to use land as one's own, is distinct from color of title, which describes taking possession under a defective instrument (like a deed based on a mistaken land survey). States often apply more lenient adverse possession standards to claims made under color of title. *Compare, e.g.*, Fl. St. § 95.16, *with id.* § 95.18. Why do you think that is?

   Entry under color of title may also affect the scope of the land treated as occupied by the adverse possessor. 2 C.J.S. *Adverse Possession* § 252 ("Adverse possession under color of title ordinarily extends to the whole tract described in the instrument constituting color of title."). *But see* Wentworth v. Forne, 137 So. 2d 166, 169 (Miss. 1962) ("In brief, when the land involved is, in part, occupied by the real owner, the adverse possession, even when this possessor has color of title, is confined to the area actually possessed.").

3. **Adverse possession by and against the government**. Although government agencies may acquire title by adverse possession, the general rule is that public property held for public use is not subject to the doctrine. Why do you think that is?

4. **Disabilities**. The title owner of land may be subject to a disability (e.g., status as a minor, mental incapacity) that may extend the time to bring an ejectment action against an unlawful occupant. States generally spell out such exceptions by statute.

5. **A Moving Target.** States vary their adverse possession rules to take into account a variety of factors (e.g., claim under color of title, payment of property taxes, enclosure or cultivation of land, etc.). These factors may change with the times. In the aftermath of the financial crisis, for example, reports of trespassers occupying foreclosed, vacant properties with the goal of acquiring title via adverse possession prompted renewed attention to the doctrine. Florida enacted legislation that requires those seeking adverse possession without color of title to pay all outstanding taxes on the property within one year of taking possession and disclose in writing the possessor's identity, date of possession, and a description of the property sufficient to enable the identification of the property in the public records. Local officials are then required to make efforts to contact the record owner of the property. Fl. St. § 95.18. The form created under the statute is reprinted below. Are measures like these useful? Consider the problem of "zombie foreclosures." A property may be vacant because the owners received a notice of foreclosure and left. Sometimes the lenders never complete the foreclosure process, perhaps to avoid the costs that come with ownership of the property. Title therefore remains with the out-of-possession owners, who remain responsible for taxes, association fees, and the like. What outcome should adverse possession law seek to promote in such cases?



FLORIDA DEPARTMENT OF REVENUE

RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION WITHOUT COLOR OF TITLE
Section 95.18, Florida Statutes

DR-452
R. 07/13
Provisional
Effective 01/14

THIS RETURN DOES NOT CREATE ANY INTEREST ENFORCEABLE BY LAW IN THE DESCRIBED PROPERTY

For residential structures, a person who occupies or attempts to occupy a residential structure solely by claim of adverse possession prior to making a return, commits trespass under s. 810.08, F.S. A person who occupies or attempts to occupy a residential structure solely by claim of adverse possession and offers the property for lease to another commits theft under s. 812.014, F.S.

COMPLETED BY ADVERSE POSSESSION CLAIMANT

The person claiming adverse possession (claimant) must file this return with the property appraiser in the county where the property is located as required in s. 95.18(1), F.S.

Name of claimant(s)			
Mailing address		Phone	
		Parcel ID, if available	
		☐ the property claimed is only a portion of this parcel ID	
Date of filing		Date claimant entered into possession of property	

Legal description of property claimed — Fields will expand online, or you may add pages.
Must be full and complete. If the property appraiser cannot identify the property from the legal description, you may be required to obtain a survey.

This property has been: (Check all that apply.)	☐ protected by substantial enclosure	☐ cultivated, maintained, or improved in a usual manner

Describe your use of the property, in detail below.

Dates of payments of any outstanding taxes or liens levied by the state, county or municipality:

Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct. I further acknowledge that the return does not create any interest enforceable by law in the described property.

Signature of claimant(s) _____

_____

State of Florida
County of _____
This instrument was sworn to and subscribed before me on _____ by _____,
personally known to me or who produced _____ as identification.

_____
Signature and seal, notary public

COMPLETED BY PROPERTY APPRAISER

Received in the office of the property appraiser of _____ County, Florida, on _____.
A signed copy of this return has been delivered to the claimant(s). A copy will be sent to the owner of record.

_____ _____
Signature, property appraiser or deputy — Date

TO THE OWNER OF RECORD

A tax payment made by the owner of record before April 1 the year after the taxes were assessed will have priority over a payment made by the claimant. An adverse possession claim will be removed if the owner of record or tax collector furnishes a receipt to the property appraiser showing payment of taxes by the owner of record during the period of the claim. (S. 95.18, F.S.)

This return is a public record and may be inspected by any person under s. 119.01, F.S.

D. Adverse Possession of Chattels

O'Keeffe v. Snyder

416 A.2d 862 (N.J. 1980)

The opinion of the Court was delivered by POLLOCK, J.

This is an appeal from an order of the Appellate Division granting summary judgment to plaintiff, Georgia O'Keeffe, against defendant, Barry Snyder, d/b/a Princeton Gallery of Fine Art, for replevin of three small pictures painted by O'Keeffe. In her complaint, filed in March, 1976, O'Keeffe alleged she was the owner of the paintings and that they were stolen from a New York art gallery in 1946. Snyder asserted he was a purchaser for value of the paintings, he had title by adverse

possession, and O'Keeffe's action was barred by the expiration of the six-year period of limitations provided by N.J.S.A. 2A:14-1 pertaining to an action in replevin. Snyder impleaded third party defendant, Ulrich A. Frank, from whom Snyder purchased the paintings in 1975 for $35,000.

The trial court granted summary judgment for Snyder on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft. The Appellate Division reversed and entered judgment for O'Keeffe. A majority of that court concluded that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. Consequently, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.

The dissenting judge stated that the appropriate measurement of the period of limitation was not by analogy to adverse possession, but by application of the "discovery rule" pertaining to some statutes of limitation. He concluded that the six-year period of limitations commenced when O'Keeffe knew or should have known who unlawfully possessed the paintings, and that the matter should be remanded to determine if and when that event had occurred.

We granted certification …

I

The record, limited to pleadings, affidavits, answers to interrogatories, and depositions, is fraught with factual conflict. Apart from the creation of the paintings by O'Keeffe and their discovery in Snyder's gallery in 1976, the parties agree on little else.

O'Keeffe contended the paintings were stolen in 1946 from a gallery, An American Place. The gallery was operated by her late husband, the famous photographer Alfred Stieglitz.

An American Place was a cooperative undertaking of O'Keeffe and some other American artists… . In 1946, Stieglitz arranged an exhibit which included an O'Keeffe painting, identified as Cliffs. According to O'Keeffe, one day in March, 1946, she and Stieglitz discovered Cliffs was missing from the wall of the exhibit.

O'Keeffe estimates the value of the painting at the time of the alleged theft to have been about $150.

About two weeks later, O'Keeffe noticed that two other paintings, Seaweed and Fragments, were missing from a storage room at An American Place. She did not tell anyone, even Stieglitz, about the missing paintings, since she did not want to upset him.

Before the date when O'Keeffe discovered the disappearance of Seaweed, she had already sold it (apparently for a string of amber beads) to a Mrs. Weiner, now deceased. Following the grant of the motion for summary judgment by the trial court in favor of Snyder, O'Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning to O'Keeffe their interest in the sale.

O'Keeffe testified on depositions that at about the same time as the disappearance of her paintings, 12 or 13 miniature paintings by Marin also were stolen from An American Place. According to O'Keeffe, a man named Estrick took the Marin paintings and "maybe a few other things." Estrick distributed the Marin paintings to members of the theater world who, when confronted by Stieglitz, returned them. However, neither Stieglitz nor O'Keeffe confronted Estrick with the loss of any of the O'Keeffe paintings.

There was no evidence of a break and entry at An American Place on the dates when O'Keeffe discovered the disappearance of her paintings. Neither Stieglitz nor O'Keeffe reported them missing to the New York Police Department or any other law enforcement agency. Apparently the paintings were uninsured, and O'Keeffe did not seek reimbursement from an insurance company. Similarly, neither O'Keeffe nor Stieglitz advertised the loss of the paintings in Art News or any other publication. Nonetheless, they discussed it with associates in the art world and later O'Keeffe mentioned the loss to the director of the Art Institute of Chicago, but she did not ask him to do anything because "it wouldn't have been my way." O'Keeffe does not contend that Frank or Snyder had actual knowledge of the alleged theft.

Stieglitz died in the summer of 1946, and O'Keeffe explains she did not pursue her efforts to locate the paintings because she was settling his estate. In 1947, she retained the services of Doris Bry to help settle the estate. Bry urged O'Keeffe to

report the loss of the paintings, but O'Keeffe declined because "they never got anything back by reporting it." Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. The record does not indicate whether such a registry existed at the time the paintings disappeared.

In September, 1975, O'Keeffe learned that the paintings were in the Andrew Crispo Gallery in New York on consignment from Bernard Danenberg Galleries. On February 11, 1976, O'Keeffe discovered that Ulrich A. Frank had sold the paintings to Barry Snyder, d/b/a Princeton Gallery of Fine Art. She demanded their return and, following Snyder's refusal, instituted this action for replevin.

Frank traces his possession of the paintings to his father, Dr. Frank, who died in 1968. He claims there is a family relationship by marriage between his family and the Stieglitz family, a contention that O'Keeffe disputes. Frank does not know how his father acquired the paintings, but he recalls seeing them in his father's apartment in New Hampshire as early as 1941-1943, a period that precedes the alleged theft. Consequently, Frank's factual contentions are inconsistent with O'Keeffe's allegation of theft. Until 1965, Dr. Frank occasionally lent the paintings to Ulrich Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Ulrich Frank, who kept them in his residences in Yardley, Pennsylvania and Princeton, New Jersey. In 1968, he exhibited anonymously Cliffs and Fragments in a one day art show in the Jewish Community Center in Trenton. All of these events precede O'Keeffe's listing of the paintings as stolen with the Art Dealers Association of America, Inc. in 1972.

Frank claims continuous possession of the paintings through his father for over thirty years and admits selling the paintings to Snyder. Snyder and Frank do not trace their provenance, or history of possession of the paintings, back to O'Keeffe.

As indicated, Snyder moved for summary judgment on the theory that O'Keeffe's action was barred by the statute of limitations and title had vested in Frank by adverse possession. For purposes of his motion, Snyder conceded that the paintings had been stolen. On her cross motion, O'Keeffe urged that the paintings were stolen, the statute of limitations had not run, and title to the paintings remained in her.

II

[The court held that there was a genuine factual dispute whether the paintings had been stolen.]

III

On the limited record before us, we cannot determine now who has title to the paintings. That determination will depend on the evidence adduced at trial. Nonetheless, we believe it may aid the trial court and the parties to resolve questions of law that may become relevant at trial.

Our decision begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft. Proof of theft would advance O'Keeffe's right to possession of the paintings absent other considerations such as expiration of the statute of limitations.

On this appeal, the critical legal question is when O'Keeffe's cause of action accrued. The fulcrum on which the outcome turns is the statute of limitations in N.J.S.A. 2A:14-1, which provides that an action for replevin of goods or chattels must be commenced within six years after the accrual of the cause of action. …

Since the alleged theft occurred in New York, a preliminary question is whether the statute of limitations of New York or New Jersey applies. The New York statute, N.Y. Civ. Prac. Law § 214 (McKinney), has been interpreted so that the statute of limitations on a cause of action for replevin does not begin to run until after refusal upon demand for the return of the goods. Here, O'Keeffe demanded return of the paintings in February, 1976. If the New York statute applied, her action would have been commenced within the period of limitations.

The traditional rule to determine which of two statutes of limitations is applicable is that the statute of the forum governs unless the limitation is a condition of the cause of action. However, this Court has discarded the mechanical rule that the statute of limitations of the forum must be employed in every suit on a foreign cause of action. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 140-141 (1973). Heavner set out five requirements for barring an action by applying a statute of limitations other than the appropriate New Jersey statute: (1) the cause of action arose in the other state; (2) the

parties are all present in and amenable to jurisdiction in the other state; (3) New Jersey has no substantial interest in the matter; (4) the substantive law of the other jurisdiction is applicable, and (5) the limitations' period of the other jurisdiction has expired at the time of the commencement of the suit in New Jersey. The Heavner rule provides a limited and special exception to the general rule that the rule of the forum determines the applicable period of limitations. In the present case, none of the parties resides in New York and the paintings are located in New Jersey. On the facts before us, it would appear that the appropriate statute of limitations is the law of the forum, N.J.S.A. 2A:14-1. On remand, the trial court may reconsider this issue if the parties present other relevant facts.

IV

On the assumption that New Jersey law will apply, we shall consider significant questions raised about the interpretation of N.J.S.A. 2A:14-1. The purpose of a statute of limitations is to stimulate to activity and punish negligence and promote repose by giving security and stability to human affairs. A statute of limitations achieves those purposes by barring a cause of action after the statutory period. In certain instances, this Court has ruled that the literal language of a statute of limitations should yield to other considerations.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law.

This Court first announced the discovery rule in *Fernandi*, supra, 35 N.J. at 434. In *Fernandi*, a wing nut was left in a patient's abdomen following surgery and was not discovered for three years. The majority held that fairness and justice mandated that the statute of limitations should not have commenced running until the plaintiff knew or had reason to know of the presence of the foreign object in her body. …

Similarly, we conclude that the discovery rule applies to an action for replevin of a painting under N.J.S.A. 2A:14-1. O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings. …

In determining whether O'Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O'Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

V

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. R. Brown, The Law of Personal Property (3d ed. 1975), § 4.1 at 33 (Brown). Adverse possession does not create title by prescription apart from the statute of limitations.

To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous. …

[T]here is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. … For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective

of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes. …

The problem is serious. According to an affidavit submitted in this matter by the president of the International Foundation for Art Research, there has been an "explosion in art thefts" and there is a "worldwide phenomenon of art theft which has reached epidemic proportions".

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.

For example, under the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.

Properly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin. In determining whether the discovery rule should apply, a court should identify, evaluate, and weigh the equitable claims of all parties. If a chattel is concealed from the true owner, fairness compels tolling the statute during the period of concealment. That conclusion is consistent with tolling the statute of limitations in a medical malpractice action where the physician is guilty of fraudulent concealment.

It is consistent also with the law of replevin as it has developed apart from the discovery rule. In an action for replevin, the period of limitations ordinarily will run against the owner of lost or stolen property from the time of the wrongful taking, absent fraud or concealment. Where the chattel is fraudulently concealed, the general rule is that the statute is tolled …

The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. …

By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.

Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Under the discovery rule, the burden is on the owner as the

one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations.

VI

Read literally, the effect of the expiration of the statute of limitations under N.J.S.A. 2A:14-1 is to bar an action such as replevin. The statute does not speak of divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title. Nonetheless, the effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor. …

Before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. The only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 321 (1890) (Ames). As Dean Ames wrote: "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand." *Id.* at 319.

Recognizing a metaphysical notion of title in the owner would be of little benefit to him or her and would create potential problems for the possessor and third parties. The expiration of the six-year period of N.J.S.A. 2A:14-1 should vest title as effectively under the discovery rule as under the doctrine of adverse possession. …

VII

We next consider the effect of transfers of a chattel from one possessor to another during the period of limitation under the discovery rule. Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous

dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner.
Professor Ballantine explains:

> Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last. [H. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 158 (1919)] …

For the purpose of evaluating the due diligence of an owner, the dispossession of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.

We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. …

Treating subsequent transfers as separate acts of conversion could lead to absurd results. As explained by Dean Ames: –

> … If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the disposed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself, – a conclusion as shocking in point of

> justice as it would be anomalous in law. [Ames, *supra* at 323, footnotes omitted]

It is more sensible to recognize that on expiration of the period of limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer. …

We reverse the judgment of the Appellate Division in favor of O'Keeffe and remand the matter for trial in accordance with this opinion.

Notes and Questions

1. What did O'Keeffe do to locate the paintings? At least according to the court, what more could she have done? What more should she have done? What did the Franks and Snyder do to make their possession of the paintings clear? What more could they have done? What more should they have done? Did the court properly balance the parties' interests? Did it give the right incentives to future parties in their positions?

2. The court argues that switching from adverse possession to the discovery rule "shifts the emphasis from the conduct of the possessor to the conduct of the owner." Is this a good description of the difference between the two tests? Is the court's explanation of its reasons for the change persuasive?

3. Notice *O'Keeffe*'s discussion of the choice-of-law problem. O'Keeffe's suit was timely under the New York statute of limitations but may not have been under New Jersey's. In theory, choice of law is simple for property: the law of the property's "situs" (i.e. location) controls.* The rule is easy enough to apply to

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* Relatedly, courts have *in rem* jurisdiction over property located within their state's borders, and the traditional rule has been that courts have no jurisdiction at all over real property outside their state's borders. Why might these rules have developed? Do they seem likely to simplify litigation or complicate it?

real property, although even there hard cases are possible.* But personal property can move around, generating contacts with multiple states. Suppose the contacts had been flipped, so that the painting was stolen in New Jersey but was currently in New York. Should New York law have applied? Another possible rule is that the law of the place where the property is now applies. What incentives would that rule create? How about a rule selecting the law of the place where the property was at the time of the relevant events? (Wait. What *are* the "relevant events" in a replevin case involving the statute of limitations?) Another layer of difficulty in choice of law comes from the characterization problem: is the validity of a mortgage securing a loan with an illegally high rate of interest a "property" issue (governed by the situs rule) or a "contract" issue (governed by the place the contract was made or the place of residence of the parties)? The characterization question puts *O'Keeffe*'s use of medical-malpractice tort principles in a replevin case in a new light, doesn't it?

The New York Mess

As noted in *O'Keeffe*, New York has a three-year statute of limitations for personal-property actions, and traditionally applied a demand-and-refusal rule to start the statute running. Two further doctrines complicate the picture. One is that the demand-and-refusal rule only applies against good-faith purchasers; the limitations period in a suit against a thief starts at the time of the theft. (Do you see how this result, illogical as it may sound, follows from the logic that the the good-faith purchaser is not considered a wrongdoer until she refuses a demand for return of the property?) The other is that an owner who unreasonably delays making a demand for the return of property, at least where she knows the identity of the possessor, may find her suit barred by the equitable doctrine of laches.

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* *See, e.g.*, *Durfee v. Duke*, 375 U.S. 106 (1963), in which the Missouri River, which forms the boundary between Nebraska and Missouri, had shifted its channel from the east of the land in question to the west of it. If the river had shifted suddenly (by "avulsion"), the boundary stayed where it was and the land was legally in Nebraska. But if the river had shifted course slowly (by "accretion"), the boundary moved with the river and the land was in Missouri. Since the plaintiff claimed title under a Nebraska foreclosure proceeding and the defendant claimed title under a Missouri swamp land patent, the case turned on which state the land was in.

In *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), a landscape by Claude Monet owned by Gerda DeWeerth disappeared from a castle in Southern Germany where American soldiers were quartered during World War II. It turned up on the art market in the mid-1950s and was eventually sold by a New York gallery to Edith Baldinger, who kept it in her apartment in New York. In 1981, DeWeerth's nephew tracked the painting to the gallery's sale to Baldinger and made a demand for its return which was refused. The Second Circuit, sitting in diversity, held that New York "would impose a duty of reasonable diligence in attempting to locate stolen property," not just a duty to demand its return in a reasonable time after the property is located:

> For if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred. … In this case, plaintiff's proposed exception to the rule would rob it of all of its salutary effect: The thief would be immune from suit after three years, while the good-faith purchaser would remain exposed as long as his identity did not fortuitously come to the property owner's attention. A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary hardship to the good-faith purchaser, the party intended to be protected. … A rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to stolen art. Much art is kept in private collections, unadvertised and unavailable to the public. An owner seeking to recover such property will almost never learn of its whereabouts by chance. Yet the location of stolen art may frequently be discovered through investigation.

The court concluded that DeWeerth's efforts were "minimal" before her nephew took up the case in 1981, so Baldinger kept the Monet.

That was 1987. Shortly thereafter, the same issue came up through the New York state court system. In *Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991), a painting by Marc Chagall was stolen from the Guggenheim Museum by a mailroom employee in the 1960s. The Lubells bought the painting from a reputable dealer in 1967; the museum demanded it back in 1986. The court rejected *O'Keeffe*, repudiated

DeWeerth's interpretation of New York law, and reaffirmed the New York demand-and-refusal rule. It specifically rejected the discovery rule with its requirement of reasonable diligence by the owner:

> Our case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property. … Further, the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence. Here, the parties hotly contest whether publicizing the theft would have turned up the gouache. According to the museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the museum also argues that publicity often pushes a missing painting further underground. In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art, it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin. All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner.
>
> Further, our decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged

> owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.

Armed with the New York Court of Appeals's holding in *Guggenheim*, Gerda DeWeerth filed a Rule 60(b) motion for relief from judgment, arguing that the decision against her rested on a misinterpretation of New York law and that she should not have been subjected to a diligent-search requirement. The District Court agreed with her, but the Second Circuit reversed in *DeWeerth v. Baldinger,* 38 F.3d 1266 (2d Cir. 1994), emphasizing the need for finality in litigation:

> We conclude that the prior *DeWeerth* panel conscientiously satisfied its duty to predict how New York courts would decide the due diligence question, and that *Erie* and its progeny require no more than this. The fact that the New York Court of Appeals subsequently reached a contrary conclusion in *Guggenheim* does not constitute an "extraordinary circumstance" that would justify reopening this case in order to achieve a similar result.

Finally, consider *SongByrd Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000), another diversity case under New York law. Henry Byrd, who recorded under the name "Professor Longhair," was a celebrated jazz musician. He went to Woodstock, New York for a studio recording session for Bearsville Records in the 1970s. The session was considered unsatisfactory at the time, so the tapes were never released. Instead, Arthur Davis, the record-store owner who discovered Byrd, sent the tapes to Bearsville "as demonstration tapes only, without any intent for either Albert Grossman or Bearsville Records Inc. to possess these aforementioned tapes as owner." Byrd's attorney wrote two letters to Bearsville requesting the return of the tapes in 1975, but there was no evidence in the record that the letters were even received. Byrd died in 1980, and after Bearsville's founder died in 1985, his estate licensed the recordings to two record companies. One of the resulting albums won Byrd a (posthumous) Grammy for Best Traditional Blues Album of 1987. SongByrd, the successor-in-interest to Byrd's rights, sued in 1995. The Second Circuit held that the conversion claim was barred, because the defendant "began using the master tapes as its own when it licensed portions of them to Rounder in 1986."

> The conversion alleged by SongByrd occurred no later than that date. The demand-and-refusal rule, which functioned to delay accrual of the claim in [*Guggenheim*] … for the benefit of the true owner, normally provides some benefit to the good-faith possessor by precipitating its awareness that continued possession will be regarded as wrongful by the true owner. New York has not required a demand and refusal for the accrual of a conversion claim against a possessor who openly deals with the property as its own.

As an alternative basis for its holding, the court added that the plaintiff had unreasonably delayed making its demand.

> Even if a demand were required for accrual of SongByrd's claim, [*Guggenheim*] instructs that a plaintiff may not unreasonably delay in making a demand for property whose location is known. Byrd, either independently or through his agents, had known since the 1970s that the master tapes were in Grossman's possession, and the unanswered letters to Grossman in 1975 for return of the master tapes probably sufficed to alert him to Grossman's disregard of his ownership claim, thereby rendering any demand thereafter unreasonably delayed. In any event, his successors' delay in not making a demand in 1987, when Bearsville's licensing of the master tapes became well known in the music world as a result of the Grammy Award for Byrd's recordings, was clearly unreasonable.

After *DeWeerth*, *Guggenheim*, and *SongByrd*, does New York have a coherent approach to the statute of limitations in personal property cases? Does it depend whether the case is brought in state or federal court? Has New York done better or worse than New Jersey at balancing the competing interests at stake?

11. Co-ownership and Marital Property

More than one person can "own" a thing at any given time. Their rights will be exclusive as against the world, but not exclusive as against each other. When conflicts between them develop, or when the outside world seeks to regulate their behavior, we need to understand the nature and limits of their rights.

In this section, we will not address the form of concurrent ownership known as partnership, which we cover separately, though you will see some comparative references to it in the case that follows. Nor will we address corporations (in which ownership can be nearly infinitely divided and is separated from control; see Corporations section). These topics are dealt with in detail in business associations and similar courses. We will also not consider forms of concurrent ownership that are of purely historical interest, such as coparceny.* The main types of co-ownership we will consider are (1) tenancy in common, (2) joint tenancy, and (3) tenancy by the entireties, along with a brief look at (4) community property, a particular kind of co-ownership available in some states.

In the late 1980s, a sample of real estate records showed that about two-thirds of residential properties were held in some form of co-ownership. Evelyn Alicia Lewis, Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform, 1994 Wis. L. Rev. 331; see also Carole Shammas et al., Inheritance in America from Colonial Times to the Present 171-72 (1987) (showing percentage of land held in joint tenancies rising from under 1% in 1890 to nearly 80% in 1960, then dropping to 63% in 1980); N. William Hines, Real Property Joint Tenancies: Law, Fact, and Fancy (51 Iowa L. Rev. 582 (1966) (finding that joint tenancies in Iowa rose from under 1% of acquisitions in 1933 to over a third of farm acquisitions and over half of urban acquisitions in 1964, almost exclusively by married couples); Yale B. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961) (study of California counties in 1959 and 1960 finding that married

* A form of ownership only available to female heirs, when there were no male heirs.

couples held over two-thirds of property as cotenants, 85% of which was as joint tenants).

Given that many justifications for the institution of private property rely on the idea that competing interests in property lead to inefficiency, waste, and conflict, it is perhaps surprising that so much private property is, in practice, owned by more than one person. If communal ownership is so inefficient, why do we recognize so many kinds of co-ownership?

A. Types of Co-Ownership: Introduction

U.S. v. Craft
535 U.S. 274 (2002)

Justice O'CONNOR delivered the opinion of the Court.

… English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common, joint tenancy, and tenancy by the entirety. The tenancy in common is now the most common form of concurrent ownership. The common law characterized tenants in common as each owning a separate fractional share in undivided property. Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. Tenants in common have many other rights in the property, including the right to use the property, to exclude third parties from it, and to receive a portion of any income produced from it.

Joint tenancies were the predominant form of concurrent ownership at common law, and still persist in some States today. The common law characterized each joint tenant as possessing the entire estate, rather than a fractional share: "[J]oint-tenants have one and the same interest … held by one and the same undivided possession." Joint tenants possess many of the rights enjoyed by tenants in common: the right to use, to exclude, and to enjoy a share of the property's income. The main difference between a joint tenancy and a tenancy in common is that a joint tenant also has a right of automatic inheritance known as "survivorship." Upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of

intestate succession; rather, the remaining tenant or tenants automatically inherit it. Joint tenants' right to alienate their individual shares is also somewhat different. In order for one tenant to alienate his or her individual interest in the tenancy, the estate must first be severed – that is, converted to a tenancy in common with each tenant possessing an equal fractional share. Most States allowing joint tenancies facilitate alienation, however, by allowing severance to automatically accompany a conveyance of that interest or any other overt act indicating an intent to sever.

A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons. Because of the common-law fiction that the husband and wife were one person at law (that person, practically speaking, was the husband), Blackstone did not characterize the tenancy by the entirety as a form of concurrent ownership at all. Instead, he thought that entireties property was a form of single ownership by the marital unity. Neither spouse was considered to own any individual interest in the estate; rather, it belonged to the couple.

Like joint tenants, tenants by the entirety enjoy the right of survivorship. Also like a joint tenancy, unilateral alienation of a spouse's interest in entireties property is typically not possible without severance. Unlike joint tenancies, however, tenancies by the entirety cannot easily be severed unilaterally. Typically, severance requires the consent of both spouses, or the ending of the marriage in divorce. At common law, all of the other rights associated with the entireties property belonged to the husband: as the head of the household, he could control the use of the property and the exclusion of others from it and enjoy all of the income produced from it. The husband's control of the property was so extensive that, despite the rules on alienation, the common law eventually provided that he could unilaterally alienate entireties property without severance subject only to the wife's survivorship interest.

With the passage of the Married Women's Property Acts in the late 19th century granting women distinct rights with respect to marital property, most States either abolished the tenancy by the entirety or altered it significantly. Michigan's version of the estate is typical of the modern tenancy by the entirety. Following Blackstone, Michigan characterizes its tenancy by the entirety as creating no individual rights whatsoever: "It is well settled under the law of this State that one tenant by the entirety has no interest separable from that of the other …. Each is vested with an

entire title." And yet, in Michigan, each tenant by the entirety possesses the right of survivorship. Each spouse – the wife as well as the husband – may also use the property, exclude third parties from it, and receive an equal share of the income produced by it. Neither spouse may unilaterally alienate or encumber the property, although this may be accomplished with mutual consent. Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divorce decree specifies otherwise.…

B. Marital Interests

1. Tenancy by the Entirety

U.S. v. Craft
535 U.S. 274 (2002)

Justice O'CONNOR delivered the opinion of the Court.

This case raises the question whether a tenant by the entirety possesses "property" or "rights to property" to which a federal tax lien may attach. Relying on the state law fiction that a tenant by the entirety has no separate interest in entireties property, the United States Court of Appeals for the Sixth Circuit held that such property is exempt from the tax lien. We conclude that, despite the fiction, each tenant possesses individual rights in the estate sufficient to constitute "property" or "rights to property" for the purposes of the lien, and reverse the judgment of the Court of Appeals.

I

In 1988, the Internal Revenue Service (IRS) assessed $482,446 in unpaid income tax liabilities against Don Craft, the husband of respondent Sandra L. Craft, for failure to file federal income tax returns for the years 1979 through 1986. When he failed to pay, a federal tax lien attached to "all property and rights to property, whether real or personal, belonging to" him. 26 U.S.C. § 6321.

At the time the lien attached, respondent and her husband owned a piece of real property in Grand Rapids, Michigan, as tenants by the entirety. After notice of the lien was filed, they jointly executed a quitclaim deed purporting to transfer the husband's interest in the property to respondent for one dollar. When respondent

attempted to sell the property a few years later, a title search revealed the lien. The IRS agreed to release the lien and allow the sale with the stipulation that half of the net proceeds be held in escrow pending determination of the Government's interest in the property.

Respondent brought this action to quiet title to the escrowed proceeds. The Government claimed that its lien had attached to the husband's interest in the tenancy by the entirety. It further asserted that the transfer of the property to respondent was invalid as a fraud on creditors. The District Court granted the Government's motion for summary judgment, holding that the federal tax lien attached at the moment of the transfer to respondent, which terminated the tenancy by the entirety and entitled the Government to one-half of the value of the property.

Both parties appealed. The Sixth Circuit held that the tax lien did not attach to the property because under Michigan state law, the husband had no separate interest in property held as a tenant by the entirety. It remanded to the District Court to consider the Government's alternative claim that the conveyance should be set aside as fraudulent.

On remand, the District Court concluded that where, as here, state law makes property exempt from the claims of creditors, no fraudulent conveyance can occur. It found, however, that respondent's husband's use of nonexempt funds to pay the mortgage on the entireties property, which placed them beyond the reach of creditors, constituted a fraudulent act under state law, and the court awarded the IRS a share of the proceeds of the sale of the property equal to that amount. …

We granted certiorari to consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached.

II

Whether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes "property and rights to property" for the purposes of the federal tax lien statute, is ultimately a question of federal law. The answer to this federal question, however, largely depends upon state law. The federal tax lien statute itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." Accordingly, "[w]e look initially to state law to

determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."

A common idiom describes property as a "bundle of sticks" – a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of the federal tax lien statute is a question of federal law.

In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien. In Drye v. United States, 528 U.S. 49 (1999), we considered a situation where state law allowed an heir subject to a federal tax lien to disclaim his interest in the estate. The state law also provided that such a disclaimer would "creat[e] the legal fiction" that the heir had predeceased the decedent and would correspondingly be deemed to have had no property interest in the estate. We unanimously held that this state law fiction did not control the federal question and looked instead to the realities of the heir's interest. We concluded that, despite the State's characterization, the heir possessed a "right to property" in the estate – the right to accept the inheritance or pass it along to another – to which the federal lien could attach.

III

We turn first to the question of what rights respondent's husband had in the entireties property by virtue of state law.…

In determining whether respondent's husband possessed "property" or "rights to property" within the meaning of 26 U.S.C. § 6321, we look to the individual rights created by these state law rules. According to Michigan law, respondent's husband had, among other rights, the following rights with respect to the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with

the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

IV

We turn now to the federal question of whether the rights Michigan law granted to respondent's husband as a tenant by the entirety qualify as "property" or "rights to property" under § 6321. The statutory language authorizing the tax lien "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." We conclude that the husband's rights in the entireties property fall within this broad statutory language.

Michigan law grants a tenant by the entirety some of the most essential property rights: the right to use the property, to receive income produced by it, and to exclude others from it. See Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("[T]he right to exclude others" is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"). These rights alone may be sufficient to subject the husband's interest in the entireties property to the federal tax lien. They gave him a substantial degree of control over the entireties property, and, as we noted in Drye, "in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' [t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property."

The husband's rights in the estate, however, went beyond use, exclusion, and income. He also possessed the right to alienate (or otherwise encumber) the property with the consent of respondent, his wife. It is true, as respondent notes, that he lacked the right to unilaterally alienate the property, a right that is often in the bundle of property rights. There is no reason to believe, however, that this one stick – the right of unilateral alienation – is essential to the category of "property."…

Excluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would, moreover, exempt a rather large amount of what is commonly thought of as property. … Community property States often provide that real community property cannot be alienated without the consent of

both spouses. Accordingly, the fact that respondent's husband could not unilaterally alienate the property does not preclude him from possessing "property and rights to property" for the purposes of § 6321.

Respondent's husband also possessed the right of survivorship – the right to automatically inherit the whole of the estate should his wife predecease him. Respondent argues that this interest was merely an expectancy, which we suggested in Drye would not constitute "property" for the purposes of a federal tax lien. 528 U.S., at 60, n. 7 ("[We do not mean to suggest] that an expectancy that has pecuniary value … would fall within § 6321 prior to the time it ripens into a present estate"). Drye did not decide this question, however, nor do we need to do so here. As we have discussed above, a number of the sticks in respondent's husband's bundle were presently existing. It is therefore not necessary to decide whether the right to survivorship alone would qualify as "property" or "rights to property" under § 6321.

That the rights of respondent's husband in the entireties property constitute "property" or "rights to property" "belonging to" him is further underscored by the fact that, if the conclusion were otherwise, the entireties property would belong to no one for the purposes of § 6321. Respondent had no more interest in the property than her husband; if neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system.

Justice SCALIA's and Justice THOMAS' dissents claim that the conclusion that the husband possessed an interest in the entireties property to which the federal tax lien could attach is in conflict with the rules for tax liens relating to partnership property. This is not so. As the authorities cited by Justice THOMAS reflect, the federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets.. As a holder of this lien, the Federal Government is entitled to "receive … the profits to which the assigning partner would otherwise be entitled," including predissolution distributions and the proceeds from dissolution....

There is, however, a difference between the treatment of entireties property and partnership assets. The Federal Government may not compel the sale of partnership

assets (although it may foreclose on the partner's interest). It is this difference that is reflected in Justice SCALIA's assertion that partnership property cannot be encumbered by an individual partner's debts. This disparity in treatment between the two forms of ownership, however, arises from our decision in United States v. Rodgers, supra (holding that the Government may foreclose on property even where the co-owners lack the right of unilateral alienation), and not our holding today. In this case, it is instead the dissenters' theory that departs from partnership law, as it would hold that the Federal Government's lien does not attach to the husband's interest in the entireties property at all, whereas the lien may attach to an individual's interest in partnership property….

We therefore conclude that respondent's husband's interest in the entireties property constituted "property" or "rights to property" for the purposes of the federal tax lien statute. We recognize that Michigan makes a different choice with respect to state law creditors: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." But that by no means dictates our choice. The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts' answers to similar questions involving state law. As we elsewhere have held, "'exempt status under state law does not bind the federal collector.'"…

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

…I write separately to observe that the Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States.

Justice THOMAS, with whom Justice STEVENS and Justice SCALIA join, dissenting.

…The Court does not contest that the tax liability the IRS seeks to satisfy is Mr. Craft's alone, and does not claim that, under Michigan law, real property held as a tenancy by the entirety belongs to either spouse individually. Nor does the Court

suggest that the federal tax lien attaches to particular "rights to property" held individually by Mr. Craft. Rather, borrowing the metaphor of "property as a 'bundle of sticks' – a collection of individual rights which, in certain combinations constitute property," the Court proposes that so long as sufficient "sticks" in the bundle of "rights to property" "belong to" a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer.

This amorphous construct ignores the primacy of state law in defining property interests ….

I

Title 26 U.S.C. § 6321 provides that a federal tax lien attaches to "all property and rights to property, whether real or personal, belonging to" a delinquent taxpayer. It is uncontested that a federal tax lien itself "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." Consequently, the Government's lien under § 6321 "cannot extend beyond the property interests held by the delinquent taxpayer," under state law….

A

…As the Court recognizes, pursuant to Michigan law, as under English common law, property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons. Neither spouse has "any separate interest in such an estate." An entireties estate constitutes an indivisible "sole tenancy." Because Michigan does not recognize a separate spousal interest in the Grand Rapids property, it did not "belong" to either respondent or her husband individually when the IRS asserted its lien for Mr. Craft's individual tax liability. Thus, the property was not property to which the federal tax lien could attach for Mr. Craft's tax liability.

Drye … was concerned not with whether state law recognized "property" as belonging to the taxpayer in the first place, but rather with whether state laws could disclaim or exempt such property from federal tax liability after the property interest was created. *Drye* held only that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held, and that a federal lien therefore attached to the taxpayer's interest in the estate. 528 U.S., at 61 (recognizing that a disclaimer does not restore the status quo ante because the heir "determines

who will receive the property – himself if he does not disclaim, a known other if he does")….

B

…Rather than adopt the majority's approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular "rights to property" to which the federal tax lien could attach. He did not.[5] … With such rights subject to lien, the taxpayer's interest has "ripen[ed] into a present estate" of some form and is more than a mere expectancy, and thus the taxpayer has an apparent right "to channel that value to [another]."

In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. See 4 G. Thompson, Real Property § 37.14(a) (D. Thomas ed. 1994) (noting that a married person's power to devise one-half of the community property is "consistent with the fundamental characteristic of community property": "community ownership means that each spouse owns 50% of each community asset").

It is clear that some of the individual rights of a tenant in entireties property are primarily personal, dependent upon the taxpayer's status as a spouse, and similarly not susceptible to a tax lien. For example, the right to use the property in conjunction

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[5] Even such rights as Mr. Craft arguably had in the Grand Rapids property bear no resemblance to those to which a federal tax lien has ever attached. See W. Elliott, Federal Tax Collections, Liens, and Levies ¶ ¶ 9.09[3][a] – [f] (2d ed.1995 and 2000 Cum. Supp.) (listing examples of rights to property to which a federal tax lien attaches, such as the right to compel payment; the right to withdraw money from a bank account, or to receive money from accounts receivable; wages earned but not paid; installment payments under a contract of sale of real estate; annuity payments; a beneficiary's rights to payment under a spendthrift trust; a liquor license; an easement; the taxpayer's interest in a timeshare; options; the taxpayer's interest in an employee benefit plan or individual retirement account).

with one's spouse and to exclude all others appears particularly ill suited to being transferred to another, and to lack "exchangeable value."

Nor do other identified rights rise to the level of "rights to property" to which a § 6321 lien can attach, because they represent, at most, a contingent future interest, or an "expectancy" that has not "ripen[ed] into a present estate." By way of example, the survivorship right wholly depends upon one spouse outliving the other, at which time the survivor gains "substantial rights, in respect of the property, theretofore never enjoyed by [the] survivor." …

Similarly, while one spouse might escape the absolute limitations on individual action with respect to tenancy by the entirety property by obtaining the right to one-half of the property upon divorce, or by agreeing with the other spouse to sever the tenancy by the entirety, neither instance is an event of sufficient certainty to constitute a "right to property" for purposes of § 6321. Finally, while the federal tax lien could arguably have attached to a tenant's right to any "rents, products, income, or profits" of real property held as tenants by the entirety, the Grand Rapids property created no rents, products, income, or profits for the tax lien to attach to….

Ownership by "the marriage" is admittedly a fiction of sorts, but so is a partnership or corporation. There is no basis for ignoring this fiction so long as federal law does not define property, particularly since the tenancy by the entirety property remains subject to lien for the tax liability of both tenants….

Notes and Questions

1. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), reached a different result under state law. *Sawada* allowed a transfer of entireties property (the family home) by a husband and wife to their children, in order to avoid the risk that the home would be vulnerable to claims by Masako and Helen Sawada, who'd been injured when they were struck by a car operated by the husband, and who eventually became judgment creditors as a result of the lawsuits they filed against the husband, Kokichi Endo. Given that any lien against the house could only attach to the husband's interest and that the house couldn't be sold

without the wife's consent, what exactly was the risk to the Endos' ownership of the house?

The Endos conveyed the house to their children, for no valuable consideration, after the accident and after the first complaint was filed. The parents continued to live in the house, though they had no legal interest in it. After trial, both Sawadas were awarded a total of roughly $25,000. The wife, Ume Endo, died shortly thereafter, survived by Kokichi. The Sawadas, unable to recover against Kokichi Endo's personal property, sought to invalidate the transfer of the family home to the children as fraudulent.

The Hawaii Supreme Court found that a spouse's interest in property held by the entireties was not subject to levy and execution by that spouse's individual creditors, even though some states do allow seizure and sale by creditors, subject to the other spouse's contingent right of survivorship. The Hawaii Supreme Court reasoned that the Married Women's Property Acts equalized husband and wife, creating a unity of equals who both had the right to use and enjoy the whole estate. This insulated the wife's interest in the estate from the separate debts of her husband, and vice versa. "A joint tenancy may be destroyed by voluntary alienation, or by levy and execution, or by compulsory partition, but a tenancy by the entirety may not. The indivisibility of the estate, except by joint action of the spouses, is an indispensable feature of the tenancy by the entirety." Creditors of one spouse could not even attach that spouse's right of survivorship, because that would make a conveyance by both spouses too uncertain, harming the other spouse's interest.

The Hawaii Supreme Court continued, "there is obviously nothing to prevent [a] creditor from insisting upon the subjection of property held in tenancy by the entirety as a condition precedent to the extension of credit. Further, the creation of a tenancy by the entirety may not be used as a device to defraud existing creditors." That's all well and good for voluntary creditors, but what about involuntary creditors like the Sawadas? They weren't offered any options before they extended "credit" to Kokichi Endo in the form of the injuries he inflicted on them. Is this rule fair to them? (Is the proper comparison a world in which Kokichi Endo didn't own a house at all when he

hit them, or a world in which he owned a house jointly or in common when he hit them? Does it matter that the law is less directly involved in whether Endo owned a house than in the rules of co-ownership?)

The Hawaii Supreme Court concluded that public policy supported its holding, because tenancy by the entirety protected an interest in family solidarity:

> When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate. This would not be possible where a third party has become a tenant in common or a joint tenant with one of the spouses, or where the ownership of the contingent right of survivorship of one of the spouses in a third party has cast a cloud upon the title of the marital estate, making it virtually impossible to utilize the estate for these purposes.

561 P.2d at 1297. A dissent pointed out that, under the Married Women's Property Acts, what was required was equality as between spouses, not any particular rule about creditors. At common law, "the interest of the husband in an estate by the entireties could be taken by his separate creditors on execution against him, subject only to the wife's right of survivorship." Thus, the dissent reasoned, equal treatment merely required that both spouses be subjected to this rule.

One way of looking at the matter: entireties property is specifically designed, at least in its modern incarnation, to protect the interest of one spouse against the other's independent acts. If that's the case, then aren't the *Craft* dissents correct? If a state may choose this objective in its property law, why shouldn't this choice be respected? Or are there special concerns relating to federal tax that justify overriding this choice? If so, should the government be able to force the sale of entireties property, or should it be forced to wait to see which spouse survives the other?

2. **Forfeiture**. What about criminal forfeiture of property involved in a crime, such as a house in which a drug transaction occurred? Some forfeiture statutes exempt property used without the consent or knowledge of its owner. Under those statutes, some courts allow the innocent spouse to retain use and possession of entirety property during her lifetime, as well as her right of survivorship. *Compare* United States v. 1500 Lincoln Ave., 949 F.2d 73 (3d Cir. 1991) (guilty spouse's interest is forfeited, subject to innocent spouse's possession and survivorship rights), *with* United States v. 15621 S.W. 209th Ave., 894 F.2d 1511 (11th Cir. 1990) (not allowing current forfeiture, but allowing government to file lis pendens preserving its right to guilty spouse's interest upon death of innocent spouse or severance of estate). What if a forfeiture statute doesn't protect innocent owners? In that case, the government can seize the entire property, including the innocent spouse's interest. Bennis v. Michigan, 516 U.S. 442 (1996) (rejecting takings and due process claims).

3. **Homestead acts as an alternative?** Many states have so-called "homestead" acts, protecting the family home (up to a certain value or size) from many creditors' claims, though not against foreclosure of a mortgage on that home. California provides for $50,000 for a single person, $75,000 for a "family unit," and $150,000 for people 65 or older, disabled, or 55 or older with an annual income under $15,000. Cal. Code Civ. Proc. § 704.730 (2003). Washington provides for protections for $40,000 real property or $15,000 personal property. Wash. Rev. Code §6.13.030 (1999). Should the tenancy by the entirety be abolished in favor of homestead exemptions? Compare the protections for mortgagors, discussed in the unit on Mortgages.
4. **Creating a tenancy by the entirety.** Traditionally, a tenancy by the entirety was created by granting property "to X and Y, husband and wife, as tenants by the entirety." Today, X and Y can be any spouses, and states that recognize tenancies by the entirety often presume that a transfer "to A and B, [spouses]," creates that estate. See, e.g., Constitution Bank v. Olson, 620 A.2d 1146 (Pa. Super. Ct. 1993). Other states always presume a tenancy in common even when the co-owners are married, so a clear expression of the requisite intent is required. See Miss. Code Ann. §89-11-7. As a rule, the magic words "tenants by the entirety" should be used.

If the cotenants are not married, the magic words will not work. In Riccelli v. Forcinito, 595 A.2d 1322 (Pa. Super. Ct. 1991), Sam Riccelli and Carmen Pirozek bought property in 1962 "as tenants by the entireties with the right of survivorship." However, they weren't married at the time of the purchase, and so they couldn't have a tenancy by the entirety. What kind of tenancy did they have? The court reasoned: "The appropriate form of tenancy is to be determined by the intention of the parties, 'the ultimate guide by which all deeds must be interpreted.'… [J]oint tenancy with the right of survivorship best effectuates their intention to the extent legally permissible, that being the form of tenancy for unmarried persons most nearly resembling the tenancy by the entireties enjoyed by husband and wife, since in both instances the survivor takes the whole." The modern presumption in favor of tenancy in common yielded to a clearly expressed contrary intent. *See also* Funches v. Funches, 413 S.E.2d 44 (Va. 1992) ("tenancy by the entirety" with express survivorship language that was given to unmarried parties created a joint tenancy because of the survivorship language). *But see* Smith v. Stewart, 596 S.W.2d 346 (Ark. Ct. App. 1980) (deed "to A and B, his wife," when A and B were unmarried, failed to create a joint tenancy; the relevant state statute required an express declaration of joint tenancy with right of survivorship), aff'd, 601 S.W.2d 837 (Ark. 1980).

5. **Divorce.** Because marriage is a requirement for a tenancy by the entirety, divorce ends that form of ownership. What should replace it? The modern preference is for tenancy in common as a general rule, and many states follow that rule with tenancies by the entireties that end by divorce. See, e.g., Mich. Comp. Laws Ann. § 552.102. A few states presume that a tenancy by the entirety is converted to a joint tenancy unless the parties otherwise agree. See, e.g., Estate of Childress v. Long, 5888 So. 2d 192 (Miss. 1991).

6. **Common law marriage.** Common law marriage was widely recognized when access to formal marriage was sometimes difficult, particularly in rural areas. However, it is now recognized only in 11 states and the District of Columbia. Where it is recognized, the parties must manifest an intent to be married and hold themselves out as husband and wife. If they do so, they have

exactly the same rights as any other married couple. Is this a kind of "adverse possession" of the benefits of marriage?

Many states abolished common law marriage on the theory that it was no longer required, given the ease of accessing a marriage license, and that it encouraged people to lie about whether they'd held themselves out as husband and wife. Moreover, a marriage license makes it easy to understand who is entitled to pensions and other benefits, which became more important as those types of assets became more significant throughout the twentieth century.

2. Community Property

Nine states, representing roughly 30% of the population of the U.S., recognize community property for married people: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Under community property regimes, marital property belongs to each spouse equally. Each spouse has a right to pass on his or her share to anyone by will, making community property different from joint tenancy; however, it is also possible to hold community property with a right of survivorship, highly similar to joint tenancy. In the absence of a right of survivorship, a surviving spouse is typically entitled to some of the community property when the other spouse dies intestate; his or her share generally depends on whether there are surviving issue (children and other descendants), and how many there are.

The basic idea of community property is that a marriage is a cooperative endeavor, and each spouse contributes to gains, whether directly or indirectly. Except for Alaska, which requires an explicit agreement, Alaska Stat. § 34.77.090 (2002), the default rule under a community property regime is that property earned by a spouse during marriage belongs to the marital community, and each spouse owns half of the community property as an equal undivided interest. This includes property purchased with income earned during the marriage. This contrasts to common law states, in which property belongs by default to the spouse who acquires it during the marriage.

Property owned before marriage, as well as property acquired by inheritance or gift during the marriage, remains separate property in most states. States are divided about whether and when income from separate property, such as interest, royalties, and rent, becomes part of the community property. Idaho, Louisiana, Texas and Wisconsin treat the income from all property as community property, while the other states allow such income to remain separate property. Classification may prove complicated: for example, is an award of damages from a bike accident involving one spouse community property? The answer may depend on whether the award represents economic harm such as lost earnings (community property) or pain and suffering (separate property). What if the award is for loss of a limb, which has both earnings-related and quality of life-related aspects? What if the award is for loss of consortium – the caretaking and intimate relations shared between spouses?

In general, spouses are free to take property as separate property by agreement, and to convert property from one regime to the other by agreement. If community and separate property are commingled, tracing the shares may prove very difficult, and the party with the burden of showing that the property is separate may have a hard time prevailing. Carefully kept records may allow a tracing spouse to overcome the presumption that assets held during marriage are community property. Under the "family expense presumption," family expenses are presumed to have come from community assets in a commingled account. If such expenses exceeded deposits of community funds, the balance will be separate property. See v. See, 415 P.2d 776 (Cal. 1966). As for outstanding debt paid off in part with community property, California apportions community and separate property according to the contributions made. Thus, a person who has a house subject to a mortgage before she marries, and then pays the remainder of the mortgage with money earned during marriage, will own the house partly as separate property and partly as community property. Other states use an "inception" theory and consider the house entirely separate property because the purchase was made before the marriage. And other states use a "vesting" theory and consider the house entirely community property because title didn't vest until the mortgage was paid off.

In most cases, either spouse may manage community property. However, if title is in only one spouse's name, that spouse may be the only one who can manage the property. In addition, a spouse who runs a business that is community property may

have exclusive control. The controlling spouse has a kind of fiduciary duty: she must act in good faith towards her spouse, but she is not required to act with good judgment. Transferring or mortgaging community property, unlike day-to-day management, requires the consent of both spouses in a number of community property states, though not all. *See* J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & CONTEMP. PROBS. 99 (1993). The fact that a deed says that property is separate property is not controlling, because the law prevents a spouse from converting community property to separate property unilaterally. In some states, such as Texas, the controlling spouse can make reasonable gifts of community property, while California and Washington allow any gift by the managing spouse to be set aside by the other spouse. In most states, a bona fide purchaser from any managing spouse is protected against invalidation of the sale.

In some states, creditors can reach whatever property a spouse is entitled to manage. If the spouses share the family car, for example, then a creditor of either spouse could seize the car to satisfy one spouse's debt (after following the appropriate procedures). Others only allow creditors to reach community property if both spouses consented to the relevant debt, and others limit the amount of community property creditors of only one spouse can reach.

A spouse may dispose of half of the community property at his or her death. There is no right of survivorship, but the other half belongs to the survivor. The decedent can allocate the property however she wants in a will; if there is no will, then some community property states make the other spouse the heir, while others give the decedent's issue priority.

There is no such thing as a tenancy by the entireties in a community property state; there can be joint tenancy or tenancy in common, but property held in those forms is separate property. Like a tenancy by the entireties, community property can only exist between married people. Moreover, neither spouse alone can convey his or her undivided share to another person, except to the other spouse. Community property is not subject to partition. Without agreement, the spouse's only option to separate the couple's undivided interests is divorce, which will result in an equal or "equitable" division of community property, depending on the state. California, New Mexico,

and Louisiana divide community property and debts equally,* while courts use the more flexible equitable division in the other community property states. In California, absent a written agreement to the contrary, a spouse who contributes separate property to acquiring community property must be reimbursed for the contribution at divorce, though the spouse can't get interest or an adjustment for a change in the value of the property, and the reimbursement can't exceed the net value of the property at the time the property was acquired. Cal. Family Code §2640(b). Can you see why the legislature felt it necessary to impose the net value cap? What kind of unsavory activities might result if the rule were different?

If a married couple moves to a non-community property state, community property retains its character, which can lead to some complicated situations.

A family law course will cover the significant differences between community property and joint tenancy in more detail, including tax implications. The regimes reward careful planning, especially for people with substantial assets. *See* Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925 (2009) (arguing that marital property rules, particularly in community property states, create perverse incentives toward divorce).

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* In the absence of agreement to the contrary or deliberate misappropriation of community property by one spouse.

12. Leasing Real Property

The law of concurrent ownership, discussed in the previous chapter, generally regulates relationships between intimates. Arrangements like the joint tenancy generally arise between individuals who know each other and remain locked in ongoing relationships. As a result, there's not much arms-length bargaining and relatively few disputes work their way into the court system.

The law of landlord-tenant is very different. It is the law of strangers—strangers who often have little in common and may never interact after the lease terminates. How the law responds to this difference is one of the central theoretical questions you will wrestle with in this chapter. More practically, in this section of the course you will learn about the types of leaseholds, tenant selection, transferring leases, ending leases, and the various rights and responsibilities of tenants and landlords during the course of the lease.

A. The Dual Nature of the Lease

In its simplest form, the lease is a transfer in which the owner of real property conveys exclusive possession to a tenant (generally in exchange for rent). Most law students know through personal experience that the process of renting generally entails signing a lease contract. Like other contracts, a lease's terms can be negotiated and they explicitly govern many of the rights and responsibilities of the parties involved. So why then are leases discussed in the property course rather than contracts?

The short response is that a lease is a property-contract hybrid. While it is surely a contract, it's a contract for a very particular kind of property interest. The fuller answer, like so much in property, lies in the history of feudal land law. Under the traditional common law, a leasehold was understood primarily as a property interest, similar in nature to the estates covered in our chapter on Estates and Future Interests. A lord (often a baron) conveyed a possessory right to a tenant (usually a peasant) and retained for himself a future interest (typically a reversion). Importantly, once the landlord transferred the right to possession, he had few other obligations to the tenant.

This basic model survived until the 1960s, when many jurisdictions began to introduce general contract law principles (e.g. the implied duty of good faith and fair dealing) into the law of landlord-tenant. Importing contract theories into the lease has had two practical effects. First, parties to a lease now have the option to terminate in the case of *any* material breach; in the past tenants could only terminate if the landlord interfered with their possession. Second, modern tenants have far more protections from indifferent and unscrupulous landlords than their counterparts 50 years ago. Courts and legislatures have proven particularly eager to help residential tenants—whom they view as vulnerable—from predations of the free market.

B. Tenant Selection

As we saw earlier in the textbook, the right to exclude remains a cornerstone of property ownership. Owners have expansive power to keep others off of their land and out of their homes. Generally speaking, this right extends to landlords, who have broad discretion to select tenants as they see fit. Landlords, for example, remain free to exclude smokers from their properties. They can also refuse to rent to a tenant who acts erratically, possesses a criminal record, or has a low credit score. Landlords, however, cannot violate state or federal anti-discrimination laws when they go through the leasing process.

The Civil Rights Act of 1866

One of the oldest laws that protects tenants against discrimination in the housing market is the Civil Rights Act of 1866. Passed in the aftermath of the Civil War, the Civil Rights Act of 1866 prohibits all discrimination based on race in the purchase or rental of real or personal property. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Thus, landlords cannot deny an apartment unit to a potential tenant based on tenant's heritage or the color of their skin. There are no exceptions.

The Fair Housing Act of 1968

The Fair Housing Act of 1968 (and its many amendments) greatly expanded the number of individuals covered by anti-discrimination law. Broadly speaking, the Fair Housing Act (FHA) prohibits discrimination in the renting, selling, advertising, or financing of real estate on the basis of race, color, national origin, religion, sex, familial status, and disability. It is worth looking closely at some of its provisions. The Act begins with a statement of policy and a few (counter-intuitive) definitions:

§3601. Declaration of Policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§3602. Definitions

As used in this subchapter . . .

(c) "Family" includes a single individual. .. .

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21). . . .

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

The definition of "familial status" surprises many students. Whom, exactly, does it protect? Unmarried people? Single mothers? Although more intuitive, the definition of handicap has generated a number of legal disputes. Alcohol, for example, is not a controlled substance under section 802 of title 21. Does that mean that a landlord cannot refuse to rent to a person who drinks heavily or sounds very drunk (and belligerent) over the phone?

The real meat of the Fair Housing act comes in §3604. The first subsection makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable" a "dwelling" to any person because of race, color, religion, sex, familial status, or national origin. *See* 42 U.S.C. §3604(a). Later sections provide similar protections for the handicapped. The Act then takes a number of additional steps designed to eliminate discrimination from the housing market. Under the terms of the law it is illegal to:

(1) discriminate in the terms or conditions of a sale or rental [§3604(b)];

(2) create or publish an advertisement or statement that express a preference or hostility toward individuals in any of the protected categories [§3604(c)];

(3) lie about or misrepresent the availability of housing [§3604(d)];

(4) refuse to permit handicapped tenants from making reasonable modifications of the existing premise at their own expense [§3604(f)(3)(A)];

(5) refuse to make reasonable accommodations in rules and policies to accommodate individuals with handicaps [§3604(f)(3)(B)];

(6) Harass or intimidate persons in their enjoyment of a dwelling [§3617].

Unlike the Civil Rights Act of 1866, the Fair Housing Act does contain a number of important exemptions. Section 3607(b), for example, allows housing designated for older persons to bar families with young children. Similarly, section 3607(a) allows religious organizations and private clubs to give preferences to their own members. The most controversial exemption, reproduced below, is the so-called Mrs. Murphy exemption:

(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further , That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further , That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further , That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

What does this exemption allow? If the act is intended to root out pernicious discrimination, why include this provision?

It is crucial to note that the plain text of the Mrs. Murphy exemption states that it does not apply to 3604(c)—the subsection that prohibits discriminatory advertising. Thus, although certain categories of landlords are exempted from the statute's basic framework, they are still not allowed to post discriminatory advertisements.

State Anti-Discrimination Efforts

Some state legislatures have passed laws that afford far more protection from discrimination than the federal statutes provide. Minnesota, for example, protects against housing discrimination on the basis of sexual orientation, gender identity, marital status, and source of income. Other states in the Northeast and West Coast provide similar coverage, but these positions are in no way a majority. As the map below indicates, in most states nothing prevents a landlord from denying an apartment to an engaged heterosexual couple, based on the belief that cohabitation before marriage is sinful.

Proving Discrimination

Two broad categories of cases may be brought under the FHA: disparate treatment claims and disparate impact claims.

A sign erected by white homeowners trying to prevent black tenants from moving into their Detroit neighborhood (1942).

Disparate treatment claims target intentional forms of discrimination, including the refusal to rent based on one of the protected categories. A plaintiff can show intent to discriminate with "smoking gun" style evidence, such as statements by the landlord that he "would never rent to an Irishman." Of course, modern landlords rarely make such forthright admissions. As a result, courts in the United States have established a burden-shifting approach that allows plaintiffs to prove intentional discrimination with indirect circumstantial evidence. The initial burden is on the plaintiff to make a *prima facie* case of discrimination. In a refusal to rent case, the plaintiff must show that (1) that she is a member of a class protected by the FHA; (2) that she applied for and was qualified to rent the unit; (3) that she was rejected; and (4) the unit remained unrented. Once the plaintiff has established sufficient evidence to state a *prima facie* case, the burden shifts to the defendant landlord to proffer a legitimate nondiscriminatory reason for the refusal to rent. If the defendant meets this requirement, the burden then shifts back to the tenant to prove that the reason offered is a pretext.

Discrimination is often ferreted out through the use of "testers." Advocacy groups, many of which are funded by the federal government, will send comparable white and black individuals to inquire about renting a vacant unit. If the landlord treats the testers differently (e.g., provides different levels of assistance, shows different units,

provides different information about unit availability) this provides persuasive evidence of illegal discrimination.

Disparate impact claims allege that some seemingly neutral policy has a disproportionately harmful effect on members of a group protected by the FHA. These cases rely heavily on statistical evidence and employ a very similar burden-shifting methodology as the disparate treatment claims. Using statistics, plaintiffs need to show that a defendant's policy has actually caused some disparity. The defendant then has the opportunity to escape liability if it can show show that its actions are necessary to achieve a valid goal. See *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

Problems

1. William Neithamer, who is gay and HIV positive attempted to rent an apartment from Brenneman Properties. Neithamer did not reveal his HIV status, but admitted to the property manager that he had dismal credit because he had recently devoted all of his resources to taking care of a lover who had died of AIDS. Neithamer, however, offered to pre-pay one year's rent. Brenneman Properties rejected Neithamer's application and, in turn, Neithamer sued under the FHA. Does he have a case? *See Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp 2d 1 (D.D.C. 1999).

2. Over the phone, Landlord said to Plaintiff, "Do you have children? I don't want any little boys because they'll mess up the house and nobody would be here to watch them. Really, this house isn't good for kids because it's right next to a main road." Plaintiff sues. Landlord argues that her statements only show that she is concerned about the welfare of children. Is that a legitimate non-discriminatory reason to refuse to rent?

3. A local government has decided to knock down two high-rise public housing projects within its borders. The high-rises primarily house recent immigrants from Guatemala. A local advocacy group brings a lawsuit on their behalf, claiming that the government action has a disparate impact on a protected group. Is this a disparate treatment or disparate impact case? Can you think of

a non-discriminatory reason why the government may have taken such an action?

4. The FHA requires landlords to make "reasonable accommodations" for individuals with handicaps. Which of the following requests by a tenant would qualify as a reasonable accommodation? (a) Asking a landlord with a first-come/first-served parking policy to create a reserved parking space for a tenant who has difficulty walking; (b) Requesting that a landlord waive parking fees for a disabled tenant's home health care aide; (c) Asking the landlord to make an exception to the building's "no pets" rule for a tenant with a service animal; (d) Requesting landlord to pay for a sign language interpreter for a deaf individual during the application process; (e) Asking the landlord to provide oral reminders to pay the rent for a tenant with documented short-term memory loss.

An Exercise in Advertising

Imagine that you are a lawyer for a newspaper in a large metropolitan area. The local chapter of the ACLU has raised concerns that some advertisements in the classifieds section of your paper violate the Fair Housing Act.* Your boss has asked you to review the ads for any offending language. Which of the following would you feel comfortable printing?†

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* Would any of these ads violate the Civil Rights Act of 1866?

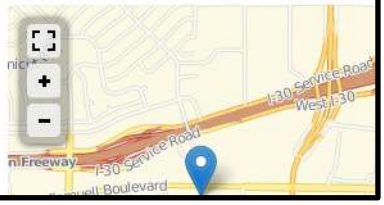
† The government does provide some guidance to landlords worried about triggering FHA liability through their advertisements. There are, for example, published lists of "words to avoid" and "acceptable language." Although context is important, landlords can generally use these phrases: good neighborhood, secluded setting, single family home, quality construction, near public transportation, near places of worship, and assistance animals only.

FOR RENT	FOR RENT
Seeking tenant for 1 bed apt. $500/m. I only rent to black people.	New apartment building. $650/m. Walking distance to synagogue. Great amenities.
FOR RENT	**FOR RENT**
Great Deal! Apt. in exclusive Danbury area. Very selective. Contact ASAP. $700/m	Perfect apt. for rent. Near park. $400/m. Absolutely no pets.
FOR RENT	**FOR RENT**
Snazzy digs near downtown! Looking for muscular football players to rent rooms. 500/m	Looking for tenants. Absolutely no lawyers. Only couples. Must show income 3x monthly rent.
FOR RENT	**FOR RENT**
Seeking new tenants for 2 br. Pref for women – I'm female & want female tenants!	Great place by University. $600/m. Kids ok, but must pay 2x security dep. Kids = trouble

What about this ad for a roommate on Craigslist? Is it objectionable to you? Does it violate the FHA? Does it matter that the poster is looking for a *roommate*? Would your answers change if the advertisement read, "Have a room available for an able-bodied white man with no children?"

$650 / 1010ft² - Have a room available for female Christian elderly woman none smoker (I 30 & st frances)

Nice comfortable furnished room available access to patio, backyard, 1/2 bath & full bath available, wyfi available, cable TV available, This all for that special Christian elderly none smoking or drinking church going female. Thank you
Serious inquiries only!!!



Fair Housing Council of San Fernando Valley v. Roommate.com, LLC

666 F.3d 1216 (9th Cir. 2012)

KOZINSKI, Chief Judge:

There's no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the Fair Housing Act ("FHA") extend to the selection of roommates?

Roommate.com, LLC ("Roommate") operates an internet-based business that helps roommates find each other. Roommate's website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended "Additional Comments" section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics, including sex, sexual orientation and familial status. The Fair Housing Councils of San Fernando Valley and San Diego ("FHCs") sued Roommate in federal court, alleging that the website's questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq. . . .

ANALYSIS

If the FHA extends to shared living situations, it's quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental *of a dwelling*." 42 U.S.C. § 3604(b) (emphasis added). The FHA also makes it illegal to:

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental *of a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. § 3604(c) (emphasis added). The reach of the statute turns on the meaning of "dwelling."

The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate "dwellings" for purposes of the statute. Is a "dwelling" a bedroom plus a right to access common areas? What if roommates share a bedroom? Could a "dwelling" be a bottom bunk and half an armoire? It makes practical sense to interpret "dwelling" as an independent living unit and stop the FHA at the front door.

There's no indication that Congress intended to interfere with personal relationships inside the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA's prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women

they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it's possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results. . . . Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. *Id.* While the right protects only "highly personal relationships," *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618), the right isn't restricted exclusively to family, *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The right to association also implies a right not to associate. *Roberts*, 468 U.S. at 623.

To determine whether a particular relationship is protected by the right to intimate association we look to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. . . .

Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which "is entitled to special protection as the center of the private lives of our people." Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). . . . Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.

An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won't have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave. . . .

It's a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." Frisby v. Schultz, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional

problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. . . . Reading "dwelling" to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of "dwelling" to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA. . . .

As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

1. **What's a dwelling?** The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). Do you think the FHA applies to college dormitories? Is it illegal to reserve some dormitories for women or to have ethnic-themed dorms?

2. **A broader Craigslist problem.** It's not unusual to stumble across advertisements for apartments (as opposed to just roommate ads) on Craigslist that violate the FHA. If a local newspaper published similar ads they would be liable under the FHA for publishing discriminatory material. Why doesn't anyone sue Craigslist? The answer is that section 230(c) of the Communications Decency Act provides internet service providers and website owners with broad immunity from liability for content posted by third parties. Craigslist and other similar sites may voluntarily remove offending posts, but they are not required to do so.

C. The Quest for Clean, Safe, and Affordable Premises

In feudal England, policy makers and government officials expressed little concern over the housing conditions of renters. The law was well-settled: Once a landlord turned over the right of possession, the tenant became responsible for maintenance

of the leased property. If a tenant decided to live in squalor rather than complete basic repairs, that was the tenant's problem, not the landlord's worry. Although it may seem counterintuitive to modern readers (who rely on landlords to fix nearly everything), putting the burden on the tenant to maintain the property actually produced efficient results in the medieval world: landlords often lived long distances from their lessees, communication was slow, houses were simply constructed, and most tenants had the knowledge and skills to complete basic repairs.

The basic principle that tenants are responsible for their own living conditions remained unchallenged until the 1960s, when both academics and politicians expressed growing concern about the rental housing stock in central cities. Many worried that exploitative landlords were flouting safety regulations and taking advantage of tenants who had few housing choices as a result of their poverty and the rampant discrimination in the housing market. The problems in the poorest neighborhoods also had spillover effects in surrounding communities—disease, vermin, and fires do not respect municipal borders. In response to these problems, the law began to vest tenants with a new series of rights against their landlords. This subsection traces the evolution of these rights and explores the rise of legal tools to ensure minimum housing standards for all renters.

1. The Covenant of Quiet Enjoyment

Traditional common law principles do not leave renters completely defenseless against unprincipled landlords. Every lease, whether residential or commercial, contains a *covenant of quiet enjoyment*. Often this promise is explicitly stated in the lease contract. Where it's not specifically mentioned, all courts will imply it into the agreement. The basic idea is that the landlord cannot interfere with the tenant's use of the property. Most courts state the legal test this way: A breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant's use or enjoyment of the premises.

Consider the following hypothetical:

> Little Bo Peep Detective Services rents the second floor of a four-floor building. A year into the five-year lease, the landlord suddenly begins a construction project designed to update the suites on the first floor. These

> renovations create loud noise and regular interruptions of electric service. The construction work has also made the parking lot inaccessible. Employees and customers need to walk a quarter-mile to access the building from a nearby parking garage.

Do these problems amount to a violation of the covenant of quiet enjoyment? To determine whether the interference is "substantial" courts generally consider the purpose the premises are leased for, the foreseeability of the problem, the potential duration, and the degree of harm. In this example, if the construction project lasts for more than a few days, then Little Bo Peep can most likely bring a successful claim against its landlord under the covenant of quiet enjoyment. The problems here are not mere trifles—the noise, lack of electricity, and inadequate parking fundamentally affect the company's ability to use the property as they intended.

The difficult conceptual issue with the covenant of quiet enjoyment concerns the remedy. If the landlord breaks the covenant, what are the tenant's options? After a breach, the tenant can always choose to stay in the leased property, continue to pay rent, and sue the landlord for damages.

Additionally, certain violations of the covenant of quiet enjoyment allow the tenant to consider the lease terminated, leave, and stop paying rent. Recall from earlier in the chapter that the landlord's fundamental responsibility is to provide the tenant with possession (or, in some jurisdictions, the right to possession). From that principle, courts developed a rule that in cases where the landlord wrongfully evicts the tenant, all the tenant's obligations under the lease cease. Imagine:

> Landlord and tenant both sign a lease that reads, "Landlord agrees to provide Tenant with possession of 123 Meadowlark Lane for a period of 12 months beginning April 1. Tenant agrees to pay $100 per month." After 4 months, however, the Landlord retakes possession of the property by forcing the tenant out and changing the locks.

Assuming the tenant hasn't committed a material breach, the landlord's actions constitute an obvious violation of the covenant of quiet enjoyment—the tenant can no longer use the property for any purpose. Thus, any eviction where the tenant is

physically denied access to the unit ends the tenant's obligation to pay rent and allows the tenant to sue for damages incurred from being removed from possession (A tenant could also sue to regain the unit). The law is very clear on this point. Relatedly, if the landlord denies the tenant access to some portion of the rented space (say, an allotted parking space) that, too, constitutes a breach of the covenant of quiet enjoyment. The tenant subject to such a partial eviction has the option to terminate the lease and sue for damages.

But what if the landlord doesn't physically interfere with her tenant's occupancy? What if the landlord creates an environment that's so miserable that the tenant is forced to flee? Is this an "eviction" that would allow the tenant to consider the lease terminated or must the tenant stay and continue paying rent while he brings a damages lawsuit

Fidelity Mutual Life Insurance Co. v. Kaminsky

768 S.W.2d 818 (Tex. App. 1989)

MURPHY, Justice.

The issue in this landlord-tenant case is whether sufficient evidence supports the jury's findings that the landlord and appellant, Fidelity Mutual Life Insurance Company ["Fidelity"], constructively evicted the tenant, Robert P. Kaminsky, M.D., P.A. ["Dr. Kaminsky"] by breaching the express covenant of quiet enjoyment contained in the parties' lease. We affirm.

Dr. Kaminsky is a gynecologist whose practice includes performing elective abortions. In May 1983, he executed a lease contract for the rental of approximately 2,861 square feet in the Red Oak Atrium Building for a two year term which began on June 1, 1983. The terms of the lease required Dr. Kaminsky to use the rented space solely as "an office for the practice of medicine." Fidelity owns the building and hires local companies to manage it. At some time during the lease term, Shelter Commercial Properties ["Shelter"] replaced the Horne Company as managing agents. Fidelity has not disputed either management company's capacity to act as its agent.

The parties agree that: (1) they executed a valid lease agreement; (2) Paragraph 35 of the lease contains an express covenant of quiet enjoyment conditioned on Dr. Kaminsky's paying rent when due, as he did through November 1984; Dr. Kaminsky

abandoned the leased premises on or about December 3, 1984 and refused to pay additional rent; anti-abortion protestors began picketing at the building in June of 1984 and repeated and increased their demonstrations outside and inside the building until Dr. Kaminsky abandoned the premises.

When Fidelity sued for the balance due under the lease contract following Dr. Kaminsky's abandonment of the premises, he claimed that Fidelity constructively evicted him by breaching Paragraph 35 of the lease. Fidelity apparently conceded during trial that sufficient proof of the constructive eviction of Dr. Kaminsky would relieve him of his contractual liability for any remaining rent payments. Accordingly, he assumed the burden of proof and the sole issue submitted to the jury was whether Fidelity breached Paragraph 35 of the lease, which reads as follows:

Quiet Enjoyment.

> Lessee, on paying the said Rent, and any Additional Rental, shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the said term.

A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant's beneficial use of the premises. *See Downtown Realty, Inc. v. 509 Tremont Bldg.*, 748 S.W.2d 309, 313 (Tex.App.—Houston [14th Dist.] 1988, n.w.h.). Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if he can establish a constructive eviction by the landlord. . . .

In order to prevail on his claim that Fidelity constructively evicted him and thereby relieved him of his rent obligation, Dr. Kaminsky had to show the following: 1) Fidelity intended that he no longer enjoy the premises, which intent the trier of fact could infer from the circumstances; 2) Fidelity, or those acting for Fidelity or with its permission, committed a material act or omission which substantially interfered with use and enjoyment of the premises for their leased purpose, here an office for the practice of medicine; 3) Fidelity's act or omission permanently deprived Dr. Kaminsky of the use and enjoyment of the premises; and 4) Dr. Kaminsky abandoned the premises within a reasonable period of time after the act or omission. *E.g.*, *Downtown Realty, Inc.*, 748 S.W.2d at 311 . . . .

[T]he jury found that Dr. Kaminsky had established each element of his constructive eviction defense. The trial court entered judgment that Fidelity take nothing on its suit for delinquent rent.

Fidelity raises four points of error. . . .

Fidelity's first point of error relies on *Angelo v. Deutser*, 30 S.W.2d 707 (Tex.Civ.App.—Beaumont 1930, no writ), *Thomas v. Brin*, 38 Tex.Civ.App. 180, 85 S.W. 842 (1905, no writ) and *Sedberry v. Verplanck*, 31 S.W. 242 (Tex.Civ.App.1895, no writ). These cases all state the general proposition that a tenant cannot complain that the landlord constructively evicted him and breached a covenant of quiet enjoyment, express or implied, when the eviction results from the actions of third parties acting without the landlord's authority or permission. Fidelity insists the evidence conclusively establishes: a) that it did nothing to encourage or sponsor the protestors and; b) that the protestors, rather than Fidelity or its agents, caused Dr. Kaminsky to abandon the premises. Fidelity concludes that reversible error resulted because the trial court refused to set aside the jury's answers to the special issues and enter judgment in Fidelity's favor and because the trial court denied its motion for a new trial. We disagree. . . .

The protests took place chiefly on Saturdays, the day Dr. Kaminsky generally scheduled abortions. During the protests, the singing and chanting demonstrators picketed in the building's parking lot and inner lobby and atrium area. They approached patients to speak to them, distributed literature, discouraged patients from entering the building and often accused Dr. Kaminsky of "killing babies." As the protests increased, the demonstrators often occupied the stairs leading to Dr. Kaminsky's office and prevented patients from entering the office by blocking the doorway. Occasionally they succeeded in gaining access to the office waiting room area.

Dr. Kaminsky complained to Fidelity through its managing agents and asked for help in keeping the protestors away, but became increasingly frustrated by a lack of response to his requests. The record shows that no security personnel were present on Saturdays to exclude protestors from the building, although the lease required Fidelity to provide security service on Saturdays. The record also shows that Fidelity's attorneys prepared a written statement to be handed to the protestors soon after

Fidelity hired Shelter as its managing agent. The statement tracked TEX.PENAL CODE ANN. § 30.05 (Vernon Supp.1989) and generally served to inform trespassers that they risked criminal prosecution by failing to leave if asked to do so. Fidelity's attorneys instructed Shelter's representative to "have several of these letters printed up and be ready to distribute them and verbally demand that these people move on and off the property." The same representative conceded at trial that she did not distribute these notices. Yet when Dr. Kaminsky enlisted the aid of the Sheriff's office, officers refused to ask the protestors to leave without a directive from Fidelity or its agent. Indeed, an attorney had instructed the protestors to remain unless the landlord or its representative ordered them to leave. It appears that Fidelity's only response to the demonstrators was to state, through its agents, that it was aware of Dr. Kaminsky's problems.

Both action and lack of action can constitute "conduct" by the landlord which amounts to a constructive eviction. *E.g.*, *Downtown Realty Inc.*, 748 S.W.2d at 311. In *Steinberg v. Medical Equip. Rental Serv., Inc.*, 505 S.W.2d 692 (Tex. Civ. App.—Dallas 1974, no writ) accordingly, the court upheld a jury's determination that the landlord's failure to act amounted to a constructive eviction and breach of the covenant of quiet enjoyment. 505 S.W.2d at 697. Like Dr. Kaminsky, the tenant in Steinberg abandoned the leased premises and refused to pay additional rent after repeatedly complaining to the landlord. The *Steinberg* tenant complained that Steinberg placed trash bins near the entrance to the business and allowed trucks to park and block customer's access to the tenant's medical equipment rental business. The tenant's repeated complaints to Steinberg yielded only a request "to be patient." Id. Fidelity responded to Dr. Kaminsky's complaints in a similar manner: although it acknowledged his problems with the protestors, Fidelity, like Steinberg, effectively did nothing to prevent the problems.

This case shows ample instances of Fidelity's failure to act in the fact of repeated requests for assistance despite its having expressly covenanted Dr. Kaminsky's quiet enjoyment of the premises. These instances provided a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the leased premises, not because of the trespassing protestors, but because of Fidelity's lack of response to his complaints about the protestors. Under the circumstances, while it is undisputed that Fidelity did not "encourage" the demonstrators, its conduct essentially allowed them to continue

to trespass. The general rule of the *Angelo*, *Thomas* and *Sedberry* cases, that a landlord is not responsible for the actions of third parties, applies only when the landlord does not permit the third party to act. *See e.g.*, *Angelo*, 30 S.W.2d at 710 ["the act or omission complained of must be that of the landlord and not merely of a third person *acting without his authority or permission*" (emphasis added)]. We see no distinction between Fidelity's lack of action here, which the record shows resulted in preventing patients' access to Dr. Kaminsky's medical office, and the *Steinberg* case where the landlord's inaction resulted in trucks' blocking customer access to the tenant's business. We overrule the first point of error. . . . .

In its [final] point of error, Fidelity maintains the evidence is factually insufficient to support the jury's finding that its conduct permanently deprived Dr. Kaminsky of use and enjoyment of the premises. Fidelity essentially questions the permanency of Dr. Kaminsky's being deprived of the use and enjoyment of the leased premises. To support its contentions, Fidelity points to testimony by Dr. Kaminsky in which he concedes that none of his patients were ever harmed and that protests and demonstrations continued despite his leaving the Red Oak Atrium building. Fidelity also disputes whether Dr. Kaminsky actually lost patients due to the protests.

The evidence shows that the protestors, whose entry into the building Fidelity failed to prohibit, often succeeded in blocking Dr. Kaminsky's patients' access to his medical office. Under the reasoning of the *Steinberg* case, omissions by a landlord which result in patients' lack of access to the office of a practicing physician would suffice to establish a permanent deprivation of the use and enjoyment of the premises for their leased purpose, here "an office for the *practice* of medicine." *Steinberg*, 505 S.W.2d at 697; *accord*, *Downtown Realty, Inc.*, 748 S.W.2d at 312 (noting jury's finding that a constructive eviction resulted from the commercial landlord's failure to repair a heating and air conditioning system in a rooming house).

Texas law has long recited the requirement, first stated in *Stillman*, 266 S.W.2d at 916, that the landlord commit a "material and permanent" act or omission in order for his tenant to claim a constructive eviction. However, as the *Steinberg* and *Downtown Realty, Inc.* cases illustrate, the extent to which a landlord's acts or omissions permanently and materially deprive a tenant of the use and enjoyment of the premises often involves a question of degree. Having reviewed all the evidence before the jury in this

case, we cannot say that its finding that Fidelity's conduct permanently deprived Dr. Kaminsky of the use and enjoyment of his medical office space was so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule the fourth point of error.

We affirm the judgment of the trial court.

Notes and Questions

1. **Evolution of the doctrine.** As discussed above, English judges widely recognized that tenants could terminate the lease (and sue for damages) if the landlord physically denied them possession of the rented property. Eventually the basic concept was expanded to situations where the landlord commits some act that, while it falls short of an actual eviction, so severely affects the value of the tenancy that the tenant is forced to flee. This is known as *constructive eviction*.

2. **Basic constrictive eviction law.** To make a claim of constructive eviction a tenant must show that some act or omission by the landlord substantially interferes with the tenant's use and enjoyment of the property. The tenant also needs to notify the landlord about the problem, give the landlord an opportunity to cure the defect, and then vacate the premise within a reasonable amount of time.

3. **Stay or go?** Why might a tenant contemplating bringing a constructive eviction claim worry about the requirement to vacate the premises? Is constructive eviction a more powerful remedy in a place like San Francisco, which has a very tight housing market, or Houston, which has more open units?

4. **Landlord's wrongful conduct.** To make use of the doctrine of quiet enjoyment, the tenant must show that the landlord committed some wrongful act. There's wide agreement that any affirmative step taken by the landlord that impedes the tenant's use of the property can meet the requirement of an "act." Examples would include burning toxic substances on the property, prolonged construction activities, or a substantial alteration of an essential

feature of the leased premises. The trickier doctrinal question is whether a landlord's failure to act can ever qualify as the wrongful conduct. Traditionally, courts hesitated to impose liability on landlords for their omissions, but the law of most states now asserts that a "lack of action" can constitute the required act. For example, a landlord's failure to provide heat in the winter months is generally found to violate the covenant of quiet enjoyment. Some courts, nervous about unjustly expanding landlords' potential liability, deem omissions wrongful only when the landlord fails to fulfill some clear duty—either a duty bargained for in the lease or a statutory duty.

5. **Troublesome tenants.** Suppose your landlord rents the floor above your apartment to the members of a Led Zeppelin cover band. If the band practices every night between the hours of 3:00 am and 4:00 am, could you bring a successful constructive eviction claim against the landlord?

6. **Third parties.** What if the Led Zeppelin cover band played every night at a club across the street? If the noise from the bar kept you awake, could you sue your landlord for constructive eviction?

2. The Implied Warranty of Habitability

Although the covenant of quiet enjoyment offers tenants some protections, the doctrine—without more—can leave renters exposed to dreadful living conditions. What if cockroaches invade a tenant's apartment? Or a sewer pipe in the basement begins to leak? What if a storm shatters the windows of the apartment? Or a wall of a building falls down? Unless the landlord somehow caused any of these disasters (or had a clearly articulated duty to fix them) a tenant cannot bring a successful case under the covenant of quiet enjoyment. In *Hughes v. Westchester Development Corp.*, 77 F.2d 550 (D.C. Cir. 1935), for example, vermin invaded the tenant's apartment, making it "impossible to use the kitchen and toilet facilities." Despite the infestation, the court found that the tenant remained responsible for the rent because the landlord was not to blame for the bugs' sudden appearance. Leases, the court ruled, contained no implied promise that the premise was fit for the purpose it was leased. If tenants desired more and better protection, they had the burden to bargain for such provisions in the lease.

All of this changed in the late 1960s and early 70s. The most lasting accomplishment of the tenants' rights movement was the widespread adoption of the *implied warranty of habitability*. In the United States, only Arkansas has failed to adopt the rule. In a nutshell, the implied warranty of habitability imposes a duty on landlords to provide residential tenants with a clean, safe, and habitable living space.

Hilder v. St. Peter
478 A.2d 202 (Vt. 1984)

BILLINGS, Chief Justice.
Defendants appeal from a judgment rendered by the Rutland Superior Court. The court ordered defendants to pay plaintiff damages in the amount of $4,945.00, which represented "reimbursement of all rent paid and additional compensatory damages" for the rental of a residential apartment over a fourteen month period in defendants' Rutland apartment building. Defendants filed a motion for reconsideration on the issue of the amount of damages awarded to the plaintiff, and plaintiff filed a cross-motion for reconsideration of the court's denial of an award of punitive damages. The court denied both motions. On appeal, defendants raise [two] issues for our consideration: first, whether the court correctly calculated the amount of damages awarded the plaintiff; secondly, whether the court's award to plaintiff of the entire amount of rent paid to defendants was proper since the plaintiff remained in possession of the apartment for the entire fourteen month period. . . .

The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants' 10–12 Church Street apartment building in Rutland with her three children and new-born grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter $140 a month and a damage deposit of $50; plaintiff paid defendant the first month's rent and the damage deposit prior to moving in. Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff's damage deposit if she would clean the apartment herself prior to taking possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the

window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff's tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff attached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants' building. Raw sewage littered the floor of the basement, but defendant failed to clean it up. Plaintiff also discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff's tenancy, to furnish heat.

In its conclusions of law, the court held that the state of disrepair of plaintiff's apartment, which was known to the defendants, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of the implied warranty of habitability. The court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that the court misapplied the law of Vermont relating to habitability because the plaintiff never abandoned the demised premises and, therefore, it was error to award her the full

amount of rent paid. Plaintiff counters that, while never expressly recognized by this Court, the trial court was correct in applying an implied warranty of habitability and that under this warranty, abandonment of the premises is not required. Plaintiff urges this Court to affirmatively adopt the implied warranty of habitability.

Historically, relations between landlords and tenants have been defined by the law of property. Under these traditional common law property concepts, a lease was viewed as a conveyance of real property. *See* Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases,* 56 Cornell L.Q. 489, 489–90 (1971) (hereinafter cited as *Expansion of Tenants' Rights*). The relationship between landlord and tenant was controlled by the doctrine of caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?,* 1975 Wis. L. Rev. 19, 27–28. The landlord's only covenant was to deliver possession to the tenant. The tenant's obligation to pay rent existed independently of the landlord's duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. *Expansion of Tenants' Rights, supra,* at 490. The land, not the dwelling, was regarded as the essence of the conveyance.

An exception to the rule of caveat lessee was the doctrine of constructive eviction. *Lemle v. Breeden*, 462 P.2d 470, 473 (Haw. 1969). Here, if the landlord wrongfully interfered with the tenant's enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. *Legier v. Deveneau*, 126 A. 392, 393 (Vt. 1924).

Beginning in the 1960's, American courts began recognizing that this approach to landlord and tenant relations, which had originated during the Middle Ages, had become an anachronism in twentieth century, urban society. Today's tenant enters into lease agreements, not to obtain arable land, but to obtain safe, sanitary and comfortable housing.

> [T]hey seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and

> ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C.Cir.), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970).

Not only has the subject matter of today's lease changed, but the characteristics of today's tenant have similarly evolved. The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling. *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974). Additionally, "the common law courts assumed that an equal bargaining position existed between landlord and tenant. . . ." Note, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L.REV. 237, 238 (1980) (hereinafter cited as *A Dream Deferred*).

In sharp contrast, today's residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. *Green v. Superior Court*, *supra*, 517 P.2d at 1173. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to "discover and cure" any faults and break-downs. *Id.* Confronted with a recognized shortage of safe, decent housing, see 24 V.S.A. § 4001(1), today's tenant is in an inferior bargaining position compared to that of the landlord. *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979). Tenants vying for this limited housing are "virtually powerless to compel the performance of essential services." *Id.*

In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.

> The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition.

Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 842 (Mass. 1973).

Recognition of residential leases as contracts embodying the mutual covenants of habitability and payment of rent does not represent an abrupt change in Vermont law. Our case law has previously recognized that contract remedies are available for breaches of lease agreements. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 381 A.2d 1063, 1065 (Vt. 1977). . . . More significantly, our legislature, in establishing local housing authorities, 24 V.S.A. § 4003, has officially recognized the need for assuring the existence of adequate housing.

> [S]ubstandard and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists . . . .

24 V.S.A. § 4001(4). In addition, this Court has assumed the existence of an implied warranty of habitability in residential leases. *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983).

Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will. *Boston Housing Authority v. Hemingway*, *supra*, 293 N.E.2d at 843. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit. *Id.* Essential facilities are "facilities vital to the use of the premises for residential purposes. . . ." *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971). This means that a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty. Nor can this implied warranty of habitability be waived by any written provision in the lease or by oral agreement.

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)–5003(c)(5). A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability. "[O]ne or two minor violations standing alone which do not affect" the health or safety of the tenant, shall be considered *de minimus* and not a breach of the warranty. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 63. . . . In addition, the landlord will not be liable for defects caused by the tenant. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 62.

However, these codes and standards merely provide a starting point in determining whether there has been a breach. Not all towns and municipalities have housing codes; where there are codes, the particular problem complained of may not be addressed. *Park West Management Corp. v. Mitchell*, *supra*, 391 N.E.2d at 1294. In determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant. *Id.*

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord "of the deficiency or defect not known to the landlord and [allowed] a reasonable time for its correction." *King v. Moorehead*, *supra*, 495 S.W.2d at 76.

Because we hold that the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. *Lemle v. Breeden*, *supra*, 462 P.2d at 475. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. *Birkenhead v. Coombs*, *supra*, 465 A.2d at 246. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue. *Id.* "[I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony" concerning the value of the defect. *Id.* at 247. The tenant will be liable only for "the reasonable rental

value [if any] of the property in its imperfect condition during his period of occupancy." *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the implied warranty of habitability. *See* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1470–73 (1974) (hereinafter cited as *A New Doctrine*); *A Dream Deferred*, *supra*, at 250–51. Damages for annoyance and discomfort are reasonable in light of the fact that:

> the residential tenant who has suffered a breach of the warranty . . . cannot bathe as frequently as he would like or at all if there is inadequate hot water; he must worry about rodents harassing his children or spreading disease if the premises are infested; or he must avoid certain rooms or worry about catching a cold if there is inadequate weather protection or heat. Thus, discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.

Moskovitz, *A New Doctrine*, *supra*, at 1470–71. Damages for discomfort and annoyance may be difficult to compute; however, "[t]he trier [of fact] is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard." *Vermont Electric Supply Co. v. Andrus*, 315 A.2d 456, 459 (Vt. 1974).

Another remedy available to the tenant when there has been a breach of the implied warranty of habitability is to withhold the payment of future rent. *King v. Moorehead*, *supra*, 495 S.W.2d at 77. The burden and expense of bringing suit will then be on the landlord who can better afford to bring the action. In an action for ejectment for nonpayment of rent, 12 V.S.A. § 4773, "[t]he trier of fact, upon evaluating the seriousness of the breach and the ramification of the defect upon the health and safety of the tenant, will abate the rent at the landlord's expense in accordance with its findings." *A Dream Deferred*, *supra*, at 248. The tenant must show that: (1) the landlord had notice of the previously unknown defect and failed, within a reasonable time, to repair it; and (2) the defect, affecting habitability, existed during the time for which rent was withheld. *See A Dream Deferred*, *supra*, at 248–50. Whether a portion, all or none of the rent will be awarded to the landlord will depend on the findings

relative to the extent and duration of the breach. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082–83. Of course, once the landlord corrects the defect, the tenant's obligation to pay rent becomes due again. *Id.* at 1083 n. 64.

Additionally, we hold that when the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent. 11 Williston on Contracts § 1404 (3d ed. W. Jaeger 1968); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

In addition to general damages, we hold that punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, *supra*, 381 A.2d at 1065. A willful and wanton or fraudulent breach may be shown "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting . . . a reckless or wanton disregard of [one's] rights . . . . " *Sparrow v. Vermont Savings Bank*, 112 A. 205, 207 (Vt. 1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper. *111 East 88th Partners v. Simon*, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980).

> The purpose of punitive damages . . . is to punish conduct which is morally culpable. . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action. . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

Davis v. Williams, 402 N.Y.S.2d 92, 94 (N.Y.Civ.Ct.1977).

In the instant case, the trial court's award of damages, based in part on a breach of the implied warranty of habitability, was not a misapplication of the law relative to habitability. Because of our holding in this case, the doctrine of constructive eviction, wherein the tenant must abandon in order to escape liability for rent, is no longer

viable. When, as in the instant case, the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly unnecessary. *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*, *supra*, 418 A.2d at 26–27. Under our holding, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid.

In its conclusions of law the trial court stated that the defendants' failure to make repairs was compensable by damages to the extent of reimbursement of all rent paid and additional compensatory damages. The court awarded plaintiff a total of $4,945.00; $3,445.00 represents the entire amount of rent plaintiff paid, plus the $50.00 deposit. . . .

Additionally, the court denied an award to plaintiff of punitive damages on the ground that the evidence failed to support a finding of willful and wanton or fraudulent conduct. *See Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, *supra*, 381 A.2d at 1065. The facts in this case, which defendants do not contest, evince a pattern of intentional conduct on the part of defendants for which the term "slumlord" surely was coined. Defendants' conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff's rights. The trial court found that defendants were aware of defects in the essential facilities of plaintiff's apartment, promised plaintiff that repairs would be made, but never fulfilled those promises. The court also found that plaintiff continued, throughout her tenancy, to pay her rent, often in the face of verbal threats made by defendant Stuart St. Peter. These findings point to the "bad spirit and wrong intention" of the defendants, *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983), and would support a finding of willful and wanton or fraudulent conduct, contrary to the conclusions of law and judgment of the trial judge. However, the plaintiff did not appeal the court's denial of punitive damages, and issues not appealed and briefed are waived. *R. Brown & Sons, Inc. v. International Harvester Corp.*, 453 A.2d 83, 84 (Vt. 1982).

Notes and Questions

1. **Residential v. commercial.** Unlike the covenant of quiet enjoyment, the implied warranty of habitability only applies to residential leases. Commercial tenants still largely operate under common-law legal rules. Commonly,

commercial landlords and tenants do not rely on the default rules, but rather assign the duty of upkeep and repair with an express provision in the lease.

2. **What is habitability?** Do all defects in an apartment amount to violations? What is the standard of habitability as laid out in *Hilder*?

3. **Paternalism?** Is the implied warranty of habitability too paternalistic? Some economists argue that the poorest Americans should have more freedom over how they spend their limited dollars. Isn't it possible that some individuals might want to occupy a really cheap (if slightly dangerous) dwelling so that they have more money to spend on healthy foods, transportation, and clothes? Would it matter if the evidence showed that such apartments were in fact cheaper than "habitable" apartments?

4. **Necessary?** Do you agree with the arguments made by the court in *Hilder* about the necessity of the implied warranty of habitability? Don't landlords already have excellent incentives to maintain their buildings?

5. **Arkansas and beyond.** As mentioned above, Arkansas is the one state that has not adopted the implied warranty of habitability—either by statute or judicial fiat. Is Arkansas a Mad Max-style hellscape for renters? Are tenants there worse (or worse off) than the tenants in other states? Some people think so. *Vice* magazine recently dubbed Arkansas, "The Worst Place to Rent in America." You can see the report on renting in Arkansas at: https://www.youtube.com/watch?v=9G2Pk2JZP-E. But does the implied warranty of habitability provide much practical protection? Do poor tenants know about it? Do they have the resources to push back against aggressive landlords who threaten lawsuits and other forms of retaliation? Professor David Super has suggested that the decision of tenants' rights movement to focus on habitability over affordability and overcrowding was a strategic mistake. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389-463 (2011). Is there a nirvana for renters anywhere?

6. **Procedure & remedies.** If a tenant believes his apartment does not meet the standard of habitability, he must first must notify the landlord of the defects and give the landlord a reasonable amount of time to cure the problems. If the landlord either cannot or will not make repairs, the implied warranty of habitability offers the renter a menu of options. Each option presents a different combination of costs and risks to the tenant. If the landlord breaches, the tenant may:

    a. *Leave, terminate contract.* The tenant may consider the lease terminated and move out.

    b. *Stay and sue for damages.* As with the covenant of quiet enjoyment, a tenant may stay in the unit and pay rent, while suing the landlord for damages. There is significant disagreement among jurisdictions about how to calculate damages. In *Hilder*, the court uses the difference between the rental price of the dwelling if it met the standard of habitability and the value of the dwelling as it exists; the rent charged is not evidence of actual value, but rather evidence of the appropriate price if it met the standard of habitability. [Note that given the court's calculation, the value was apparently zero?] Other courts look at the difference between the amount of rent stated in the lease and the fair market value of the premises. What is the better approach? Should the rent charged be considered evidence of fair market value? If not, why not?

    c. *Stay and charge the cost of repair.* A tenant has the option to fix the defect and then deduct the cost of repair from the rent.

    d. *Stay and withhold rent.* In most jurisdictions, a tenant can withhold the entire rent for violations of the implied warranty of habitability (although, a cautious tenant should pay the rent into an escrow account). This is a very powerful remedy. First, it gives the landlord strong incentive to respond to valid complaints from tenants. Second, it puts the burden on the landlord (rather than the tenant) to initiate a lawsuit when contested issues arise. Finally, if the landlord does move

to evict the tenant for non-payment, violations of the implied warranty of habitability can serve as a defense.

e. *Extreme violations.* Tenants have won punitive damages in cases where the landlord committed repeated or gruesome violations of the implied warranty.

Problem

1. The Mad Hatter and the Alice each decide to rent an apartment in Wonderland. The Mad Hatter walks into a large apartment and sees a hole in the roof, but he decides to rent the unit anyway. The apartment that Alice decides to lease has no obvious problems. The next day, however, some mold spots appear by one of the vents. The mold grows rapidly and Alice starts to have regular headaches and some trouble breathing. Additionally, an unknown troublemaker smashed Alice's air conditioning unit and it no longer works. Can either the Mad Hatter or Alice win a lawsuit against their landlord if their problems aren't fixed?

3. Retaliatory Eviction

Imperial Colliery Co. v. Fout
373 S.E.2d 489 (W. Va. 1988)

Danny H. Fout, the defendant below, appeals a summary judgment dismissing his claim of retaliatory eviction based on the provisions of W.Va.Code, 55–3A–3(g), which is our summary eviction statute. Imperial Colliery had instituted an eviction proceeding and Fout sought to defend against it, claiming that his eviction was in retaliation for his participation in a labor strike.

This case presents two issues: (1) whether a residential tenant who is sued for possession of rental property under W.Va.Code, 55–3A–1, *et seq.,* may assert retaliation by the landlord as a defense, and (2) whether the retaliation motive must relate to the tenant's exercise of a right incidental to the tenancy.

Fout is presently employed by Milburn Colliery Company as a coal miner. For six years, he has leased a small house trailer lot in Burnwell, West Virginia, from Imperial

Colliery Company. It is alleged that Milburn and Imperial are interrelated companies. A written lease was signed by Fout and an agent of Imperial in June, 1983. This lease was for a primary period of one month, and was terminable by either party upon one month's notice. An annual rental of $1.00 was payable in advance on January 1 of each year. No subsequent written leases were signed by the parties.

On February 14, 1986, Imperial advised Fout by certified letter that his lease would be terminated as of March 31, 1986. Fout's attorney corresponded with Imperial before the scheduled termination date. He advised that due to various family and monetary problems, Fout would be unable to timely vacate the property. Imperial voluntarily agreed to a two-month extension of the lease. A second letter from Fout's attorney, dated May 27, 1986, recited Fout's personal problems and requested that Imperial's attempts to oust Fout be held "in abeyance" until they were resolved. A check for $1.00 was enclosed to cover the proposed extension. Imperial did not reply.

On June 11, 1986, Imperial sued for possession of the property, pursuant to W.Va.Code, 55–3A–1, *et seq.*, in the Magistrate Court of Kanawha County. Fout answered and removed the suit to the circuit court on June 23, 1986. He asserted as a defense that Imperial's suit was brought in retaliation for his involvement in the United Mine Workers of America and, more particularly, in a selective strike against Milburn. Imperial's retaliatory motive was alleged to be in violation of the First Amendment rights of speech and assembly, and of the National Labor Relations Act, 29 U.S.C. § 151, *et seq*. Fout also counter-claimed, seeking an injunction against Imperial and damages for annoyance and inconvenience.

After minimal discovery, Imperial moved for summary judgment. The circuit court granted Imperial's motion in an amended judgment order dated October 8, 1986, relying principally upon *Criss v. Salvation Army Residences*, 173 W.Va. 634, 319 S.E.2d 403 (1984). The court concluded that the retaliation defense "must derive from, or in some respect be related to, exercise by the tenant of rights incident to his capacity as a 'tenant'." Since Fout's participation in the labor strike was admittedly unrelated to his tenancy, the defense was dismissed and possession of the property was awarded to Imperial. It is from this order that Fout appeals.

Our initial inquiry is whether retaliation by the landlord may be asserted by the tenant as a defense in a suit under W.Va.Code, 55–3A–3(g). We addressed this issue in *Criss*

v. Salvation Army Residences, *supra*, and stated without any extended discussion that this section "specifically provides for the defense of retaliation." 173 W.Va. at 640, 319 S.E.2d at 409. We did not have occasion in *Criss* to trace the development of the retaliatory eviction defense.

It appears that the first case that recognized retaliatory eviction as a defense to a landlord's eviction proceeding was *Edwards v. Habib*, 397 F.2d 687 (D.C.Cir.1968), *cert. denied*, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969). There, a month-to-month tenant who resided in a District of Columbia apartment complex reported to a local health agency a number of sanitary code violations existing in her apartment. The agency investigated and ordered that remedial steps be taken by the landlord, who then advised Edwards that her lease was terminated. When the landlord sued for possession of the premises, Edwards alleged the suit was brought in retaliation for her reporting of the violations. A verdict was directed for the landlord and Edwards appealed.

On appeal, the court reviewed at length the goals sought to be advanced by local sanitary and safety codes. It concluded that to allow retaliatory evictions by landlords would seriously jeopardize the efficacy of the codes. A prohibition against such retaliatory conduct was therefore to be implied, even though the regulations were silent on the matter.

Many states have protected tenant rights either on the *Edwards* theory or have implied such rights from the tenant's right of habitability. Others have utilized statutes analogous to section 5.101 of the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 503 (1985), which is now adopted in fifteen jurisdictions. Similar landlord and tenant reform statutes in seventeen other states also provide protection for tenancy-related activities.

Under W.Va.Code, 37–6–30, a tenant is, with respect to residential property, entitled to certain rights to a fit and habitable dwelling. In *Teller v. McCoy*, 162 W.Va. 367, 253 S.E.2d 114 (1978), we spoke at some length of the common law right of habitability which a number of courts had developed to afford protection to the residential tenant. We concluded that these rights paralleled and were spelled out in more detail in W.Va.Code, 37–6–30. In Teller, we also fashioned remedies for the tenant where

there had been a breach of the warranty of habitability. However, we had no occasion to discuss the retaliatory eviction issue in *Teller*.

The central theme underlying the retaliatory eviction defense is that a tenant should not be punished for claiming the benefits afforded by health and safety statutes passed for his protection. These statutory benefits become a part of his right of habitability. If the right to habitability is to have any meaning, it must enable the tenant to exercise that right by complaining about unfit conditions without fear of reprisal by his landlord. *See* Annot., 40 A.L.R.3d 753 (1971).

After the seminal decision in *Edwards*, other categories of tenant activity were deemed to be protected. Such activity was protected against retaliation where it bore a relationship to some legitimate aspect of the tenancy. For example, some cases provided protection for attempts by tenants to organize to protect their rights as tenants. Others recognized the right to press complaints directly against the landlord via oral communications, petitions, and "repair and deduct" remedies. . . .

A few courts recognize that even where a tenant's activity is only indirectly related to the tenancy relationship, it may be protected against retaliatory conduct if such conduct would undermine the tenancy relationship. Typical of these cases is *Winward Partners v. Delos Santos*, 59 Haw. 104, 577 P.2d 326 (1978). There a group of month-to-month tenants gave testimony before a state land use commission in opposition to a proposal to redesignate their farm property from "agricultural" to "urban" uses. The proposal was sponsored by the landlord, a land developer. As a result of coordinated activity by the tenants, the proposal was defeated. Within six months, the landlord ordered the tenants to vacate the property and brought suit for possession.

The Hawaii Supreme Court noted that statutory law provided for public hearings on proposals to redesignate property, and specifically invited the views of the affected tenants. The court determined that the legislative policy encouraging such input would be jeopardized "if ... [landlords] were permitted to retaliate against ... tenants for opposing land use changes in a public forum." 59 Haw. at 116, 577 P.2d at 333. It relied on *Pohlman v. Metropolitan Trailer Park, Inc.*, 126 N.J.Super. 114, 312 A.2d 888 (Ch.Div.1973), which involved a similar fact pattern where tenants' intervention in zoning matters to protect their tenancy was sufficiently germane to the landlord-tenant relationship to support the defense of retaliatory eviction. *See also S.P. Growers*

Ass'n v. Rodriguez, 17 Cal.3d 719, 552 P.2d 721, 131 Cal.Rptr. 761 (1976) (retaliation for suit by tenant charging violation of Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, et seq.).

The Legislature, in giving approval to the retaliation defense, must have intended to bring our State into line with the clear weight of case law and statutory authority outlined above. We accordingly hold that retaliation may be asserted as a defense to a summary eviction proceeding under W.Va.Code, 55–3A–1, et seq., if the landlord's conduct is in retaliation for the tenant's exercise of a right incidental to the tenancy.

Fout seeks to bring this case within the *Windward* line of authority. He argues principally that Imperial's conduct violated a public policy which promotes the rights of association and free speech by tenants. We do not agree, simply because the activity that Fout points to as triggering his eviction was unrelated to the habitability of his premises.

From the foregoing survey of law, we are led to the conclusion that the retaliatory eviction defense must relate to activities of the tenant incidental to the tenancy. First Amendment rights of speech and association unrelated to the tenant's property interest are not protected under a retaliatory eviction defense in that they do not arise from the tenancy relationship. Such rights may, of course, be vindicated on other independent grounds.

For the reasons discussed above, the judgment of the Circuit Court of Kanawha County is affirmed.

Notes and Questions

1. **The basic law.** In states that recognize retaliatory eviction, a landlord may not punish tenants when they exercise legal rights incidental to their tenancy. Generally, this means that a landlord cannot raise the rent, reduce services, refuse to renew a lease, or bring an eviction action for the purpose of retaliating against a tenant who has complained about the condition of the unit, filed a lawsuit concerning the fitness of the unit, contacted a local agency, or exercised rights under the implied warranty of habitability.

2. **Legal change.** Under the traditional English common law, a landlord could raise the rent or refuse to renew a tenant's lease for any reason. How does the court in *Imperial Colliery* justify changing a long-settled rule?

3. **Rise of the doctrine.** The doctrine of retaliatory eviction came to prominence around the same time as the implied warranty of habitability. What's the link between these two rules?

4. **Retaliate for what?** West Virginia, like most states, protects tenants from retaliatory eviction. In the case above, Fout presented evidence that he lost his tenancy as a result of retaliation by his landlord. Why then did Fout lose? Do you agree with the limitations that West Virginia has put on the doctrine of retaliatory eviction? Why should tenants fear losing their homes if they exercise their First Amendment rights?

5. **Property serves human values?** Recall *Marsh v. Alabama* (company owned town cannot prevent distribution of pamphlets on sidewalk) and *New Jersey v. Shack* (property owners cannot bar social service workers from meeting with migrant laborers) from earlier in the course. In those opinions we saw that property rights are occasionally trumped other values. Why don't Fout's rights under the First Amendment and the National Labor Relations Act outweigh his landlord's desire to kick him out? Can you distinguish *Imperial Colliery* from *Marsh* and *Shack*?

6. **Is housing special?** Is housing a good like any other, or is it somehow different from most things we buy and sell on the market? In continental European countries there's a tentative national consensus that all housing—even privately owned apartments—has a uniquely public or social dimension. As a result, many European nations grant citizens strong protections against forced relocations. For example, "good faith" eviction schemes are pervasive. In a "good faith" jurisdiction, a landlord can only refuse to renew a tenancy for a good reason—generally some faulty behavior on the part of the tenant (damaging the premise, creating a nuisance, breaching a material term in the lease) or the landlord's desire to remodel the unit. Should U.S. states adopt such a rule?

7. **Remedies.** What's the appropriate remedy for a tenant who wins a retaliatory eviction case?

8. **Establishing motive.** Peter Pan calls his local Board of Health to complain about the conditions in The Neverland Apartments, where he rents a two-bedroom unit. The landlord, Hook, is furious at Pan. They get into a heated screaming match in front of the building. If Hook waits a year and then dramatically raises Pan's rent, will Pan be able to win a retaliatory eviction case? What if Hook waits six months? Three months? Some states require the tenant to show that the landlord would not have taken action "but for" the tenant exercising a right. Because of the difficulties in establishing motive, other states employ a burden-shifting model in retaliatory eviction cases. In these jurisdictions, the law presumes that the landlord has acted with a retaliatory motive if the landlord raises the rent (or takes another retaliatory action) within a certain amount of time after the tenant has availed himslef of a legal entitlement. The window of time varies from three months to a year, but many states use a six-month period. Importantly, the presumption against the landlord is rebuttable.

9. **How common is retaliation?** In his book, *Evicted: Poverty and Profit in the American City*, Matthew Desmond recounts an anecdote about a landlord who would immediately begin preparing eviction papers as soon as his tenants complained about their living conditions.

4. Landlord's Tort Liability

A landlord's responsibility for injuries sustained on the leased premise has dramatically expanded in the last 50 years. As discussed in the previous subsection, under the traditional common law rule, the tenant had the duty to undertake all repairs and maintenance on the rented property. As a result, the law absolved landlords from liability for injuries sustained because of dangerous conditions in the unit. The costs of damage (to both property and persons) sustained from rotted decks, falling plaster, and collapsing walls all fell squarely on tenants.

Almost every jurisdiction now imposes greater duties on landlords. At the very least, landlords must exercise reasonable care in keeping common areas safe, use reasonable care when making repairs, and warn tenants about latent defects—unsafe conditions that would not be obvious upon an inspection. Other jurisdictions, following the logic of the implied warranty of habitability, have gone farther. They reason that since the landlord now has a duty to provide tenants (and their guests) with safe and clean premises, a failure to comply with this obligation may amount to negligence. The basic rule in these states is that a landlord must take reasonable steps to repair defects of which the landlord becomes aware. Failure to comply exposes landlords to liability for injuries that result from the defective conditions.

Landlords sometimes attempt to avoid the obligation to repair by inserting into the lease a clause stating that the lessor is not responsible for personal injury or property damage that occurs on the premise. While such exculpatory clauses are typically upheld in commercial settings, courts increasingly strike them from residential leases as violations of public policy.

5. Gentrification & Rent Control

Photo courtesy of Flickr user Keith Hamm

Defined broadly, gentrification is the movement of wealthier people into a poor neighborhood, which results in a subsequent increase in rents and the ultimate displacement of longtime residents. The stereotypic progression starts when artists and gay couples move into a run-down but centrally located neighborhood in the urban core. They fix up houses, open trendy cafes, and start galleries. The newcomers also demand better public services and police protection from the local government. As the number of amenities grows, home prices and rents begin to rise. Married couples without children start to flow into the area, followed quickly by bankers, lawyers, and families attracted the neighborhood's beautiful older homes and terrific location. As rents continue to rise, many of the original residents—who are often poor and black—can no longer afford the neighborhood. They are forced to either move or pay an enormous percentage of their income toward rent.

One resident of a gentrifying neighborhood in Portland gives a personal account of the basic problem:

> Last week I heard a shuffle at my front door and saw that my building manager was slipping a notice under my door. I opened it only to read that my rent was being raised by 10%. . . . [In the last year], my rent has gone up a total of 14%. If it continues at this pace, I'll have to find another place to live because I'll be priced out of my very walkable, very centrally-located neighborhood.
>
> [Gentrification is] an emotional tinderbox. People who are just going about their lives are having to face eviction, displacement, or just have to spend a lot more on housing if they want to stay where they are because of forces completely out of their control. In other words, you could be doing everything "right" in your life – being a responsible citizen, earning a viable income and doing your best – but it still isn't good enough. Not unlike the tragedy of having your house destroyed by a natural phenomenon like a hurricane or a flood, you could become a victim of the "greed phenomenon" where developers look with dollar signs in their eyes at the house you live in with the intention of razing it and building a hugely profitable and expensive condo building there instead.

For low-income individuals pushed out of their neighborhoods, the process of gentrification often produces traumatic effects. In addition to the financial costs of an unwanted move, gentrification often shatters valuable personal networks. People who have lived their entire lives within a small geographic area may suddenly find themselves separated from the friends and family who provide emotional support and economic resources that serve as a vital buffer against the ills of poverty.

Many activists have suggested that rent control laws are the best solution to problems spawned by gentrification. Rent control legislation comes in a variety of forms but most often puts caps on the amount of rent that a landlord can charge (first-generation controls) and/or requires that prices for rented properties do not increase by more than a certain percent each year (second-generation controls). Rent controls, activists argue, allow existing tenants to stay in their homes while continuing to devote the same percentage of their incomes to rent has they have in the past.

Economists have a very different perspective on fighting gentrification with rent control mechanisms. American legal economists are typically opposed to rent controls. Often heatedly so. To understand why, put yourself in the shoes of a landlord in a city that holds the price of rent below what the market will bear. How would you respond if you were forced to provide a service for less than the market price? First and foremost, you probably wouldn't build any new rental housing units. Why? Because you'd almost certainly make more money if you used your capital to build something that's not regulated by the government. Ultimately, the lack of proper incentive to build apartments lowers the supply of rental housing and thereby increases the price (for anyone who doesn't qualify for rent controls). Second, you might decide to skimp on the maintenance of your rent-controlled unit in order to recoup some of the lost profits. After all, will a tenant in a rent-controlled apartment really give up their unit if you don't respond to their request to fix the sink?

So goes the theory, at any rate—and it is a theory that has found expression in judicial opinions, particularly among those judges of the U.S. Court of Appeals for the Seventh Circuit who moonlight as academic legal economists of the so-called "Chicago School." *See* Chicago Board of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741-42 (7th Cir. 1987) (Opinion of Posner, J.). In apparent agreement with these

theoretical arguments, very few American jurisdictions today maintain rent control policies—only New York, Los Angeles, and a few places in the Bay Area have significant rent control laws. State and local governments are much more likely to attack problems of affordable housing by either giving rent vouchers to the poor or building government-owned housing projects (are these better options?).

But perhaps the legal economists of a generation ago were mistaken—or at least insufficiently sensitive to the potential variety of rent control measures and the diversity of urban environments in which they can be deployed. While first-generation rent control measures have few academic defenders in the United States, there is some suggestion that the actual empirics of second-generation rent controls and other tenant protections may diverge from the dire theoretical predictions of the Chicago School. In particular, the effects of rent control on the supply, quality, and distribution of rental housing may depend significantly on the nature of the protective regulation imposed, the density of existing housing stock, availability of vacant land, the mix of other regulatory constraints on land use in general and housing in particular, and idiosyncrasies of the local economy—particularly the degree of competition among landlords. *See generally* Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J. ECON. PERSPECT. 99 (1995); Bengt Turner & Stephen Malpezzi, *A review of empirical evidence on the costs and benefits of rent control*, 10 SWED. ECON. POLICY REV. 11 (2003). Outside of the United States, moreover, economists and politicians are less antagonistic toward rent control. Paris, for example, recently passed a law capping many rents. Germany, the Netherlands, and Sweden also have widespread limitations on how much rent landlords can charge.

Notes and Questions

1. **Europe v. America.** What do you think accounts for the different views on rent control between European policy makers and their American counterparts?

2. **Getting to Affordability.** If rent control isn't the answer, what steps should government take to ensure access to affordable housing? Should the government have any role at all in the housing market? Before the Great Depression the federal government played almost no part housing policy.

How should government housing policy regarding affordable housing fit into the mix of economic regulations addressing problems of poverty and equity.

13. Nuisance

> "There is perhaps no more impenetrable jungle in the entire law than that regarding the word 'nuisance.' "
>
> —*W. Page Keeton et al., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984).*

People want to use land for different things. We've already seen how the resulting conflicts provide a rationale for property rights. In the so-called tragedy of the commons, for example, each cattle owner has an incentive to use the pasture for grazing before someone else beats him or her to it. The race to consume leaves the pasture depleted and everyone worse off. Property rights are one, but by no means the only, mechanism for addressing the problem, as an individual owner may have the necessary incentive to ensure that the plot is not overconsumed. Likewise property rights enable owners to manage their holdings free from external interference. The farmer may plant her corn even though her neighbor wishes a hotel were there. And property rights facilitate the reconciliation of incompatible interests without outside intervention. Determining whether Blackacre is better off as a hotel or a farm might be a hard call for an outside regulator. But with enough money, the would-be hotelier may simply buy out the farmer (or vice versa).

This hardly exhausts the universe of potential dispute. As we have already seen, disputes may emerge within property boundaries. One joint tenant may want to use a pond for irrigation; the other, fishing. Property law provides another set of management mechanisms for this kind of disagreement—e.g. partition actions—that we studied in our unit on concurrent interests. Likewise the law of leaseholds has its own set of doctrines for managing the inevitable battles of the landlord/tenant relationship.

Here we are interested in conflicts that arise between neighboring property owners. The collision is not *within* an ownership interest (as with cotenants) but *between* such interests. My lifelong dream of operating the world's smokiest factory may be

incompatible with my neighbor's desire for odorless living. We each own our respective land. What then?

One solution is to engage in private governance. We might strike a deal, and the law of servitudes lets us bind our successors in ownership to the arrangement. Alternatively, the state might resolve our dispute via regulation—the government may declare my facility illegal via zoning law or air quality regulation, effectively picking a winner between competing interests.

The law of nuisance takes a different tack. It also involves picking a winner, but turns the choice over to a court. The court's role, however, is not explicitly regulatory. Rather, it is there to determine whether the complained-of act is contrary to someone else's property rights. Stated another way, if my factory is a nuisance, your property rights *already* preclude its operation. The nuisance action merely clarifies that I violated your property rights (and that my property rights did not include the right to use my land in the way I had). In essence, the court is determining whether a boundary has been crossed. But from another perspective, nuisance looks a lot like regulation. A judicial regulator (rather than a politically accountable agency) takes a look at the facts and decides whose interests ought to prevail. We might look at nuisance questions from either view, which complicates the doctrine.

A. The Problem of Nuisance Definition

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Restatement (Second) of Torts* § 821D (1979). What does that mean? Nuisance law is a history of courts trying to come to grips with a fairly vague exhortation. Judges sometimes invoke the maxim *sic utere tuo ut alienum non laedas*. "[O]ne must so use his own rights as not to infringe upon the rights of another. The principle of *sic utere* precludes use of land so as to injure the property of another." Cline v. Dunlora S., LLC, 726 S.E.2d 14, 17 (Va. 2012).

That's intuitive, but unhelpful. Back to the factory versus the home. If my ownership of land includes the right to emit smoke, I interfere with my neighbor's ability to enjoy her home. But if her property right includes the ability to shut me down, then her preferred property use interferes with *my* ability to use my property as I see fit. The harms are reciprocal. Appeals to *sic utere* beg the question. That said, there is

something intuitively appealing about the maxim, and perhaps you have a strong intuition (based on what?) that factories "cause" harm in a way that homes do not. How far do intuitions of harm go? What if, instead of using my property, I prefer to let it fall into disuse? Does this passive act cause harm?

Puritan Holding Co. v Holloschitz

372 N.Y.S.2d 500 (Sup. Ct. 1975)

WALTER M. SCHACKMAN, J.

Plaintiff owns a small apartment building, recently renovated, on West 93rd Street in Manhattan, almost directly across the street from a building owned by the defendant. The latter building has been abandoned. Plaintiff claims the defendant has created a nuisance by not properly caring for her property and claims it has suffered damages as a result. Defendant did not appear in the action and an inquest was held before the court.

The uncontroverted proof at trial was that defendant's building had deteriorated, become unsightly and been taken over by derelicts. The building's condition has caused a deterioration in values on the block. A real estate expert testified that the depreciation in value of plaintiff's property since the abandonment of defendant's building was $30,000 to $35,000. He further stated it would be impossible for plaintiff to obtain a mortgage because of the condition of the defendant's property. The question for the court is whether the failure of the defendant to supervise her abandoned property constitutes the maintenance of a private nuisance.

An excellent definition of nuisance appears in 4 ALR3d 908: "The nuisance doctrine operates as a restriction upon the right of an owner of property to make such use of it as he pleases. In legal phraseology the term 'nuisance' is applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, and which produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. It is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen in his person, property, the enjoyment of his property, or his comfort. It has been said that the term 'nuisance' is incapable of an

exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing."

The court has made a search of the reported cases in New York and has been unable to find any similar to the case at bar. However, it has been held that "every person who suffered actual damages, whether direct or consequential, from a nuisance, might maintain an action for his own particular injury." *(Lansing v Smith*, 4 Wend 9.) There are numerous cases where property owners, adjacent to or in the vicinity of a nuisance, were entitled to damages. Examples are: where a tire shop emitted offensive odors and fumes; the discharge of large quantities of dust; an open burning operation by a city in a landfill area and blasting operations.

In considering whether an activity is a nuisance, the court must be mindful of the location and surroundings as well as other circumstances. An activity which occurs in a particular location and surroundings may be reasonable, while the same activity in another location and in other surroundings may be a nuisance.

West 93rd Street is in the West Side Urban Renewal area which has recently seen a marked upward trend in real estate values. Annually there are thousands of buildings abandoned throughout New York City. Some buildings abandoned and left in disrepair in certain deteriorating neighborhoods of the city may not constitute a nuisance. However, here a building has been abandoned in a location where property owners are trying to maintain and upgrade the housing standards. Defendant has clearly violated section C26-80.0 of the Administrative Code of the City of New York which requires that vacant buildings must be either continuously guarded or sealed. The court is of the opinion that defendant's actions constitute a nuisance.

The court is not unmindful of the fact that given the number of abandonments, estimated by the Housing and Development Administration of the City of New York at approximately 12,000 units per year, and the further fact that the city does not have the funds to force the owners to maintain these properties, a decision in favor of plaintiff herein could result in a multiplicity of lawsuits. However, one bad building may eventually destroy an entire neighborhood. The courts have a duty to examine each situation independently.

Plaintiff has provided sufficient proof that defendant's building is, in its present condition, a nuisance. It is entitled to the difference between the market value of the building before and after the nuisance. Plaintiff's expert has testified that the difference in value is $30,000 to $35,000. The court finds in favor of the plaintiff in the sum of $30,000.

Notes and Questions

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

2. If *Holloschitz* does not go too far, how much freedom should courts have to judge land uses? Are there any metrics that would both provide judicial discretion as well as contain it? We will examine several approaches below, but the question underscores the problem of unclear boundaries in nuisance law. A lot of property doctrine exists to help us determine the scope of property rights *without* asking a judge. The metes and bounds in a deed tell us what is a trespass. The adverse possession limitations period lets expectations settle. Title recording gives notice of competing interests. And so on. When push comes to shove, litigation may be necessary to resolve disputed boundaries, but in most cases there are ways to determine them without the aid of a court. By contrast, the boundaries clarified by nuisance law are harder to ascertain ex ante in part because nuisance is more a flexible standard than a bright-line rule. What measures short of litigation are available to people like the plaintiff here? To be sure, the law cannot anticipate every possible conflict between property owners. There is therefore something to be said for ex post determinations of what is a reasonable use of land. Is this reason enough to use nuisance law to supplement regulatory and zoning schemes?

3. **Aesthetics.** Courts generally reject nuisance claims based on aesthetic harm, but that reluctance may be eroding. Rattigan v. Wile, 841 N.E.2d 680, 683 (Mass. 2006) ("We conclude in this appeal that activities on one's property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance."); *id.* at 689-90 (arguing that the modern trend is to allow such claims). Courts also sometimes consider aesthetic harm as part

of the larger nuisance analysis. Sowers v. Forest Hills Subdivision, 294 P.3d 427, 430 (Nev. 2013) ("[W]e hold that the aesthetics of a wind turbine alone are not grounds for finding a nuisance. However, we conclude that a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.").

4. What if a building became dilapidated because its owner could not afford upkeep? If so, does *Holloschitz* hint at nuisance's potential to serve as a tool of exclusion of poor people? What other activities (or groups) might the law target? *See generally* Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum,* 55 J. LEGAL EDUC. 319, 331-33 (2005) (discussing attempts to use nuisance law as a tool of racial discrimination); John Copeland Nagle, *Moral Nuisances,* 50 EMORY L.J. 265, 276-94 (2001) (discussing range of activities targeted by nuisance plaintiffs). For commentary on the disability rights implications of a recent nuisance suit between neighbors, *see* David Perry, *Flowers v Gopal-Rich folks try to declare autistic boy a "Public Nuisance"*, (September 23, 2015), *available at http://www.thismess.net/2015/09/flowers-v-gopal-rich-folks-try-to.html* . Could the mere presence of a sex offender in a residential community of families with young children be considered a nuisance? Some public nuisance ordinances deem repeated 911 calls a nuisance; what effect might such property law rules have on victims of domestic violence? *See* Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (Aug. 2013) http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf.

5. **Nuisance and Trespass**. Does the difference between nuisance and trespass turn on the nature of the particular right of ownership involved (i.e., use versus possesion)? On whether the injury to the plaintiff resulted from a physical invasion of the plaintiff's property (i.e., *quare clausum fregit*)? Consider the following historical discussion:

> Historically, trespass and nuisance were two distinct common-law classes of injury involving real property. 9 R. Powell, Real Property (1999) § 64.01[1], p. 64–5; 4 Restatement (Second), Torts, § 821D,

> comment (a) (1979). A defendant who invaded a plaintiff's possession was a trespasser; a defendant who interfered with a plaintiff's use and enjoyment of his property by acts done elsewhere than on the plaintiff's land was subject to a claim of nuisance.
>
> This ancient distinction between trespass and nuisance, on the basis of whether an invasion of a plaintiff's land was direct or indirect, is not followed by more recent cases. Instead, recent case law treats trespass cases as involving acts that interfere with a plaintiff's exclusive possession of real property and nuisance cases as involving acts interfering with a plaintiff's use and enjoyment of real property. In other words, the distinction no longer rests on the means by which the invasion is effected but, instead, on the nature of the right with which the tortfeasor interferes. When viewed in this way, claims of nuisance may include an instance of trespass in that a physical entry onto land possessed exclusively by another also may affect, in the abstract, the possessor's use and enjoyment of the land.

Boyne v. Town of Glastonbury, 955 A.2d 645, 652-53 (Conn. App. 2008) (successive citations to POWELL and the *Restatement* omitted); *see also, e.g.*, Cook v. DeSoto Fuels, Inc., 169 S.W.3d 94, 103 (Mo. Ct. App. 2005) ("[Plaintiffs'] allegations that [defendant] caused gasoline to enter their property can constitute a claim for both trespass and nuisance because that contamination involves a direct physical invasion that interferes with both the right to possession and the use and enjoyment of property."); Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc., 706 S.W.2d 218 (Mo. Ct. App. 1985) (complaint of low-level radiation emissions stated claim for nuisance *and* trespass).

B. Adjudicating Nuisance

Although some acts are treated as per se nuisances (typically illegal activities) courts must generally engage in contextual assessments of harm to determine whether a nuisance exists in fact (also referred to as a nuisance *per accidens*).

Sans v. Ramsey Golf & Country Club, Inc.

149 A.2d 599 (N.J. 1959)

FRANCIS, J.

An injunction was issued by the Chancery Division of the Superior Court against defendant Ramsey Golf and Country Club, Inc., barring the further use of the men's and women's third tees of its golf course. The Appellate Division affirmed ….

The issue presented is a novel one. The facts which created it are not seriously in dispute. The physical setting which forms its background is the product of the ingenuity of a real estate developer.

[The defendant operated a residential and country club development with a nine-hole golf course.] The development tract contained three small lakes, one of which, called Mirror Lake, became the water hazard hole about which this controversy centers.…

In 1949 the plaintiffs, husband and wife, purchased a lot in the development. Naturally, they were aware of the existence of the golf course, and they became members of the club. They commenced construction of a home on the lot in 1950, after which they acquired two adjoining parcels. One side of their property adjoins the fairway of the second hole. The rear line of the three lots is near Mirror Lake but does not run to the water. It is separated from the edge of the lake by a strip of land varying in width from 11 to 40 feet, which is owned by the golf club.

In 1948 the present third women's tee was built. Its location was designed to create a short par 4 water hole.… [T]he tee had been in continuous use since its installation, although the plaintiff Ralph Sans testified that he did not notice it until 1950 when his home was being built. Subsequently, apparently in 1949, a separate men's tee was built for this hole about 30 feet farther from the northerly edge of the lake. The purpose was to lengthen the water hazard for the men. Both tees are on golf club property. According to Sans, the men's tee is 'roughly' 50 to 60 feet from the southerly corner of the rear of his house; the women's tee is closer.

In order to reach the third tees from the second green, the golfers walk along the 11 to 40-foot-wide path (owned by defendant and described above) separating plaintiffs' rear lawn from the lake.

Plaintiffs moved into their new home in June or July of 1951, and have lived there since that time. They have two children, who were 10 and 11 years of age when the case was heard. As the membership of the club grew, play on the golf course increased, and the players' use of the third tees and the path to reach them became annoying and burdensome to plaintiffs. They began to complain to defendant's officials, and thereafter and until this suit was brought, they sought to effect the relocation of the tees to the north of the northerly line of the lake. Such a change is feasible. In fact, when a stay of the restraint issued by the trial court was denied, a new temporary tee was built and has been in use pending the determination of this appeal. The objection of defendant to adopting it permanently is that an attractive short par 4 water hole is transformed into an ordinary par 3 one on a nine-hole course which already has three par 3 holes.

Plaintiffs' complaint charged defendant and its members with trespassing on their land by using the pathway along the lake in walking to the ladies' and men's tees in question. This contention was abandoned when it appeared that plaintiffs did not own the strip and that, although National had not conveyed it to defendant in the original 1945 deed, a transfer had been made by deed in 1955. Other allegations, however, in company with the issues appearing in the pretrial order, were deemed by the trial court to present a claim that the location of the tees and the manner and incidents of their use by defendant and its members constituted a private nuisance as to plaintiffs. The trial was conducted on the latter basis.

Proof was adduced that in the golf season play begins on the third tees as early as 6 A.M. and continues throughout the day until twilight. On week-ends and holidays the activity is more intense. Sans spoke of an 'endless stream of golfers' using the path just in back of his house.…

When Sans bought his first lot in 1949, the one on which his home was later constructed, he did not see the tee or tees in question. And there is no proof that anyone called them to his attention. It does appear that a certain brochure respecting the development had been given to him. A similar one was introduced in evidence. It contained what appeared to be an aerial color view of the tract, including the course. Although the tees were indicated, none was depicted on plaintiffs' side of the lake. When an inquiry was made on cross-examination as to whether he did not know that

he was 'buying a piece of property immediately adjacent to the golf course,' he answered: 'No, we did not buy a piece adjacent to the golf course. We had a choice of three lots on that end and we bought the lot away from the golf course.' And as has been indicated, he testified further that he did not see a tee in the rear of his lots until some time in 1950 when his home was being erected.

According to plaintiffs, the constant movement of the players to and from the tee in close proximity to their rear lawn and house was accompanied by a flow of conversation which became annoying and burdensome to them. It awakened them and their children as early as 7 in the morning and it pervaded their home all day long until twilight. Moreover, they have a consciousness that everything they say in or around the house can be heard out on the path and so they are 'under a constant strain and constant tension.' They 'never feel relaxed or free at home'; '(w)e never know when there is someone in our back yard.' Occasionally, a low hook or slice or heeled shot of a golfer carries upon their lawn. Then, by means of a trespass, the ball is retrieved. Sometimes it is played from that position. Apparently there are no out-of-bounds stakes in the area. The combination of difficulties makes it impossible to sit outside and 'enjoy supper.'

At times there are as many as 12 persons waiting to use the ladies' and men's tees. On a short course containing three par 3 holes, such backing up of playing groups, particularly at a 260-yard water hole, might well be expected. This gathering adds to the conversation, and the voices can be heard in the house. While silence is the conventional courtesy when a golfer is addressing his ball and swinging, the ban is relaxed between shots, and presumably the nature of the comments depends in some measure upon the success or failure of the player in negotiating the hazardous water.

But an even more serious objection involves plaintiffs' children. They have no freedom of play on their back lawn. Golfers tell them not to play there and constantly admonish them to be quiet. If they move their activities to the north side of the property, they are endangered by balls being driven on the second fairway. This exposure has constantly worried Mrs. Sans. The children have a dog. On one occasion they were cavorting in the rear of the house and the dog was barking. A golfer instructed them to keep it quiet, and when they were unable to do so he walked on plaintiffs' property and knocked the animal unconscious with a club-even though

one of the children pleaded with him not to do it. Complaint about the incident to one of defendant's officials met with the response that 'The dog had no right to be there.' At times the players allow their own dogs to accompany them around the course, and they have attacked plaintiffs' dog when it was on the rear lawn.

The resident members of the club have the common right to use the lakes for fishing and boating. Plaintiffs have an aluminum boat in the lake immediately to the rear of their house. If the children take the boat out, the golfers at these tees order them off the water. They cannot fish with safety from the banks to the rear of the house for the same reason, and because of the danger of being struck by golf balls. Even in the winter, when children were ice skating there, golfers were hitting balls over their heads to the third fairway.…

Defendant recognized the danger, and at times during the winter the tee was closed off to avoid possible injury to the skaters. When this happened the hole was played from the other side of the lake-presumably in a manner similar to that followed since the injunction in this case.

On the basis of the evidence, which stands without substantial dispute, plaintiffs claim that the third tees in their present location constitute a private nuisance and that their use should be enjoined. Defendant denies that the facts in their total impact warrant that conclusion. Further, it claims that plaintiffs bought their lots, built their home and moved into the area with full knowledge of the existence and use of the golf course and therefore assumed any annoyances and inconveniences incident to the playing of the game.

The circumstances here are unique. A situation where a person buys or builds a home adjoining a wholly independent, unrelated and existing conventional type golf course is quite dissimilar. The basic theme of this development was residence. The recreational facilities, including the golf course were subordinate. Their purpose and existence were to make the area a desirable one in which to dwell. Note the ecstatic exclamations of the developer's brochures:

> 'The perfect home location; * * * a millionaire's paradise for moderate income families; * * * Ramsey Country Club Estates is the culmination of a ten year search for the perfect home location * * *. Each approved purchaser will

> automatically receive a share representing proportionate ownership in the Country Club and all its properties. The Club will own the impressive $100,000. ivy covered stone mansion for its club house. Here will be the center of social life for this unusual new community * * *. Owner-members of the Ramsey Country Club will own for their *exclusive use* the new 9-hole golf course * * * (the record contains no explanation of how the associate members-non-owners of property in the development-happened to be admitted to the club. Sans understood that membership was to be limited to property owners.), spacious sand bathing beaches, three picturesque lakes for canoeing, boating and fishing * * * complete facilities for the enjoyment of all winter sports * * *. Residents will enjoy swimming, canoeing, fishing, ice-skating in the comfort and safety of their own private community. * * * This magnificent club house and its grounds-all of these wonderful recreational facilities-will be shared, owned and enjoyed by a selected group of families who will live luxuriously in these unusual and incomparable surroundings for less than the cost of a small city apartment.' (Emphasis added, insertion ours.)

The plaintiffs may justly assert that these comments add equitable strength to their position in the present controversy. The brochure given to them before they became purchasers in 1949 portrayed the layout of the course; the greens were numbered and the tees were indicated. As has been pointed out, no tee appeared on their side of Mirror Lake. No suggestion is made that any representative of the developer or of defendant apprised them of any such tee. And it is not shown on the detailed map on file in the county clerk's office. In the factual context, the element of reliance by the Sans cannot be overlooked.

Thus the heart of the project was and is the home. The pastime facilities were intended to be no more than an aid to the enjoyment of the home, as the veins facilitate the functions of the heart. An avoidable and readily curable ailment in one vein should not be permitted to impair the central organ. Especially is this true when the remedy calls for a comparatively simple adjustment which will not materially impair the physical structure in its entirety.

The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. The elements are myriad. The law has never undertaken to define

all of the possible sources of annoyance and discomfort which would justify such a finding. Pollock, Torts (1887), 260, 261. Litigation of this type usually deals with the conflicting interests of property owners and the question of the reasonableness of the defendant's mode of use of his land. The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests. The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business. Prosser, Torts (2d ed. 1955), 410. As the Court of Appeals of Ohio put it in Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752, 759 (1947):

> 'The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor.'

Defendant's members have the right to the ordinary and expected use of the golf course. Plaintiffs have the correlative right to the enjoyment of their property. The element of reciprocity must be emphasized because the parties' interests stem from a common source and are more mutually interdependent than in the usual case. The Appellate Division properly suggests the pertinent inquiry to be 'whether defendant's activities materially and unreasonably interfere with plaintiffs' comforts or existence, 'not according to exceptionally refined, uncommon, or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people."

In the unusual circumstances of this case, the activities of defendant are manifestly incompatible with the ordinary and expected comfortable life in plaintiffs' home and the normal use of their property. The evaluation of the conflicting equities must be made in the factual framework presented. And any relief granted must result from a reasonable accommodation of those equities to each other in the light of the evaluation. In our judgment, the facts considered in their totality demonstrate that plaintiffs' interests are paramount and demand reasonable protection. The trial court and the Appellate Division felt that a proper balance of equitable convenience could

be achieved by requiring defendant to relocate the ladies' and men's third tees. Such relief, in our opinion, does not represent a burden disproportionate to the travail which would be suffered by plaintiffs and their family through the perpetuation of the present method of play on the course.

Judgment affirmed.

Notes and Questions

1. Why does *Sans* conclude that the "conflicting equities" favor the plaintiff?

2. **Threshold harms.** One way courts avoid getting too involved in nuisance cases is by requiring significant harm before engaging in the balancing of equities. Restatement (Second) of Torts § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.");

> Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.

   Watts v. Pama Mfg. Co., 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962) (citing *Restatement (First) of the Law of Torts*, Vol. 4, s. 822, Comments g. and j.).

3. **Restatement standards.** The *Restatement (Second) of Torts* standard for a private nuisance is an activity that invades another's interest in the use and enjoyment of land where the invasion is either "(a) intentional and

unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." *Restatement (Second) of Torts* § 822 (1979). We will focus on the first prong, intentional conduct that a court nonetheless finds unreasonable. Section 826 sets forth two tests. The invasion is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct" or if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."*

4. **"Coming to" a nuisance.** One way to adjudicate between competing interests is through first-in-time, first-in-right principles. Generally, whether the plaintiff came to the nuisance (i.e., acquired its property interest *after* the commencement of the allegedly unreasonable activity by the defendant) is treated as a factor to be considered in balancing the equities, and not as a bar to a nuisance suit. Why do you think that is? Are there circumstances in which you think coming to a nuisance ought to bar a suit? Likewise, compliance with zoning ordinances is a non-dispositive factor in the defendant's favor.

5. **Idiosyncratic harms.** The harm giving rise to nuisance liability must be "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Restatement (Second) of Torts* § 821F (1979). This creates difficulty for a range of asserted, but unproven, harms. *See, e.g.*, San Diego Gas & Electric Co. v. Superior Court, 55 Cal. Rptr. 2d 724, 752 (1996) (rejecting nuisance claim based on fear of powerline electromagnetic fields). What about technological change? American law generally rejects the notion that one has a right to light from adjacent properties. But what if one has a solar panel? Prah v. Maretti, 321

* The *Restatement* likewise provides standards for assessing the gravity of the harm to the plaintiff, including factors like degree, duration, character, ability to avoid, and nature of the plaintiff's activity (e.g., social value and local suitability). § 827. As the list indicates, they leave room for subjective interpretation. Likewise, the assessment of the defendant's conduct includes considerations of social value, suitability to the location, and ability to avoid or prevent. § 828.

N.W.2d 182, 191 (Wis. 1982) (allowing nuisance claim by owner of a solar heated home to proceed).

6. **Malice.** There is little utility to actions taken for the purposes of harming a neighbor, and the *Restatement* provides that such acts are nuisances when they cause harm to a property owner's interests. Restatement (Second) of Torts § 829.* "Spite fences" are often explicitly the subject of statutes. *See, e.g.*, N.H. Rev. Stat. Ann. § 476:1 ("Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance.").

7. **Private arrangements.** If a nuisance is a violation of a property right, it stands to reason that the right may have been transferred prior to the nuisance suit. *Cf.* DeSarno v. Jam Golf Mgmt., LLC, 670 S.E.2d 889, 890 (Ga. 2008) (distinguishing *Sans* and holding no trespass or nuisance claims were possible because "the easement in this case explicitly permitted the complained-of conduct and indeed exonerated the golf course owner from any liability for damages caused by the errant golf balls").

Note on the Clarity of Rights and Coase

The vagaries of nuisance standards reflect the difficulty of properly assigning the right (either to continue action or to enjoin the action). But perhaps all that really matters is the clarity of the property right. This was the suggestion of Nobel-Prize-winning economist Ronald Coase (1910-2013) in his famous article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The article concerned the previously encountered problem of externalities—costs or benefits of an action that are borne by someone other than the actor. When a factory emits smoke, for example, the smoke causes harms to others that the factory owner does not experience. They are external to his decision to operate, and therefore more likely to be produced than we might want. Externalities

* The provision also treats acts contrary to "common standards of decency" as a nuisance, offering as an illustration a farmer who breeds animals in full view of a neighbor's family. *Id.* cmt. d.

need not be negative. The factory might stimulate economic development, e.g., by attracting restaurants to open nearby to cater to its workers.

It has been argued that property rights emerge when the benefits of internalizing externalities outweigh the costs of establishing a property system. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). To return to the pasture held in common, suppose we make the land subject to private ownership. Giving property rights to a single party means that she will bear the cost of overgrazing (and thus take them into account before allowing that to happen, thereby internalizing the externality). She will likewise reap the benefits of improvements like an irrigation system, which without property rights would have been shared by too many to make the investment worthwhile.

But other externalities may remain. What happens when the smells of the pasture annoy the neighbors? Or if the land is used for fracking? Or a factory? How do we address the resulting harms to others? Regulation is a traditional answer to the problem of externality. The party causing the harm can either be made to pay or, if the harm is serious enough, cease the offending activity.

Enter Coase. He argued that the traditional approach, of trying to stop the harm, is question-begging in light of the reciprocity of harms:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Coase, *supra*, at 2. In other words, the issue is not stopping harm, but rather ascertaining whether the complained-of act does more harm than good. The market can help here, so long as property rights are clear and transaction costs are ignored. "It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." *Id.* at 15.

So imagine a world in which there is only a smoke-producing factory (and its owner) and a house (and its owner, who has sued the factory for causing a nuisance). Suppose further that the homeowner values life without smoke at $50, and the factory owner values operating at $100. The nuisance suit then clarifies who has the relevant property right. If the homeowner wins, he now has the right to enjoin the factory owner. In a world without transactions costs, what happens next? We would expect the factory owner to pay the homeowner to release the injunction (as she values operation more than he values life without smoke). What if the activity is deemed to *not* be a nuisance? Then there is no deal to be had. The factory owner's property rights encompass the right to emit smoke, and she values it more than the homeowner.

One interesting consequence of our hypothetical scenario is that the initial allocation of property rights *does not matter* with regards to whether the factory operates. Absent transaction costs, operations continue no matter which property owner "wins" the right to harm the other.* Coase argued that

> It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Id. at 8. This insight is referred to as the *Coase Theorem*.† The theorem has a variety of expressions. It is the idea that absent transactions costs, parties will bargain to efficient outcomes concerning externalities regardless of the initial allocation of property rights. The implication for nuisance law is the suggestion that if transaction costs are low, it might matter more that property rights be clear than that they be properly assigned in the first instance.

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* To make sure you understand this point, repeat the exercise with reversed dollar values. You will see that the factory will *shut down* regardless of whether it is a nuisance.

† The term "Coase Theorem" to describe Coase's insight is generally ascribed to George Stigler.

The Problem of Social Cost is one of the more cited and debated articles in legal history. One problem with characterizing the debate is that it involves not only Coase's work, but the various interpretations that may or may not be a fair representation of his ideas. *See, e.g.*, Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989) ("Coase's name is consistently attached to propositions that he has explicitly repudiated."). For present purposes, it is worth noting four reasons to be cautious in drawing normative lessons from Coase. First, as Coase himself emphasized, transactions costs are always present in the real world and often quite high. So if a factory is emitting smoke that falls on a neighborhood (rather than a single homeowner), bargaining costs may be large. The neighbors will face the difficulty of coordination (and the attendant problems of free riders and holdouts). Moreover, the health consequences of the factory may not be well known (i.e., there is a cost to simply having the information necessary for the neighborhood to know how highly it values freedom from smoke). Second, even if property rights allocations matter less than we think with respect to the production of externalities, they remain important from the perspective of distributive justice. When a judge decides whether A must pay B, or vice versa, one becomes wealthier at the expense of the other. The Coase Theorem tells us nothing about who merits the windfall. Likewise, wealth matters with respect to how the gain or loss is experienced insofar as money has a diminishing marginal utility. So, someone with only $1000 to his name is likely to value an additional $1000 more than would a millionaire. Third, unequal baseline distributions of wealth mean that many hypothesized transactions based on competing subjective valuations of entitlements may be impossible: what might it mean for a person with net financial worth of $10,000 to value their respiratory health at $100,000? Could such a person effectively bargain over another's right to pollute the air they breathe? Fourth, the proposition that initial allocations do not matter has been empirically challenged. It has been observed that people value what they possess more than what they do not. I may, for example, be willing to pay $50 to shut a factory down. But if my starting point is one in which the factory is not yet operating and I have a veto, I might demand $100 to release it. The "endowment effect" might mean that initial allocations therefore matter. For a colorful example of this effect in play over the right to recline an airline seat, see Christopher Buccafusco & Christopher Jon Sprigman, *Who Deserves Those 4 Inches of Airplane Seat Space?* SLATE (Sept. 23, 2014), available at

http://www.slate.com/articles/health_and_science/science/2014/09/airplane_seat_reclining_can_economics_reveal_who_deserves_the_space.single.html).

All that said, Coase's article suggests that we keep in mind the value of clear property rights and the prospect that market mechanisms may sometimes be preferable to judicial allocations. Likewise Coase reminds us anew that law is not all. And, indeed, neither is the market. As we discussed in earlier chapters, social norms may play a powerful role in resolving usage disputes. These norms may be powerful enough to resolve disputes notwithstanding changes in the underlying legal regime. For a classic account of this dynamic, concerning payments by farmers for damage done by wandering cattle, *see* Robert Ellickson, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

C. Remedies

Nuisance plaintiffs usually seek injunctions. The ongoing harm of the nuisance suggests equitable relief, as damages for past harms would not address those that would follow if the nuisance continues. 9-64 POWELL ON REAL PROPERTY § 64.07. But because equity involves balancing, courts sometimes decline injunctions or offer more tailored remedies.

Boomer v. Atlantic Cement Co.
257 N.E.2d 870 (N.Y. 1970)

BERGAN, Judge.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

The cement making operations of defendant have been found by the court of Special Term to have damaged the nearby properties of plaintiffs in these two actions. That

court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in focus in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805. A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was 'a lower riparian owner'. The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of 'the slight advantage to plaintiff and the great loss that will be inflicted on defendant' an injunction should not be granted. 'Such a balancing of injuries cannot be justified by the circumstances of this case', Judge Werner noted. He continued: 'Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction'.

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not 'unsubstantial', viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency.

There are cases where injunction has been denied. McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 is one of them. There, however, the damage shown by

plaintiffs was not only unsubstantial, it was non-existent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse consequence to plaintiffs, and thus injunctive relief was denied.… Thus if, within Whalen v. Union Bag & Paper Co., Supra which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is 'not unsubstantial', an injunction should follow.

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period—e.g., 18 months—the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a

reasonable effective spur to research for improved techniques to minimize nuisance.…

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. 'Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery' (66 C.J.S. Nuisances s 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance.…

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the 'servitude on land' of plaintiffs imposed by defendant's nuisance. (See United States v. Causby, 328 U.S. 256, 261, 262, 267, 66 S.Ct. 1062, 90 L.Ed. 1206, where the term 'servitude' addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees.

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to ex-examine this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

JASEN, Judge (dissenting).

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution.

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs,[5] but also is decidedly harmful to the general public.

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[5] There are seven plaintiffs here who have been substantially damaged by the maintenance of this nuisance. The trial court found their total permanent damages to equal $185,000.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. This is made clear by the State Constitution which provides that '(p)rivate property shall not be taken for *public use* without just compensation' (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

Notes and Questions

1. What are the costs and benefits of leaving the question of the cement plant's legality to the legislature? Modern environmental law is characterized by far-reaching federal legislation (e.g., the Clean Air Act, the Clean Water Act, the Endangered Species Act, etc.). How might things have been different had nuisance law been the primary mechanism of environmental regulation?

2. **Preemption.** State and federal legislation offers the prospect of more comprehensive regulation than case-by-case nuisance adjudication. Once these regulations are in place, defendants often claim they preempt resort to private nuisance remedies. *See* 9-64 POWELL ON REAL PROPERTY § 64.06 (collecting examples of successful and unsuccessful preemption defenses). Should compliance with, for example, a federal clean air regime provide immunity to a local nuisance suit based on air pollution? Is federal regulation best seen as a ceiling or a floor for environmental standards?

   On this question, note that federal environmental laws are often criticized for interfering with "property rights." But to the extent they limit the availability of local nuisance law, might they also be seen as interfering with the property rights of would-be nuisance plaintiffs?

Note on "Property Rules" and "Liability Rules"

When should a court award damages and when is an injunction appropriate? One of the most famous takes on the problem is found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The authors outline a framework for the protection of entitlements, distinguishing "property" and "liability" rules.

> An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.
>
> Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would

> have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.

Id. at 1091.* We might think of an injunction against trespass as an illustration of a property rule. The trespasser must keep out unless the property owner agrees to let her enter. Contract damages are an example of a liability rule. If one is willing to pay damages, one is free to breach. As the examples suggest, property rules are associated with, well, property rights, while liability rules are associated with contract remedies. But there are exceptions in both subjects. For example, some states allow for private condemnation of rights of way to provide access to landlocked privately owned land. The owner of the property has no ability to say no to another's entry into his land, but is limited to a compensation remedy. Conversely, under certain circumstances a contract may be enforced by specific performance.

Calabresi and Melamed spend some time on the question of how entitlements are assigned in the first instance (i.e., is the factory a nuisance or does its owner have the right to pollute), but for present purposes we will focus on the question of deciding how to protect an entitlement once assigned. In a vacuum, property rules let parties decide for themselves how to value entitlements, but in the real world, transaction costs get in the way. Holdouts and freeriders may interfere with the coordination of multiple purchasers or sellers of entitlement (e.g., when multiple neighbors live near an offending factory). When negotiation costs exceed the entitlement's value, it will remain with the party to whom it was assigned, regardless of overall efficiency. In such cases, a liability rule might be preferable.

As applied to nuisance, the authors observe:

> Traditionally . . . the nuisance-pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let

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* And some entitlements, as the authors discuss, are inalienable.

> us assume), Marshall, allows it (Marshall may enjoin Taney's nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages). Third, Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney's pollution is not held to be a nuisance to Marshall). In our terminology rules one and two (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney's price can Marshall end the pollution.
>
> The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule. The fourth rule … can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.

Id. at 1115-16 (footnotes omitted). In a low-transaction cost world, Calabresi and Melamed would use property rules, and assign the entitlement based on whether or not the polluter is the low-cost risk avoider. In such cases improper allocations have distributive consequences, but transactions would at least ensure economic efficiency. (Do you see why?)

> The moment we assume, however, that transactions are not cheap, the situation changes dramatically. Assume we enjoin Taney and there are 10,000 injured Marshalls. Now even if the right to pollute is worth more to Taney than the right to be free from pollution is to the sum of the Marshalls, the injunction will probably stand. The cost of buying out all the Marshalls, given holdout problems, is likely to be too great, and an equivalent of eminent domain in Taney would be needed to alter the initial injunction. Conversely, if we denied a nuisance remedy, the 10,000 Marshalls could only with enormous difficulty, given freeloader problems, get together to buy out even one Taney and prevent the pollution. This would be so even if the pollution harm was greater than the value to Taney of the right to pollute.

Id. at 1119. In such situations, the "rule four" possibility would increase the range of options in a nuisance case. If circumstances made a liability remedy appropriate, a court would be free to assign the entitlement to either party as efficiency or distributional concerns warranted. *Id.* at 1120.

Like a particle predicted by atomic theory, the rule four injunction option was described, but awaited observation in nature. It would not take long.

Spur Industries, Inc. v. Del E. Webb Development Co.

494 P.2d 700 (Ariz. 1972)

CAMERON, Vice Chief Justice.

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?

2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west. See Exhibits A and B below.

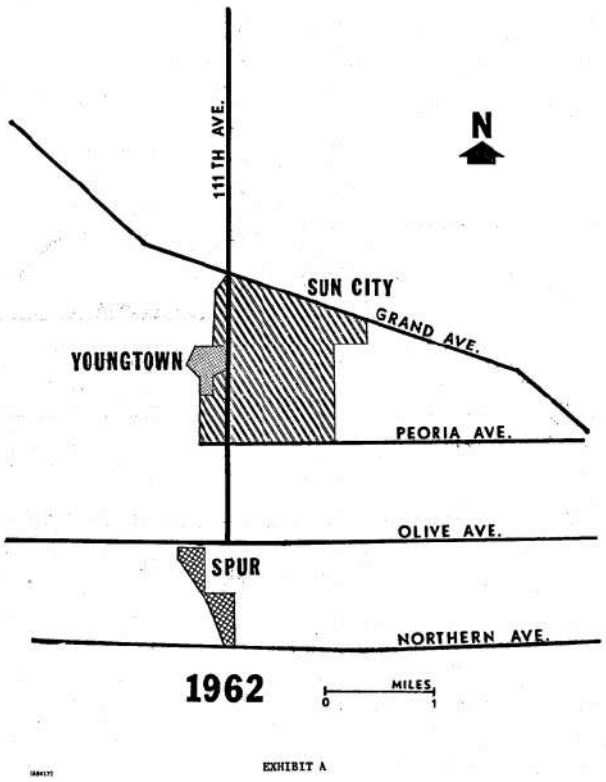


EXHIBIT A

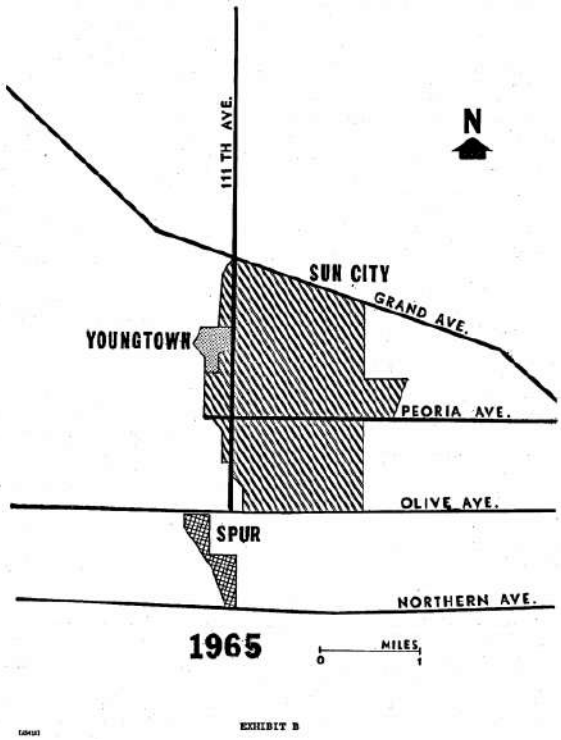


EXHIBIT B

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the Agua Fria River, though land to the east remained dependent upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue. Along 111th Avenue, approximately one mile south of Grand Avenue and 1 1/2 miles north of Olive Avenue, the community of Youngtown was commenced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feed-lots, about 1/2 mile south of Olive Avenue, in an area between the confluence of the usually dry Agua Fria and New Rivers. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for $15,000,000 or $750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres. See Exhibit A above.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2 1/2 miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider

odors from the Spur feed pens a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell.…

By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north. See Exhibit B above. Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area.…

It is noted … however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del E. Webb Development Company and Spur Industries, Inc.

MAY SPUR BE ENJOINED?

The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the

public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood.

Where the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction. Moreover, some courts have held, in the 'balancing of conveniences' cases, that damages may be the sole remedy. See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590 (1970), and annotation comments, 40 A.L.R.3d 601.

Thus, it would appear from the admittedly incomplete record as developed in the trial court, that, at most, residents of Youngtown would be entitled to damages rather than injunctive relief.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinable public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

> § 36-601, subsec. A reads as follows:
>
> '§ 36-601. Public nuisances dangerous to public health
>
> 'A. The following conditions are specifically declared public nuisances dangerous to the public health:
>
> '1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.'

By this statute, before an otherwise lawful (and necessary) business may be declared a public nuisance, there must be a 'populous' area in which people are injured:

> '* * * (I)t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance. (citations omitted) A business which is not per se a public nuisance may become such by being carried on at a place where the health, comfort, or convenience of a populous neighborhood is affected. * * * What might

> amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. * * *.' MacDonald v. Perry, 32 Ariz. 39, 49-50, 255 P. 494, 497 (1927).

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

MUST DEL WEBB INDEMNIFY SPUR?

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

§ 104. Where public interest is involved.

> 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest. * * *.' 27 Am.Jur.2d, Equity, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully [*sic*], albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called 'coming to the nuisance' cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

> 'Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the

> value of their homes. The area being Primarily agricultural, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.
>
> 'People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages.' Dill v. Excel Packing Company, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958). See also East St. Johns Shingle Co. v. City of Portland, 195 Or. 505, 246 P.2d 554, 560-562 (1952).
>
> And:
>
> '* * * a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. * * *.' Gilbert v. Showerman, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of 'coming to the nuisance' would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city.…

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the

court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitable or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.…

Notes and Questions

1. What if there had been no "guilty" developer like Del Webb? Why doesn't the logic of the coming to a nuisance cases (quoted by the opinion) apply to those who chose to purchase from Del Webb?

2. **Public vs. Private Nuisances.** Public nuisances involve unreasonable interferences with rights held by the general public. Under the *Restatement*, they arise when the complained-of actions threaten public health, violate statutory

law (including administrative regulations), or otherwise have a significant effect on a public right. *Restatement (Second) of Torts* § 821B (1979). Unlike private nuisances, they do not require an interference with the use of land. *Id.* cmt. h. As *Spur* indicates, one may sue on a public nuisance if one alleges a "special injury" specific to the plaintiff and not shared by the public at large.

3. In addition to using "coming to" nuisance arguments, feedlot operators may be specifically protected from nuisance suits. Some states explicitly insulate agricultural operations from nuisance liability with "right to farm" legislation. Kan. St. Ann. 2-3201 provides:

> It is the declared policy of this state to conserve and protect and encourage the development and improvement of farmland for the production of food and other agricultural products. The legislature finds that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses. It is therefore the purpose of this act to provide agricultural activities conducted on farmland protection from nuisance lawsuits.

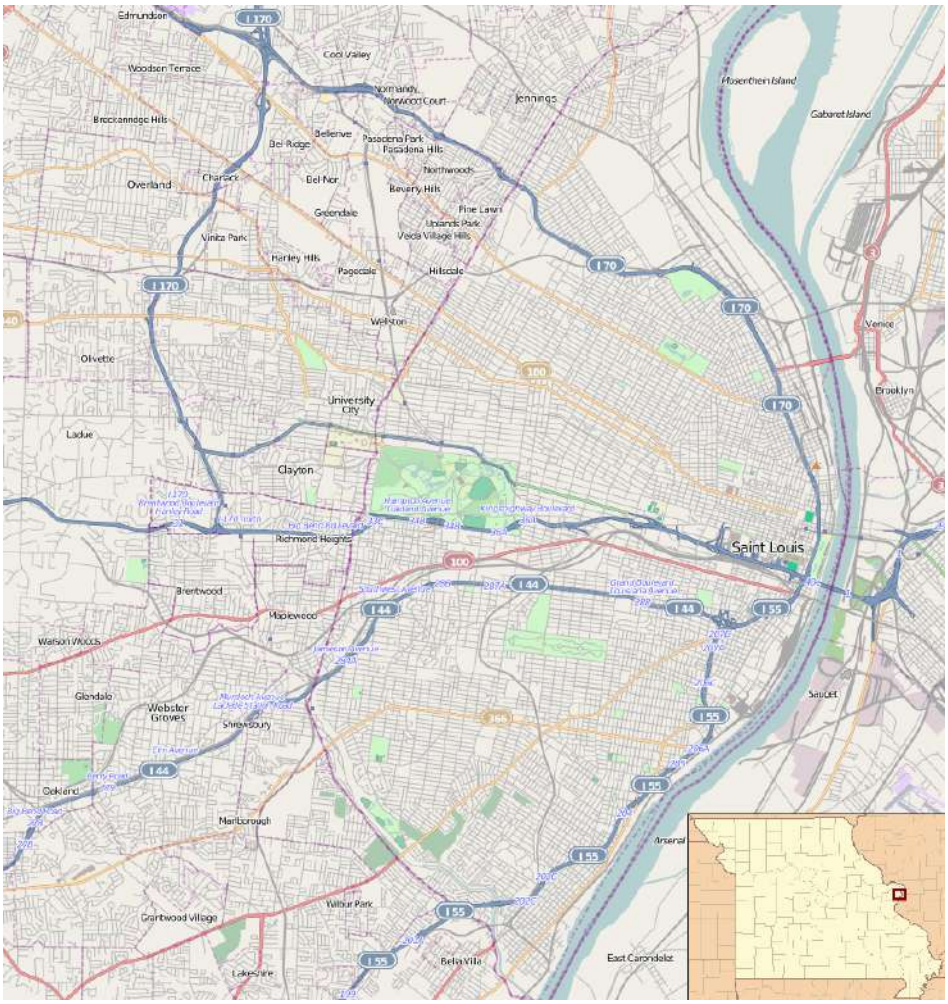
14. Zoning

Houses under construction, Fairfax, VA, by Zachary Schrag, Aug. 24, 2015

Zoning is a perennial issue for local governments. For most homeowners, their home is their largest asset, and they are exquisitely sensitive to any threats to its value – but threats can mean either the behavior of their neighbors, or constraints on their own behavior, setting up a seemingly irresolveable tension. (Economist William Fischel calls them "homevoters" in recognition of the way that their property interests shape their political choices.) In addition, local governments and would-be developers of new properties have interests of their own. Developers too seek to maximize their own property values, including their ability to develop future projects, which may lead them to sacrifice the theoretical maximum value of any given parcel. Governments want to protect their authority and their revenues, goals which they try to accomplish in a variety of ways.

Zoning is a way of answering the question: What – and where – do we want the places where we live to be? Our goals in this chapter are to understand the justifications for and modern varieties of zoning. As you read and review, consider how zoning compares to other types of land use controls, including nuisance, private covenants, and the implied warranty of habitability.

Many of our examples in this chapter will come from St. Louis, Missouri, and its surrounding suburbs. We focus on St. Louis not because it is unique, but because property law developments in and around St. Louis are broadly representative of the evolution of metropolitan areas around the country over the past century. Missouri allows particularly easy formation of new cities from unincorporated land, and that has contributed to the proliferation of local governments, so some of the issues are presented particularly starkly in Missouri. Nonetheless, you should expect similar dynamics to operate throughout the United States.



OpenStreetMap map of St. Louis, BY-SA

A. Euclidean Zoning

1. The *Euclid* Decision and Its History

Euclid v. Ambler Realty Co.
272 U.S. 365 (1926)

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farmlands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue, and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive, and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single

family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, noncommercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes, the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1, and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: in A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2 000 square feet for corner lots; in A-3 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs….

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

Annexed to the ordinance, and made a part of it, is a zone map showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts….

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions….

The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that, for such uses, it has a market value of about $10,000 per acre, but if the use be limited to residential purposes, the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added -- if not included in the foregoing -- restrictions in respect of apartment houses. Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is, or may be, a demand for any part of appellee's land for any of the last named uses, and we cannot assume the

existence of facts which would justify an injunction upon this record in respect of this class of restrictions. …

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted not to the meaning, but to the application of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution of course must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful [clue]. And the law of nuisances likewise may be consulted not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question

whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area

for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.

…. The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders;

preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that, in such sections, very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities – until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the

market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality.

… Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance, in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

Note: Facial v. As-Applied Challenges

Euclid held that a zoning ordinance would not be struck down as an unwarranted interference with property rights on its face, but left open the possibility of as-applied challenges to applications of zoning to prohibit particular developments. The Court then made clear that as-applied challenges would almost always fail as well, unless the harm to the property owner rose to the level of a taking requiring compensation under the Fifth and Fourteenth amendments. *See* Takings, *infra*. In the absence of a taking, courts were not to interfere with zoning authorities' determinations unless they were arbitrary and irrational, even if they were wrong. Nectow v. City of Cambridge, 277 U.S. 183 (1928). Lower courts received the Court's message clearly and left zoning authorities almost entirely free to zone as they wished.

Richard H. Chused, Euclid*'s Historical Imagery*

51 Case W. Res. L. Rev. 599 (2001)

… No one should be surprised that land use and urban planning emerged and flowered in the 1920s. Chaos in America's developing urban centers, unprecedented levels of immigration from Europe and migration from the southern United States, burgeoning sales of automobiles, and development of new building construction techniques generated enormous controversy during the end of the nineteenth and beginning of the twentieth centuries. As American cities grew like wildfire, cries of

distress became common. Muckraking authors produced "hit" books reflecting upon widespread concern about the state of urban America. From holding only about twenty-five percent of the nation's population in 1870, urban areas held just over half only fifty years later. Between just 1905 and 1915, immigration increased the nation's population by more than ten percent. With most of those arrivals settling in highly populated areas along the coasts and industrial cities in the heartland, responding to immigration was a major concern in urban America. The blare of urban life became a cacophony as the number of registered automobiles passed the ten million mark in 1921.

… The largely undeveloped Village of Euclid, just east of Cleveland, was caught up in this wave of planning reforms. The Village of Euclid actually adopted its first zoning ordinance in 1922, two years before the Commerce Department published its final draft of the Standard Zoning Enabling Act. Euclid followed in the footsteps of New York City, which adopted its first zoning ordinance in 1916, two years after the New York state legislature adopted the nation's first zoning enabling statute.…

It should surprise no one that race, ethnicity, and poverty were on the minds of those handling the dispute over Euclid's zoning scheme. The solidification of the Jim Crow system from the end of Reconstruction through the 1920s is a well-known story. Other startling events also brought racial and ethnic issues to public attention on a regular basis. Race riots occurred in numerous cities in the late nineteenth and early twentieth centuries. These were not like the urban disturbances that began in Watts in 1965 and appeared repeatedly until after the assassination of Reverend Martin Luther King, Jr. in 1968. In 1919 alone, for example, over twenty-five cities were faced with mobs of white people destroying African-American neighborhoods and killing residents.… Though lynching of individuals or small groups of people peaked near the end of the nineteenth century, urban mob killings more than made up for the decline in the numbers of people strung up on trees individually or in small groups. The Ku Klux Klan was a major political force at the time. Its members held elected offices in a number of states during the first few decades of the twentieth century. …

In addition, opposition to immigration was fierce by the time Judge Westenhaver decided Euclid. Acts restricting immigration were enacted in 1885, 1891, 1903, 1907,

and 1917. The quota system, favoring those seeking admission from northern Europe and severely limiting entry from other parts of Europe and the rest of the world, was imposed by legislation passed in 1921 and 1924. Immigration dropped dramatically after the last of these enactments was signed into law. Fueled by racism and anti-semitism, and given intellectual cover by Social Darwinism, many native-born whites saw themselves as the saviors of culture and civilization….

When viewed in light of such a setting, the debate in *Euclid* takes on new meanings. It was not just a case about the ability of legislative bodies to regulate property and contracts, but a debate about the sorts of social forces – good, bad, and indifferent – that could legitimately be taken into account by those elected to state legislatures….

By using a "nuisance analogy" – the idea that single use zones were likely to prevent land use conflicts – as the central feature of his argument, [Alfred Bettman, leader of the National Conference on City Planning,] sidestepped the intractable and circular debates … about the dichotomy between the police power, on the one hand, and takings or freedom of contract, on the other. …

As Bettman himself noted in a paper he wrote while *Euclid* was pending, barring apartment buildings from residential zones was thought by many to be the most troublesome feature of the typical planning ordinances. Responding to claims that such zoning tactics were merely aesthetic controls and therefore outside the police power, Bettman called upon telling imagery of middle and upper class men protecting their children from moral risk to justify single family residential zones:

> [T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. … Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself.

In this passage, it becomes clear that use of the nuisance analogy also permitted one other crucial step – the introduction of "politely" ugly discourse. By putting the home/apartment dichotomy into the nuisance analogy, Bettman could call forth a

host of phrases well suited to convince the conservative instincts of Supreme Court Justices that zoning was a positive good. The moral strength of upper-class children was at risk, Bettman warned. Keeping the kids away from a "disorderly, noisy, slovenly, blighted and slum-like district" was the only protection.

… Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture….

It was therefore possible, without ever mentioning race, immigration, or tenement houses, to call upon other code words that had the same impact. …

Notes and Questions

1. Does Chused's account make you think differently about *Euclid*? Suppose the Court had ruled the other way, that zoning was an unwarranted interference with property rights. How would our cities and suburbs look now? (Consider this question again when you study restrictive covenants.)

2. William A. Fischel, An Economic History of Zoning and a Cure for Its Exclusionary Effects (draft of December 18, 2001), puts a different emphasis on historical causes, and asks why zoning became so much more restrictive over time. Fischel argues that zoning developed, and then tightened its grip, because of homeowners' fears that the value of their single largest asset was threatened by new transportation technologies. The bus and truck came first, in the 1910s, corresponding with the initial adoption of zoning. The development of the interstate highway system in the 1960s then "put suburban homeowners at risk from value-reducing development in their neighborhoods and communities," causing them to support increasingly restrictive zoning. Zoning spread quickly to suburbs and small towns (like Euclid itself), rather than being driven by the well-known planners of the big cities.

   Before 1880, most people walked to work in American cities, and rich men tended to live close to their jobs to avoid frustrating and time-consuming commutes. Electric-powered streetcars then made it possible for urban

workers to live in residential areas, commuting to city jobs. As he notes, streetcar routes exploded from 3,000 miles of horse-drawn routes in 1882 to 22,500 mostly electrified miles in 1902. Developers built houses for the well-off workers who could afford streetcar fares, and the rich began moving to the suburbs, but not with zoning. Zoning wasn't yet needed: apartments and stores were located near streetcar lines, but it was simple for homebuilders to avoid those areas by building only a few blocks away from the tracks. Homebuilders and homeowners also used political clout to keep streetcar lines from going through exclusively residential areas.

But then, Fischel argues, trucks and buses became common, and the constraints imposed on poorer people by streetcars diminished. It became profitable to sell a vacant lot in a residential neighborhood to an industrial user or apartment builder, who could expect easy access to all the resources of the city through the new means of transportation. Restrictive covenants weren't enough to stem the flow of intensive uses, because they usually covered only relatively small areas of land, and restricted communities were vulnerable to development just on the border. Instead of trying to buy up even bigger tracts of land, developers began to support zoning, not because they trusted planners, but because they wanted to "induce homeowners to invest their savings in a large, undiversified asset…. As planning-historian Christine Boyer points out, zoning was seen as a way to provide 'an insurance policy that the single-family home owner's investment would be protected in stable neighborhood communities…."

The next development was political. Up to the first decade of the twentieth century, suburban governments were routinely formed and then absorbed into the expanding city. By the 1920s, however, suburbs became unwilling to give up their independence, and unincorporated parts of surrounding counties became more difficult for core cities to annex. Before zoning, Fischel contends, suburbs regarded merger with the city, and the intrusion of city problems and costs, as inevitable. As they grew, they needed more services, making the better-organized city police, firefighting companies, and utilities seem more attractive. But with zoning, suburbs determined that they could control their own growth and fiscal destiny. Instead of merging with the city,

suburbs began cooperating with each other to provide water and other services that had previously only been available from the central city – a pattern seen today in many St. Louis suburbs.

People who live near where they work, Fischel posits, have to balance their interests as homeowners with their interests as businesspeople, employers, or employees – they are more likely to support growth than people who fear only disruption of their living conditions from growth. Commuters, by contrast, didn't vote where they worked, so they only voted based on the value of their homes. Homeowners can't buy insurance against the risk that their homes will become less valuable, and most homeowners can't diversify their assets because they don't *have* much in the way of assets other than a home. This makes them anxious and politically active: "They know that if things go bad in their neighborhood, they will be stuck having paid a lot for an asset that they could sell only at a loss. They can avoid the personal consequences of a school system that has unexpectedly gone bad by moving, but they cannot avoid the financial consequences. Potential buyers can see the declining test scores as well as seller." As author Reihan Salan puts it, "Renters might react to demographic change with relative equanimity, knowing that even if it had negative consequences, it wouldn't endanger their biggest investment. Homeowners felt they couldn't afford not to panic." When demographic change nonetheless arrived, the result, in the St. Louis suburbs and elsewhere, was "round after round of white flight, each one of which leaves a suburban ghetto in its wake." Reihan Salam, *How the Suburbs Got Poor*, Slate, Sept. 4, 2014.

3. For the first fifty years of zoning, pro-development forces could win victories in the suburbs – if one suburb resisted, another nearby might well be more accommodating. However, Fischel argues, this changed in the 1970s, when the suburbanization of employment and the gains of the civil rights movement changed the political behavior of suburbs. The interstate highways of the 1960s enabled jobs to move out to the suburbs, in "industrial parks." Low-income workers whose jobs had previously been in city centers now found that they needed to go out to the suburbs to find work. More people, including poorer people, got cars – up to 82% of all households in 1970. With the ability to get to a job in the city center less of a constraint, residential

amenities such as schools became far more important to homeowners, who became even more anxious and insistent on keeping development away.*

Meanwhile, civil rights laws barred overt discrimination, including informal discrimination such as steering different races to different areas. While courts were hostile to racial zoning, they accepted facially neutral economic discrimination, which just happened to preserve racial lines. (Fischel points out that nearly all-white states like Vermont and New Hampshire underwent the same evolution towards increasingly restrictive zoning, suggesting that class was independently sufficient to drive this change.) Suburban homeowners adopted the rhetoric of environmentalism and demanded limits on growth and density, restricting development for everyone, not just for low-income people. Forced to choose between letting everyone in and letting no one in, they opted for no one. Fischel concludes: "The mottoes of no-growth, slow growth, managed growth, and (currently) 'smart growth' are all facially neutral watchwords which nonetheless are effective substitutes for more selective means of keeping the poor out of the suburbs." Changes in local government structure, such as environmental impact statement requirements and the "double veto" structure in which larger regional governments can block development but not force it, strengthened the anti-growth forces' hand.

2. Euclidean Zoning Theory

a. The Dominance of the Single-Family Home

Americans love their homes, and homeownership remains a cornerstone of the "American dream." Alexis de Tocqueville noted this several hundred years ago, and also commented that Americans would build homes and sell them as soon as the roof was complete. A particular ideal of the home developed in the twentieth century: "A

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* Although much of the discourse surrounding home values has to do with schools, there is no evidence that state-level equalization of school funding, which makes property taxes less important, has reduced exclusionary zoning. California equalized school finance and imposed a limit on property taxes that meant that homeowners didn't need to worry that low-income housing would increase their taxes, but exclusionary zoning didn't diminish and even intensified.

separate house surrounded by a yard is the ideal kind of home." MARY LOCKWOOD MATTHEWS, ELEMENTARY HOME ECONOMICS (1931). As a Wilmington, Delaware real estate ad from 1905 instructed, "Get your children into the country. The cities murder children. The hot pavements, the dust, the noise are fatal in many cases, and harmful always. The history of successful men is nearly always the history of country boys."

Results from the 2013 American Household Survey (AHS) show that 64% of all occupied housing, and 62% of recently built units, are detached single-family homes. Even in central cities, 79% of owner-occupied units are detached single-family houses. The average owner-occupied dwelling takes up nearly a third of an acre, as does the average recently built dwelling; bus service usually requires at least seven dwellings per acre to be viable.*

Homeownership has definite benefits. Homeowners are more likely to support school funding; even childless homeowners want their chief asset to be valuable because of its proximity to good schools. Homeowners participate more in local politics and community life than renters do, and their children seem to benefit as well. On the other hand, homeownership can be an anchor – when the structure of employment changes radically, and the best jobs are available in other regions, homeownership, and the resulting loss on a major asset, can deter people from moving, depressing economic growth and individual income.

b. Defining the Family

Any zoning scheme centered on the single-family home requires some definition of "family." In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a zoning ordinance's definition of "family" was invoked to prevent groups of unrelated college students from living together. That definition was restricted to "'(o)ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit… [or] not exceeding two (2) [persons] living and cooking together as a single housekeeping unit through not related by blood, adoption, or marriage." A group of

* Only 55% of housing units have sidewalks, and the percentage is lower for over-65 homeowners.

cohabiting college students sued to challenge the ordinance, and the Supreme Court cited *Euclid* and similar cases in support of its holding that the legislature can decide what kinds of uses are detrimental to the peaceful and attractive character of the area, subject only to constitutional law's "rational basis" standard of review:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds…. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Juan Monroy, Belle Terre, Sept. 7, 2014, CC-BY (despite the gates at the entrance to the town, this is not a private gated community, at least not in formal legal terms)

Justice Marshall's vigorous dissent in *Belle Terre* would have distinguished between "uses of land … , for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings," which zoning authorities could validly regulate, and "who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried," which he would have found they could not. Justice Marshall invoked both the First Amendment freedom of association and the constitutional right to privacy—fundamental rights the regulation of which must survive constitutional law's "strict scrutiny" standard:

> The choice of household companions -- of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution…. Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest….

In a subsequent case, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Marshall joined the plurality opinion of the Court (written by Justice Powell), which applied strict scrutiny to strike down East Cleveland's more limited definition of "family,"* over several dissents. Inez Moore lived with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys were first cousins, rather than brothers; John came to live with his grandmother and the elder and younger Dale Moores after his mother's death. This caused the household to violate East Cleveland's family ordinance, resulting in criminal charges against Mrs. Moore. The Court distinguished *Belle Terre* on grounds that the ordinance in that case "affected only unrelated individuals," whereas East Cleveland "has chosen to regulate the occupancy of its housing by slicing deeply into the family itself." The City defended its goals with the same crowding and traffic justifications as Belle Terre, and

---

* The East Cleveland ordinance stated:

> 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> (a) Husband or wife of the nominal head of the household.
>
> (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
>
> (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
>
> (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child….
>
> (e) A family may consist of one individual.

additionally argued that the ordinance limited the burden on East Cleveland's schools. The Court found that the ordiance's exclusion of extended families served these legitimate goals "marginally, at best." It further noted that there was a long tradition of "uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children…. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here."

Justices Brennan and Marshall, in concurrence, specifically pointed out that the "nuclear family" was really the pattern of "white suburbia," which could not impose its preference on others, and noted traditions among immigrants and African-Americans of living together in multigenerational arrangements as a matter of survival. The concurrence touted multigenerational families as stronger and more beneficial for children than isolated nuclear families. Justices Stewart and Rehnquist, in a dissent that defended *Euclid's* and *Belle Terre's* rational basis standard of review, argued that traditions of extended family cohabitation in such communities did not imply that "the residents of East Cleveland are constitutionally prevented from following what Mr. Justice BRENNAN calls the 'pattern' of 'white suburbia,' even though that choice may reflect 'cultural myopia.'" But ultimately, the plurality wrote, "the Constitution prevents East Cleveland from standardizing its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns."

Consider the *Moore* plurality's argument that *Belle Terre* could be distinguished on grounds that "[t]he ordinance there affected only unrelated individuals." What does this mean for *unmarried* couples with children from prior relationships? In *City of Ladue v. Horn,* 720 S.W.2d 745 (Mo. Ct. App. 1986), city authorities sued one such couple with three teenaged children from prior relationships, seeking to enjoin them from cohabiting in a zoned single-family neighborhood. The applicable ordinance's definition of "family" specifically excluded groups of more than two people not related by blood, marriage, or adoption. The court cited *Belle Terre* and *Moore* together for the proposition that constitutional limits on zoning authorities' definition of the family rest on protection of relationships of blood, marriage, or adoption, and affirmed the order enjoining them from living together in their home. The court opined that "maintenance of a traditional family environment constitutes a reasonable

basis for excluding uses that may impair the stability of that environment and erode the values associated with traditional family life."

Do you think *Ladue v. Horn* reached the right conclusion? Consider Paul Boudreaux, The Housing Bias: Rethinking Land Use Laws for a Diverse New America (2011):

> [Restrictive single family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing 'land use.' Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid's college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. . . . Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It's an accepted exercise of the police power.

Today, jurisdictions vary considerably in their definition of "family" for purposes of constructing that fortress of Euclidian zoning: the single-family home. Some jurisdictions, such as New York, are particularly protective of individual choice of living arrangements. *See, e.g.*, Group House of Port Washington v. Board of Zoning and Appeals of the Town of North Hempstead, 380 N.E.2d 207 (N.Y. 1978) (a house consisting of two surrogate parents and seven emotionally disturbed children was "... the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose"); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985) (town could not exclude from its definition of family two unrelated people under 62, while allowing two related people 62 or over); Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989) (town could not exclude five unrelated elderly women residing together under a definition of family providing that not more than 4 unrelated persons living and cooking together as a single housekeeping unit could constitute a family; state constitution precluded the town from limiting the size of a functionally equivalent family of unrelated persons but not the size of a traditional family); *cf.* Braschi v Stahl Associates, 543 N.E.2d 49

(N.Y. 1989) (two gay men living together in a spousal-like arrangement could constitute a "family" within the context of the non-eviction provisions of the New York City Rent and Eviction regulations). Other jurisdictions continue to apply definitions of "family" as restrictive as that in *Belle Terre* or *Ladue v. Horn*—even tightening those restrictions in some cases. *See, e.g.*, Stephanie McCrummen, Manassas Changes Definition of Family, Wash. Post A1 (Dec. 28, 2005) (newly enacted Manassas, VA zoning law prevented couple from living with woman's nephew; opponents attributed enactment to discrimination against immigrants); *see generally* Rigel C. Oliveri, Single Family Zoning, Intimate Association, and the Right To Choose Household Companions, Florida Law Review (2015); Adam Lubow, "… Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law, 16 J. Afford. Hous. & Comm. Dev. Law 144 (2007). The litigated cases tend to be older, and even in the 1990s enforcement often drew incredulous media coverage, but there are a few recent cases upholding restrictive definitions of family. *See, e.g.*, City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320 (La. 2014) (upholding single-family ordinance that allowed (1) an unlimited number of related people or (2) no more than four unrelated people in a single housekeeping unit, if the owner occupied the premises); State v. Champoux, 566 N.W.2d 763 (Neb. 1997) (upholding family composition ordinance); City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996) (same).

c. Segregation of uses

The key principle behind Euclidean zoning is segregation of uses, in order to protect the single-family home. One clear cost is sprawl. Living away from density has other consequences: Wages are about thirty-five percent higher in cities, and research shows that this is because urban residents tend to have greater wage growth than residents in rural areas, suggesting that growth in human capacity is enhanced by density and interacting with closely situated others. Density allows for greater specialization and more productive interactions with a greater variety of people. Another consequence of use segregation is that undesirable uses tend to get concentrated in ghettoes or red-light districts, or left to inner cities.

However, even opponents of Euclidean zoning might consider some segregation of uses desirable. In 2013, a Texas fertilizer plant explosion leveled houses and

destroyed the middle school across the street. A former city council member said that he couldn't recall the town discussing whether it was a good idea to build houses and the school so close to the plant, which has been there since 1962. "The land was available out there that way … There never was any thought about it. Maybe that was wrong." Theodoric Meyer, Could regulators have prevented the Texas fertilizer plant explosion?, Salon, Apr. 28, 2013.

d. Churches

It might fairly be said that many homevoters' concern for their property values amounts to religious fervor. Numerous zoning disputes have involved the location of churches, to which neighbors often object on grounds of weekend congestion – or, in the case of minority religions, for other reasons. Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959), involved a religious organization (a Jewish synagogue) that wished to construct a new building for religious purposes, including services and religious education. Two weeks after Temple Israel bought the land, residents petitioned to change the zoning. Before Temple Israel began construction, the City changed the zoning to exclude churches and schools. It also established a complex and burdensome procedure to seek an exception allowing church or school use, and made the exception discretionary rather than mandatory. The Missouri Supreme Court ruled that municipalities had no authority to regulate the placement of churches or schools. Under the state's Zoning Enabling Act, Section 89.020 allowed them to regulate "the location and use of buildings, structures and land for trade, industry, residence and other purposes." Given the constitutional interest in freedom of religion, and the history of locating churches in residential areas, the court interpreted "other purposes" to exclude control over the location and use of buildings for churches and schools, though municipalities could regulate the buildings for health and safety purposes.

The land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc, et seq., now protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws. The Department of Justice has explained:

> Religious assemblies, especially, new, small, or unfamiliar ones, may be illegally discriminated against on the face of zoning codes and also in the highly

> individualized and discretionary processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the zoning codes or landmarking laws may permit religious assemblies only with individualized permission from the zoning board or landmarking commission, and zoning boards or landmarking commission may use that authority in illegally discriminatory ways.
>
> To address these concerns, RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.

U.S. Dep't of Justice, Religious Land Use and Institutionalized Persons Act, Aug. 6, 2015.

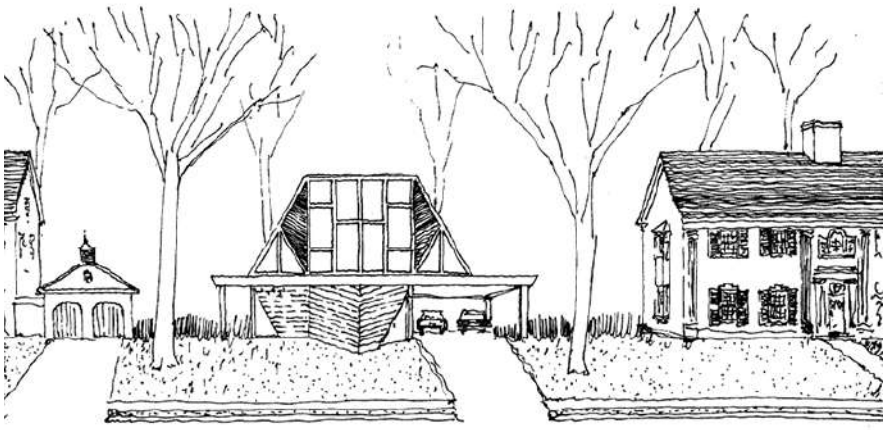
On the other hand, there are limits on the extent to which zoning ordinances can be put at the service of religious institutions, in light of the First Amendment's Establishment Clause. *See* Larkin v. Grendel's Den, 459 U.S. 116 (1982) (Massachusetts statute prohibiting sale of alcohol within 500 feet of a church "if the governing body of such church or school files written objection thereto" was an unconstitutional establishment of religion under the First Amendment).

e. Other First Amendment Concerns

To what extent may zoning ordinances limit the exercise of First Amendment rights to freedom of expression? The City of Ladue, a wealthy St. Louis suburb we will learn more about shortly, has a history of testing this question.

To take one example, may a zoning ordinance permissibly prohibit the posting of "lawn signs" of the type that are typical in political campaigns? In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) the Court struck as unconstitutional Ladue's zoning ordinance banning from residential districts all signs except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. But the Court left open the possibility that some regulations short of an outright ban—such as "time, place, and manner" restrictions typical of judicially permitted government regulation of expression—might pass First Amendment scrutiny. What types of signage regulations should be available to zoning authorities? Could a zoning ordinance, for example, place heavier restrictions on temporary leaflets advertising upcoming events or meetings than it does on more durable lawn signs demonstrating support for a political candidate? *See* Reed v. Town of Gilbert, 576 U. S. -- (2015) (striking a complex hierarchy of sign regulations as drawing impermissible and unjustified content-based distinctions).

To take another example with implications for freedom of expression, is "aesthetic zoning"—the use of zoning ordinances to require all homes within a community to conform to certain styles of architecture, for example—permissible? In *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), Ladue refused a building permit to a family that proposed to build the following home in a neighborhood of stately colonial and Tudor style homes:



Artist's rendering of proposed house

The Stoyanoffs challenged the zoning ordinance—which gave an appointed "Architectural Board" the authority to refuse new home designs unless they are "in general conformity with the style and design of surrounding structures"—on grounds that it was vague and arbitrary. The court disagreed, holding that such aesthetic criteria are a permissible exercise of the police power to preserve the "character of the district, its suitability for particular uses, and the conservation of the values of buildings therein." Are you persuaded? Should the Stoyanoffs have challenged the ordinance on First Amendment grounds instead? Would the result have been any different? Should it have been?

What about so-called "erogenous zoning"—the practice of prohibiting certain sex-themed businesses such as strip clubs, adult video parlors, and the like, in or near residential districts, schools, and churches? If a zoning ordinance has the effect of herding all such businesses into undesirable, remote, dangerous areas, is there a First Amendment problem? City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (such a restriction upheld as a reasonable "time place and manner" restriction); *accord* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). What if an ordinance has the effect of making it literally impossible to operate such a business within the jurisdiction covered by the ordinance? *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (upholding a zoning ordinance that requires nude dancers within city limits to wear "pasties and G-strings" because the effect on the expression of nude dancers was *de minimis* and the regulation was a justifiable response to the "secondary effects" of all-nude dancing); *but see* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (reversing convictions of adult bookstore and peep show operators under a zoning ordinance that prohibited *all* live entertainment within the jurisdiction, and noting that the Court in *Young v. American Mini Theatres, Inc.* "did not imply that a municipality could ban all adult theaters -- much less all live entertainment or all nude dancing -- from its commercial districts city-wide.").

f. Longstanding critiques of suburbia.

Since their inception, suburbs have been criticized for isolating and insulating the families who lived there. Social critic Louis Mumford wrote: "[T]he suburb served as an asylum for the preservation of illusion. Here domesticity could flourish, forgetful of the exploitation on which so much of it was based. Here individuality could

prosper, oblivious of the pervasive regimentation beyond. This was not merely a child-centered environment, it was based on a childish view of the world, in which reality was sacrificed to the pleasure principle." THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS 464 (1961).

Zoning raises distributional as well as efficiency concerns. Proponents of use zoning defend its contribution to "home values," while critics of growth restrictions talk about "housing prices"; the former takes the perspective of existing owners while the latter suggests more concern for people who are priced out of ownership. Indeed, use zoning does seem to raise the price of single-family homes, though it's less clear that it raises overall property values. Studies find that, in most parts of the country, home prices are roughly at or near the costs of construction. But, where zoning limits construction, prices can increase substantially. Thus, in heavily regulated urban areas like New York City and many parts of California, home prices shot up in the past few decades.

A recent study found that land use restrictions added $200,000 to the price of houses in Seattle, Washington; Seattle was in the top 3%, nationally, in approval delays for new projects. The executive officer of the Master Builders Association of King & Snohomish Counties estimated that regulatory costs comprised up to 30 percent of the total cost of building a new house (land costs included), including transportation, school and park impact fees, stormwater management fees, critical-areas mitigation and monitoring, pavement requirements and rockery permits. Neighborhood-based design review committees, which use citizen volunteers, delay the process further, sometimes requiring three or four rounds of review. Elizabeth Rhodes, UW study: Rules add $200,000 to Seattle house price, Seattle Times, Feb. 14, 2008.

3. How Zoning Works (and Doesn't)

Zoning's proponents hoped that comprehensive planning would result in a zoning plan that would last into the indefinite future. Reality quickly set in, and municipalities realized that they would need ongoing modification of their zoning codes. New uses had to be included and excluded; plans had to be revised to account for changes in population; and so on.

Missouri Municipal League, Planning and Zoning Procedures for Missouri Municipalities (Sept. 2004)

All cities, towns and villages in Missouri may adopt planning and zoning. Statutory authority to enact planning and zoning is found in Chapter 89 of the Revised Statutes of Missouri (RSMo). Chapter 89 establishes the procedural framework in which planning and zoning is enacted and administered. … Left uncoordinated, land use patterns are unpredictable and public services are provided in a haphazard manner, often adversely affecting the quality of life within the community. Zoning is the set of regulations that prescribe how land within a municipality is used….

The Missouri Revised Statutes makes provisions for a zoning commission (Section 89.070 RSMo) and a planning commission (Section 89.320 RSMo). The purpose of the zoning commission is to write the original zoning ordinance. The planning commission's function is to plan for the development of the municipality. …

Planning Staff

Many large and moderate sized cities hire a professional planning staff to assist the planning and zoning commission in the preparation and administration of the comprehensive development plan, zoning ordinance and subdivision regulations. However, in most smaller cities the planning commission functions without a professional staff. In this situation the planning commission mainly will be concerned with the administration of the zoning ordinance and subdivision regulations….

Zoning and the Comprehensive Plan

The distinction between the zoning ordinance and the comprehensive plan is sometimes a confusing subject for those outside the planning profession. This confusion arises out of the fact that many cities adopt zoning ordinances before a comprehensive plan is prepared. Therefore, it sometimes is difficult to understand the logical connection between the two documents.

According to state law (Section 89.040 RSMo), a zoning ordinance must be based on a comprehensive plan. A zoning ordinance that is not based on a comprehensive plan is not legally sound. …When a zoning ordinance is not based on a comprehensive

plan, there is a tendency for development to become frozen in existing patterns or for an undesirable development pattern to occur. An ordinance that is not developed in accordance with a plan generally requires many amendments, which makes the ordinance very difficult to interpret and administer.

What A Zoning Ordinance Does Not Do

The zoning ordinance is not designed to regulate the types of materials used for the construction of buildings or the manner in which buildings are constructed. This is the function of building codes. Also, the zoning ordinance does not establish the minimum cost of permitted structures nor control their appearance. These matters are generally controlled by protective covenants contained in the deed to property.

The zoning ordinance does not regulate the design of streets, the installation of utilities or the dedication of parks, street rights-of-way and school sites and related matters. These are controlled by the subdivision regulations and by an official map preserving beds of proposed streets against encroachment.

Zoning ordinances deal primarily with future development and cannot be used to correct existing conditions. These generally are addressed by the housing code, which establishes minimum housing standards and requires the rehabilitation or demolition of existing substandard structures….

Necessary Information

Most of the information needed to develop the zoning ordinance already should have been assembled and included in the city's comprehensive plan. Following is the type of information that will be useful in preparing the zoning ordinance.

1) The existing use of every piece of property within the city;
2) The terms of restrictive covenants applying to large sections of the city;
3) The location and capacities of all utility lines and major streets;
4) The assessed valuation of properties in different sections of the city;
5) The location and characteristics of all vacant land in the city;
6) The location of all new buildings erected during the past five years;
7) The width of streets;
8) The size of front, side and rear yards;

9) The heights of buildings;
10) The dimensions of lots; and
11) The number of families in each dwelling.

Once this information has been gathered and mapped, it should be analyzed. Analysis of the information should focus on the amount of land used for dwellings, businesses and industries; the predominant yard size; building heights; population densities; availability of utilities and street types. These studies along with the economic studies and population studies in the comprehensive plan can aid the city in forecasting future land requirements for each land use.

Elements Of A Zoning Ordinance

Most zoning ordinances consist of two parts: a zoning map indicating the boundaries of the various zoning districts and written regulations defining the manner in which property may be used in each district.

The Zoning Map

… [I]t generally is the case, when attempting to formulate a zoning district map, that existing land use patterns conflict with the land use plan to some degree. When this occurs, a compromise must be made between existing land use patterns and the city's desired land use pattern as developed in the land use plan. The land use plan then becomes a guide for this decision process, as well as a guide to be followed in making later amendments to the zoning ordinance.One of the most difficult aspects of developing a zoning district map is the drawing of exact boundary lines between districts, since all boundary lines are somewhat arbitrary, and individual property owners are likely to raise protests that are hard to resolve….

Zoning Regulations

… Each type of district will have regulations that control the height of buildings, bulk of buildings, lot coverage, yard requirements and a special provision dealing with off-street parking and loading….

Notes and Questions

1. Despite the formal insistence on a division between the plan and the implementation of the plan through zoning, many states allow a zoning ordinance to be treated as the plan itself. This collapse between planning and zoning was almost coextensive with the implementation of zoning. The New York City zoning ordinance imitated by other American cities was, according to Mel Scott, "a setback to the city planning movement because it contributed to the widespread practice of zoning before planning and, in many cities, to the acceptance of zoning as a substitute for planning." MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890: A HISTORY COMMEMORATING THE FIFTIETH ANNIVERSARY OF THE AMERICAN INSTITUTE OF PLANNERS (1971). In the 1920s, three times as many cities adopted zoning as adopted master plans.

2. Why is zoning acceptable without a separate master plan? How is a court to judge its rationality or reasonability without a master plan?

3. Over time, the tendency in zoning was towards complexity. The city of Euclid had six use zoning districts in 1926, but now has almost twenty. It wasn't alone: 70% of municipalities made their zoning rules more restrictive between 1997 and 2002, while only 16% made them less restrictive. Between 1976 and 2002, the percentage of zoning decisions that took over two years doubled.

4. For further background on zoning concepts, New York City's Zoning Handbook is a helpful guide.

4. Two examples.

The pages that follow offer descriptions of and portions from two cities' planning documents and zoning ordinances. Consider the similarities and differences between Ladue and Ferguson – rather than reading every word of the ordinances, you should skim them to get a sense of the behaviors and uses these cities believe they need to regulate. What would each city do if a new business, say an e-cigarette store (to take a category of business that did not exist a decade ago) wanted to open?

a. Ladue, Missouri

Ladue is the wealthiest suburb of Missouri. Ladue's African-American population is 1.0%, compared to nearby Ferguson's 2/3rds. Per capita income in Ladue is $88,000, compared to Ferguson's under $21,000.*

Bob Bawell, Pond at St. Louis Country Club (Ladue, Mo.), Oct. 28, 2012, BY-NC†

City of Ladue, Missouri, *Comprehensive Plan Update* (September 27, 2006)

In 1936, several villages officially consolidated as the City of Ladue. At the time it was the largest municipality in St. Louis County, with 4,553 acres of land. Its first

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* A few years ago, Ladue's police chief was fired, allegedly for refusing to target black drivers who passed through the city limits. Former Ladue Police Chief alleges he was ordered to profile black motorists, KMOV.com, May 4, 2014. Ladue sought to cover a $300,000 city budget shortfall through traffic tickets rather than by raising taxes on its millionaire homeowners. In 2006, African-Americans made up 22.5% of traffic stops by Ladue police. In 2014, though the percentage had decreased somewhat, African-Americans were still 16 times as likely to be stopped as their percentage of the population would predict. Walter Moskop, Traffic enforcement report: Black drivers in Missouri still stopped at higher rate, St. Louis Post-Dispatch, June 2, 2015.

† Seventy percent of Ladue's acreage is comprised of open space.

comprehensive plan, the *Preliminary Report Upon a City Plan*, was completed in 1939. … The plan articulated the following imperative which is equally applicable today:

> "It should be recognized that cities now are judged more by the character or quality than they are by their size. This factor will be increasingly important in the future with the entire country approaching a stabilized population. The areas that will grow are those that provide desirable living conditions and reasonable tax rates, and such areas will probably grow at the expense of some other area having less favorable conditions. Thus the protection and perpetuation of the present advantages are not only essential for the welfare of the citizens, but are important measures of insuring continued healthy growth."

…. Large residential lots predominated, with 13% of all residences situated on lots of at least five acres. The plan noted "no other large suburban town in the St. Louis region contains such a low population density or such a spacious character of development."…

In accordance with the residential character objective, the 1939 plan proposed five residential districts with largely overlapping uses, but with differences in lot area and yard regulations. Permitted minimum lot sizes ranged from 10,000 square feet to three acres. Industry was confined to grandfathered areas. The commercial district was expanded to only 15.2 acres with a neighborhood focus, and this was deemed adequate for the target population of 10,000, given the fact that commercial areas were available in adjoining communities.

Significantly, the ordinance did not make provision for apartments. The plan was clear and consistent regarding the Commission's residential character objective.

[From the 1939 report: "The opening of any section of the city for this use would invite speculation, result in undue concentration of population, and make it extremely difficult to prevent the spreading of this use throughout the entire city. Apartment development would especially overburden the school facilities, which are now adequate and have been planned for a continuation of the present type of development. If apartment construction would be permitted in the City of Ladue, it would enhance the value of the property of a few individual owners, but, on the other hand, it would seriously depreciate surrounding property, overtax school and sewer

systems, and necessitate many additional governmental services, all of which would unduly increase taxes…."]

…. Ladue's character can be described as follows:

> "Spacious" (an attribute that was already defined in the City's 1939 plan)
>
> "Spacious residential character" (as stated by the City's first Zoning Commission)
>
> A substantial legacy of fine estates, large homes, and elegant cottages
>
> Predominant single family residential land use
>
> Rolling hills
>
> Countryside setting overlain with an extensive blanket of mature vegetation
>
> Architectural quality and diversity
>
> Contained commercial areas
>
> A network of old country-type roads that frame and help to define the city's historic roots
>
> A demographically concentrated community of civically prominent and active residents
>
> A multigenerational family heritage
>
> Premium land values

[The report notes that Ladue, like most inner ring communities in the St. Louis region, is shrinking, but not by very much.] Even with substantial demographic shifts in St. Louis County that result in slow growth, the County is expected to retain its central position of economic power both within the region as well as in the State of Missouri. Approximately half of the jobs in the entire St. Louis region are located in St. Louis County. Moreover, considerable wealth is concentrated here, where one-fourth of all state sales tax revenue and over one-third of all income tax revenue are

generated. This is despite the fact that the county represents only 19% of the state's population. Its disproportionate role in the state's income tax base results directly from a high concentration of affluent households. Given the county's continued economic prominence in the region as well as the sustained affluence of county residents in general, Ladue seems to be particularly well positioned to retain its role as one of the leading affluent cities not only within the county but also in the region and the entire state….

1. Issues

5.

- The need to retain Ladue's existing housing character and general densities as infill occurs.
- The challenge of infills built to the maximum allowable footprint - "McMansions" - which are frequently out of scale to surrounding structures, negatively affect the visual quality of the blockface, and reduce the open space and landscapes that are such an important part of Ladue's character.
- The desire of older residents to have downsized high-end housing options available in Ladue, and the nature of such housing….
- The need to maintain existing retail areas at present levels of development.
- The corresponding need for commercial development within existing commercial districts as a tax-generating entity to meet rising municipal costs….

A. Goals and Objectives

…

1. Maintain, Preserve and Improve the City's Present Residential Character Within Already-Developed Areas.

a. Maintain present low densities within already-developed areas to preserve the characteristic of spaciousness.

b. Guide and direct land use activity within the estate residential districts to retain their position of visual prominence in the City's housing stock.

c. Preserve Ladue's predominantly single-family characteristics in existing neighborhoods and developments.

d. Promote architectural quality and diversity.

e Preserve and foster the City's countryside setting of rolling hills, mature trees and extensive vegetation.…

Downsized Luxury Housing Opportunities. The demand for downsized luxury housing in Ladue appears to be increasing, based on comments heard from Ladue residents as well as by general market trends and regional development activity. The City recognizes the need to consider this type of housing for residents who seek it and who prefer to continue residing in the City rather than move to another community. However, the City also recognizes the need to maintain its present low-density estate and high-end residential character. Accordingly, Ladue may encourage development of such housing within the following parameters:

- It should not result in a net increase in unit density from the site's present zoning….

The City has had a carefully developed and strictly enforced zoning ordinance since 1938 with a major emphasis on estate and high-end residential patterns that reinforce, sustain, and further its unique residential character. To that end, all other zoning categories are intended to complement and support rather than compete with quality residential development, which comprises approximately 97% of the City's total land area.

1. "A" Residential District. The "A" residential district is a visually prominent land use form in Ladue. It is the framework for the extensive development of estates that over the years have come to form the backbone of the City's residential makeup. … This district contains a 3-acre minimum lot area (130,680 s.f.) with front, side and rear yard distances of 75 feet, 50 feet, and 50 feet respectively. Minimum required frontage is 150 feet. Required minimum lot width is 200 feet. Maximum building area is 15,000 square feet, absent a special use permit.

2. "B" Residential District. This district requires a 1.8-acre (78,408 s.f.) minimum lot area with front, side, and rear yard distances of 50 feet each. Frontage minimum is 135 feet, and minimum lot width is 180 feet. Maximum building area is 15,000 square feet. The "B" District, coupled with the "A" District, together comprise the most prominent land use forms in the city.

3. "C" Residential District. The "C" residential district requires a lot area minimum of 30,000 square feet. Front, side and rear yard distances are 50 feet, 10 feet/10% of lot width up to 20 feet and 30 feet respectively. Minimum lot frontage is 90 feet, with minimum required lot width of 120 feet. Building area maximum is 15,000 square feet.

4. "D" Residential District. This district requires lots of no less than 15,000 square feet with front, side and rear yard distances of 40 feet, 10 feet/10% of lot width up to 15 feet and 30 feet respectively. Minimum required frontage is 55 feet, with minimum required lot width of 75 feet.

5. "E" Residential District. "E" residential is the smallest residential district in Ladue. It requires lots of no less than 10,000 square feet. Required front, side and rear yard distances are 40 feet, 10 feet and 30 feet respectively. Minimum required lot frontage is 50 feet, with a required minimum lot width of 75 feet.

6. "E-1" Residential District. This district requires lots of not less than 10,000 square feet, with required front, side and rear yards of 25, 10, and 30 respectively. Minimum required frontage is 50 feet with a minimum lot width of 70 feet….

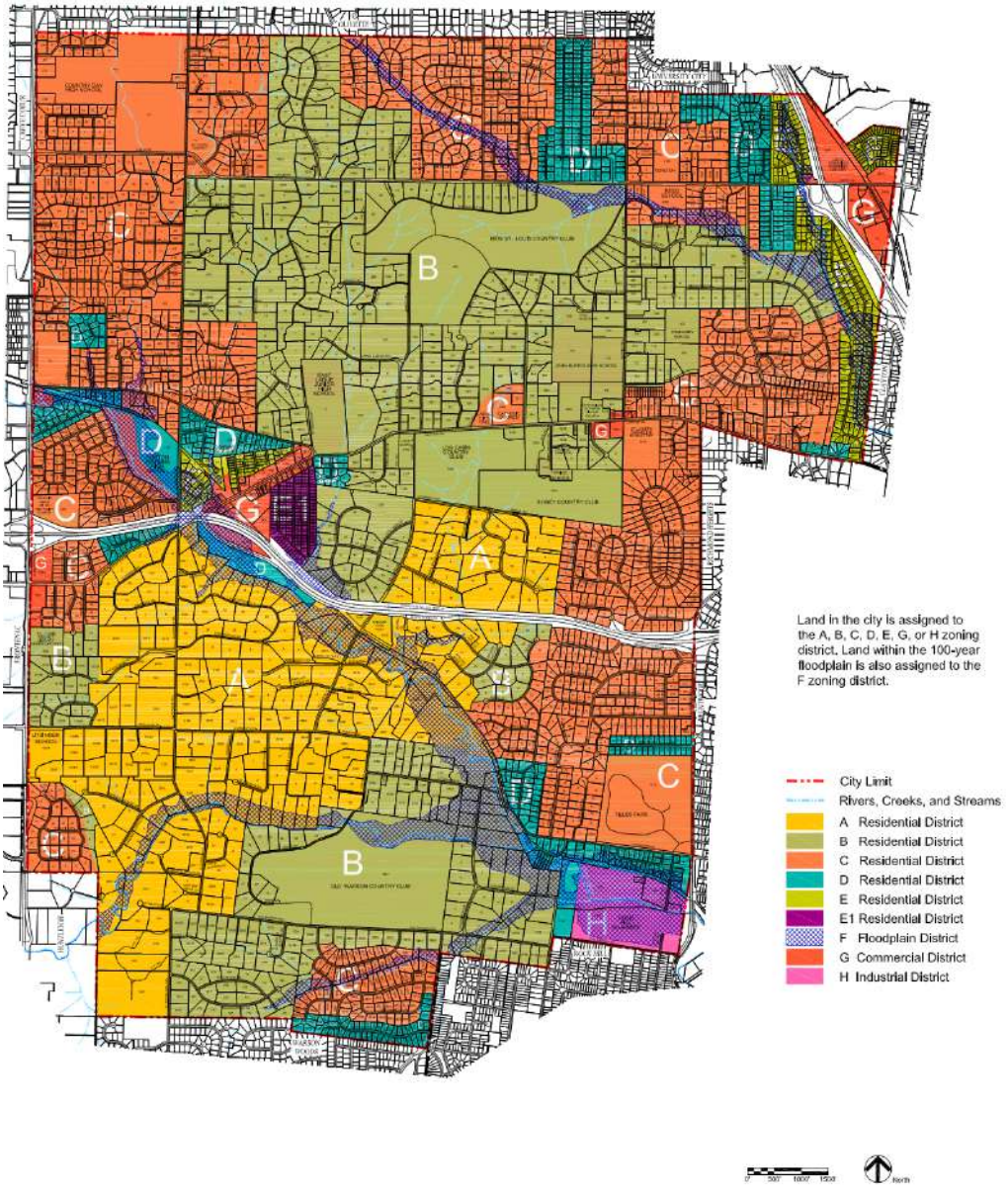
7. "F" Floodplain District. Ladue's regulations for the Flood Plain district prohibit construction, reconstruction or alterations to buildings within its boundaries, except in conformity with the City's Flood Plain Ordinance. …

8. "G" Commercial District. … Ladue's commercial district regulations permit the following uses: Banks (drive-in facilities are not allowed except as a Special Use), barbershops, beauty parlors, offices including medical/dental, parks, restaurants (no drive-in facilities or outside seating except by Special Use), and retail businesses (except automotive sales)….

9. "H" Industrial District. Ladue's single remaining industrial district is located at the old Rock Hill Quarry site, which has been operating as a landfill….

Permitted uses in the Industrial district include: Any commercial use (per above); light manufacturing not considered a nuisance because of noise, odors, dust, gases, smoke, vibration or other factors; and enclosed storage.

Ladue Zoning map (Kuhlmann Design Group):



… Future Land Use Plan…

The city is already completely developed, with only one large additional underdeveloped site available (the Landfill), totaling approximately 64 acres. Although this site is not recommended for residential development, a small portion of land to its immediate north is already so designated and might be appropriately considered for creative residential uses. …

[T]here is a growing market for the replacement of existing homes with new structures, driven by buyers who prefer larger rooms and additional storage space that new homes can provide. The elevations and footprints of these infills often dwarf not only their own lots but adjoining property as well. They can also negatively affect a larger area when their mass is sufficient to loom over the entire block face. In no residential area is this more potentially harmful than in the very small-lot district ("E") with its 10,000 square-foot minimum. Here, the City should discourage the use of variances from historic front, side and rear yard requirements, as well as elevations that are out-of-scale to surrounding buildings.

[Because Ladue is presently successful, the Plan recommends only minor changes, including tightening the standards for new construction to make sure it's attractive and limiting the grant of variances, discussed further in the next Part of the materials. To deal with the McMansions problem, the proposal would focus on the size and height of a building when viewed from the curb, "emphasizing narrower and deeper designs rather than taller and wider configurations." The plan would also "[p]romote the limited development of downsized luxury housing with no net increase in existing densities. Downsized Luxury Housing is defined as a single-family owner- occupied unit either with or without common walls, 1-3 person occupancy within a reduced living area, and with sufficient elements of architectural detail, craftsmanship, and character to make it both elegant and uniquely personal."]

Ladue, Missouri Zoning Ordinance, Ordinance 1175, as amended through Jan. 2015

… II. A. (10) The only uses permitted within the City of Ladue are those specifically listed in this Zoning Ordinance. Notwithstanding, the following uses are expressly prohibited within any Zoning district:

(a) Multiple-family dwellings and condominiums
(b) Multi-level parking structures
(c) Automotive sales
(d) Drive-through auto washing facilities
(e) Funeral homes
(f) Massage parlors
(g) Commercial pool parlors and game rooms
(h) Nursing homes
(i) Hospitals
(j) Motels

… IV.A.(4)(d) An accessory building or structure may not be used for dwelling purposes except as living accommodations for persons employed for domestic or related services to a resident of the main building.

(e) No vehicle whether automotive or a trailer, mobile home or similar item, whether supported by wheels or with wheels removed, shall be kept or used in this city for temporary or permanent living purposes ….

[The ordinance goes on to impose substantial off-street parking requirements for all homes and businesses and to regulate, among other things, the appearance of driveway monuments, the height of driveway gates, and the amount of space that must be visible between the bars of such gates.]

… No commercial vehicles used for hire for transporting people can be parked on a regular/permanent basis in residential areas.

[Oversized houses may be allowed by special permit. For all oversized houses, there must be at least 10 square feet of lot for every square foot of house, and the footprint of the house can't cover more than 10% of the lot.]

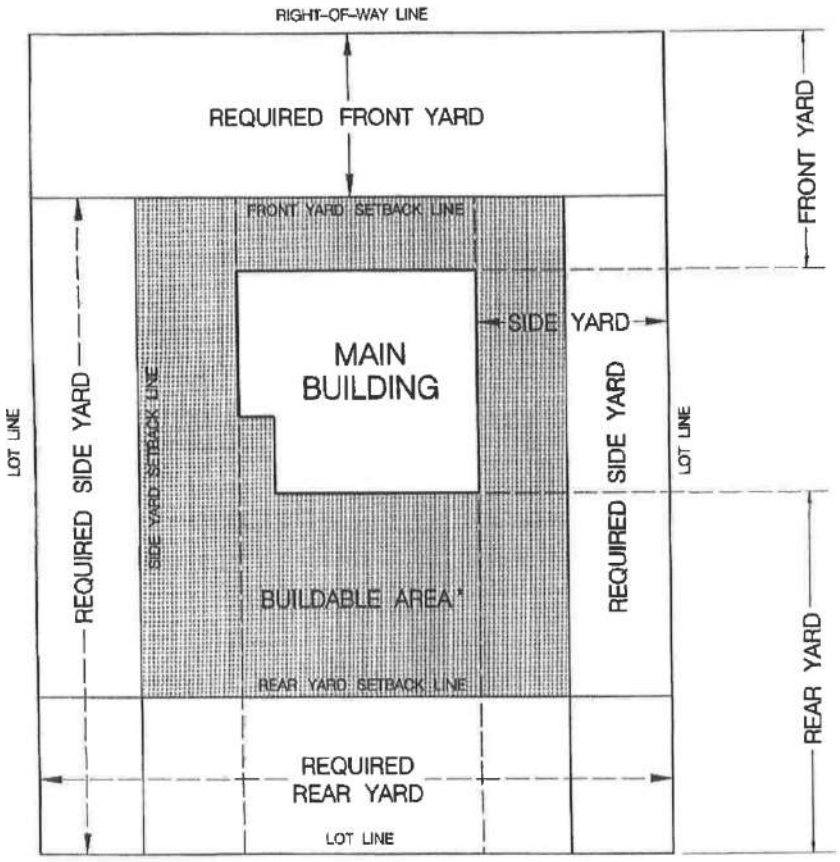


Diagram Showing Yard Locations and Yard Setback Lines of a Typical Lot

* Buildable Area is Shaded

Notes and Questions

1. Did planning succeed in its objectives in Ladue?

2. What is a "McMansion," and why do the residents of Ladue dislike them? Why might neighbors think that McMansions decrease property values or otherwise harm them? They are far from alone. One letter writer lamented, "All over Staten Island, we have seen what happens when the wrong people buy the right homes." Jim Ferreri, *Great good news in Westerleigh, but …*, Staten Island Live, Nov. 5, 2007. The author wanted to expand minimum lot sizes and ban two-family homes on Staten Island, even though he acknowledged

that those changes wouldn't prevent McMansions, which were the subject of his complaint. Perhaps more effectively, he also suggested that all the homes in his area be designated historic to prevent teardowns.

b. Ferguson, Missouri

A review of Ferguson's 1998 planning document, the most recent available, shows the same embrace of Euclidean zoning as Ladue, but with a different economic context. City of Ferguson Vision 2015 Plan Update (Aug. 1998). As the document explains, Ferguson is approximately 13 miles northwest of downtown St. Louis, near the interstate highway system. Ferguson was incorporated in 1894, and a streetcar line to St. Louis was completed in 1900. The city grew rapidly after World War II, aided by the rise of cars. The population peaked in the 1970s, then declined 22.5% between 1970 and 1990, in line with the experience of many other St. Louis suburbs. From the document's introductory materials:

> Ferguson is one of 92 municipalities in St. Louis County. The County's local government structure is a confusing mass of small municipalities, school districts, fire protection districts, isolated pockets of unincorporated lands and special districts. Many cities are in more than one school district and some cities are protected by more than one fire protection district. For many years, there have been discussions about consolidating the City of St. Louis and St. Louis County and all of its municipalities into a single government entity. Such a government would serve a population of more than 1.3 million people. While this might seem desirable in that it would cut down on duplication of services, the likelihood of this occurring in the near future seems remote.

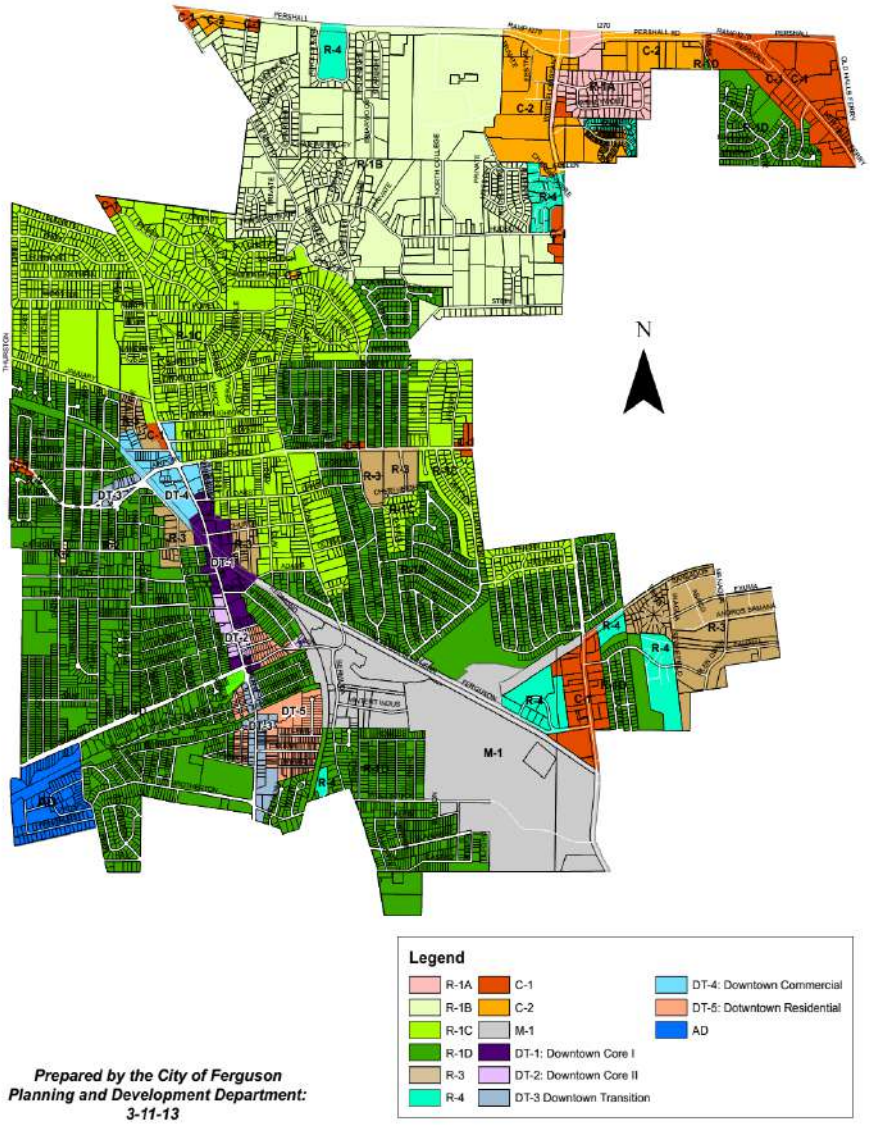
Ferguson embraces separation of uses as a goal, along with maintaining or reducing residential density. In the downtown area, Ferguson would like to encourage mixed-use development, but not to the extent of disrupting existing residential neighborhoods. The plan considers suburban residential development at four single-family houses per acre desirable.

The planning document noted, however, that residential land use generates little in the way of taxes, either property taxes or sales taxes. Moreover, Ferguson considered that rental properties were a problem, because "some owners of rental property

(particularly absentee owners who do not live in the community) do not maintain the property as well as many owner-occupied dwellings are maintained," causing health and safety problems. The recommended solution was to require inspections of rental property for any change in occupancy; the result contributed to the fine-based scheme of city financing, discussed above. The plan also recommended taking measures to decrease the number of units that were rented, but that didn't work.

In addition, because of the general downward economic drift of the area, Ferguson was confronted with new businesses, which were in need of regulation: "commercial uses such as pawn shops, check cashing agencies and other establishments which are associated with communities in decline, should be closely regulated by the city to prohibit the concentration of such uses in any one area and … such uses should be prohibited near churches, schools and residences." The current code extensively regulates both the location and the physical configuration of these businesses.

Ferguson Master Zoning Map



Ferguson has 14 zoning districts, four for single-family houses, one for one- or two-family houses, one for multiple-family residences, a "planned residence" district, a planned "mixed use" district, a general commercial district, a planned commercial district, a downtown core business district, a downtown area business district, an industrial district, and an airport district. Required minimum lot sizes vary in the single-family districts from a minimum of 20,000 square feet per family to a minimum of 7,500 square feet. The residential districts also allow public facilities such as parks and museums, community gardens, communication towers, group homes, foster care homes, churches, and family day care homes, as well as other assorted uses (stables in

one; bed and breakfast inns in all but the single-family residential district with the largest minimum lot size; "urban agriculture" on 2 acres or more in the single-family residential district with the smallest minimum lot size). The two-family residence district is like the 7,500 square feet-minimum residential district, but also allows two-family homes on lots of at least 5,000 square feet. The multiple-family residence district also allows multiple-family homes on lots of at least 5,000 square feet, as well as state licensed nursing facilities and residential treatment facilities.

The planned residence district is supposed to mix types of housing, and also allows adult day care. The planned mixed-use district is similar, with the addition of "commercial, cultural, and institutional uses" and the goals of minimizing car travel and putting employment and retail closer to higher-density housing. The allowed commercial activities are limited.* The general commercial district "is designed to allow considerable latitude in the range of retail uses allowed, provided that the uses are legal and no outdoor storage is conducted" except as specifically allowed by the code. What that "considerable latitude" looks like can be seen by skimming (*please* do not try to grasp every detail) the following list of allowed uses:

> Agricultural Services
> Veterinary Services
> Transportation and Communication Uses.
> Local and Suburban Transit and Interurban Highway Passenger Transportation
> U.S. Postal Service
> Communication

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* Private clubs or lodges; retail sales including appliance, bakery, book store, card and gift shop, carpeting, clothing, department store, drug store, electronics, fabrics, food store, furniture store, furrier, garden shop, hardware store, health foods, hobby shop, ice cream parlor, jewelry store, liquor store, newsstand, pet shop, radio and T.V. stores and sporting goods; financial institutions without drive-up facilities, and offices including business, dental, laboratory testing, medical, research and veterinarian. Special permits are available for residential treatment facilities; group quarters; billiard parlors, bowling alleys, racquetball courts, tennis facilities, theaters, restaurants and bars; drive-through facilities for financial institutions; and Automated Teller Machines (ATMs).

Building Materials, Hardware, and Garden Supply, including only the following:

Lumber and Other Building Materials Dealers including only:

Doors – retail.

Fencing dealers – retail.

Flooring, wood – retail.

Garage doors – retail.

Lumber and building material dealers – retail.

Lumber and planing mill product dealers – retail.

Millwork and lumber dealers – retail.

Paneling – retail.

Storm windows and sash, wood or metal – retail.

Paint, Glass, and Wallpaper Stores

Hardware Stores

Retail Nurseries, Lawn and Garden Supply Stores

General Merchandise Stores

Food Stores

Automotive Dealers and Gasoline, Service Stations, including only the following:

Motor Vehicle Dealers-New or New and Used.

Auto and Home Supply Stores.

Gasoline Service Stations.

Boat Dealers.

Recreational and Utility Trailer Dealers.

Motorcycle Dealers.

Other New Automotive Dealers.

Apparel and Accessory Stores.

Furniture, Home Furnishings and Equipment Stores.

Eating Places (provided that such does not have a drive-through window and is not a drive-in business).

Miscellaneous Retail, including only the following:

Drug Stores and Proprietary Stores.

Liquor Stores.

Miscellaneous Shopping Goods Stores.

Retail Stores, Not Elsewhere Classified (except auction rooms); the term "Retail Stores, Not Elsewhere Classified" shall not include adult-related businesses, including adult bookstores, adult novelty shops, and adult retail stores ….

Depository Institutions, including only the following:

Central Reserve Depository Institutions.

Commercial Banks.

Savings Institutions.

Credit Unions.

Foreign Banking.

Functions Related to Depository Banking, including:

Non-deposit Trust Facilities.

Functions Related to Depository Banking, Not Elsewhere Classified (except Check Cashing agencies).

Non-depository Credit Institutions, including only the following:

Federal and Federally-Sponsored Credit Agencies.

Business Credit Institutions.

Mortgage Bankers and Brokers.

Security and Commodity Brokers, Dealers, Exchanges, and Services

Insurance

Insurance Agents, Brokers, and Service

Real Estate, including only the following:

Real Estate Operators (except Developers) and Lessors, including only the following:

Operators of Nonresidential Buildings

Operators of Apartments.

Operators of Dwellings Other Than Apartment Buildings.

Real Estate Agents and Managers

Title Abstract Offices

Sub-dividers and Developers, Except Cemeteries

Holding and Other Investment Offices

Hotels, Motels, and Tourist Courts

Personal Services, including only the following:

Laundry, Cleaning, and Garment Services, including only the following:

Garment Pressing and Agents for Laundries and Dry Cleaners

Coin-Operated Laundries and Dry Cleaning.

Laundry and Garment Services, not elsewhere classified.

Photographic Studios, Portrait

Beauty Shops

Barber Shops

Shoe Repair Shops and Shoeshine Parlors

Funeral Service and Crematories

Miscellaneous Personal Services.

Tax Return Preparation Services.

Miscellaneous Personal Services, Not Elsewhere Classified (except escort services, massage parlors, steam baths, tattoo parlors, and Turkish baths).

Business Services, including only the following:

Advertising

Consumer Credit Reporting Agencies, Mercantile Reporting Agencies, and Adjustment and Collection Agencies

Mailing, Reproduction, Commercial Art and Photography, and Stenographic Services

Miscellaneous Equipment Rental and Leasing, including only the following:

Medical Equipment Rental and Leasing

Equipment Rental and Leasing, Not Elsewhere Classified (except airplane rental and leasing, industrial truck rental and leasing, oil field equipment rental and leasing, and oil well drilling equipment rental and leasing)

Personnel Supply Services

Computer Programming, Data Processing, and Other Computer Related Services

Miscellaneous Business Services, including only the following:

Detective, Guard, and Armored Car Services

Security Systems Services

News Syndicates
Photo finishing Laboratories
Business Services, Not Elsewhere Classified (except Gas systems, contract conversion from manufactured to natural gas, and Scrap steel cuffing on a contract or fee basis).
Automotive Repair, Services, and Garages, including only the following:
Automotive Rental and Leasing, Without Drivers.
Automobile Parking.
Car Washes (except bus washing and truck washing).
Miscellaneous Repair Services, including only the following:
Electrical Repair Shops.
Watch, Clock, and Jewelry Repair.
Re-upholstery and Furniture Repair.
Motion Pictures.
Amusement and Recreation Services.
Health Services.
Legal Services.
Educational Services.
Social Services, including only the following:
Individual and Family Social Services including Adult Day Care Centers.
Job Training and Vocational Rehabilitation Services.
Museums, Art Galleries, Botanical and Zoological Gardens
Membership Organizations, including only the following:
Business Associations.
Professional Membership Organizations.
Labor Unions and Similar Labor Organizations.
Civic, Social, and Fraternal Associations.
Political Organizations.
Other Membership Organizations.
Engineering, Accounting, Research, Management, and Related Services, including only the following:
Engineering, Architectural, and Surveying Services.
Accounting, Auditing, and Bookkeeping Services.

Research, Development, and Testing Services, including only the following:
Commercial Economic, Sociological, and Educational Research.
Management and Public Relations Services, including only the following:
Management Services.
Management Consulting Services.
Public Relations Services.
Business Consulting Services, Not Elsewhere Classified.
Services Not Elsewhere Classified.
Public Administration, including only the following:
Executive, Legislative, and General Government, except Finance.
Justice, Public Order, and Safety, including only the following:
Courts.
Police Protection.
Legal Counsel and Prosecution.
Fire Protection.
Other Public Order and Safety.
Public Finance, Taxation, and Monetary Policy.
Administration of Human Resources Programs.
Administration of Environmental Quality and Housing Programs.
Administration of Economic Programs.
National Security and International Affairs.

Allowed with a permit:

Used Vehicle Sales
Used Merchandise Sales and Auction Rooms.
Antique stores.
Book stores, secondhand.
Clothing stores, secondhand.
Furniture stores.
Furniture, antique.

Glassware, antique.
Home furnishings, secondhand.
Home furnishings, antique.
Musical instrument stores, secondhand.
Objects of art, antique.
Pawnshops
Phonograph and phonograph records stores, secondhand.
Shoe stores, secondhand.
Auction rooms.

Check Cashing Agencies and Personal Credit Institutions (except Short-term Loan Establishments)*

Miscellaneous Personal Services.†
Automotive Repair Shops and Automotive Services, Except Repair
Religious Organizations

General Warehousing and Storage including only Mini-warehouses and Self-Service Storage Facilities

Child Day Care Services
Automated Teller Machines (ATMs).
Eating Places (all uses which have drive-through windows or is a drive-in business) and Drinking Places (Alcoholic Beverages).

The planned commercial district is supposed to be planned as a unit, with a narrower range of allowable commercial uses. The industrial district allows light manufacturing and wholesale uses:

Construction Uses including only the following:

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* With limits on how close they can be to places of worship, schools, and residential zones; requirements that each store be at least 1,000 feet from similar stores including pawnshops; limits on hours of operations; bans on walk-up or drive-up windows; bans on having bars, heavy mesh screens or similar material visible from outside; and other restrictions.

† Escort services, massage parlors, steam baths, tattoo parlors, and Turkish baths may be allowed, subject to similar restrictions on locations near places of worship, schools, residentially zoned property, pawn shops, check cashing establishments, and any other miscellaneous personal service establishment.

Building Construction – General Contractors and Operative Builders.
Heavy Construction other than Building Construction – Contractors.
Construction – Special Trade Contractors.

Manufacturing Uses including only the following:

Bakery Products.
Bottled and Canned Soft Drinks and Carbonated Waters.
Manufactured Ice.
Textile Mill Products.
Apparel and other Finished Products made from Fabrics and Similar Materials.
Millwork, Veneer, Plywood, and Structural Wood Members.
Wood Containers.
Wood Buildings and Mobile Homes.
Miscellaneous Wood Products.
Furniture and Fixtures.
Paperboard Containers and Boxes.
Converted Paper and Paperboard Products, Except Containers and Boxes.
Printing, Publishing, and Allied Industries.
Rubber and Miscellaneous Plastics Products.
Leather and Leather Products.
Flat Glass.
Glass and Glassware, Pressed or Blown.
Glass Products, Made of Purchased Glass.
Pottery and Related Products.
Metal Cans and Shipping Containers.
Cutlery, Hand Tools and General Hardware.
Heating Equipment and Plumbing Fixtures.
Fabricated Structural Metal Products.
Screw Machine Products, and Bolts, Nuts, Screws, Rivets, and Washers.
Metal Forgings and Stampings.
Coating, Engraving, and Allied Services.
Miscellaneous Fabricated Metal Products.
Machinery.

Electronic and other Electrical Equipment and Components.

Measuring, Analyzing, and Controlling Instruments, Photographic, Medical, and Optical Goods; Watches and Clocks.

Miscellaneous Manufacturing Industries.

Transportation and Communication Uses Including only the following:

Local and Suburban Transit and Interurban Highway Passenger Transportation.

Motor Freight Transportation and Warehousing.

U.S. Postal Service.

Pipe Lines, Except Natural Gas.

Transportation Services.

Communication.

Communication antennae.

Communication towers.

Electric, Gas, and Sanitary Services including only the following:

Electric Services, including facilities which are engaged in the transmission and/or distribution of electric energy for sale.

Natural Gas Distribution.

Sanitary Services, Not Elsewhere Classified.

Steam and Air-Conditioning Supply.

Irrigation Systems.

Wholesale Trade – Durable Goods including only the following:

Motor Vehicles and Automotive Parts and Supplies.

Furniture and Home Furnishings.

Lumber and other Construction Materials.

Professional and Commercial Equipment and Supplies.

Electrical Goods.

Hardware, Plumbing and Heating Equipment and Supplies.

Machinery, Equipment, and Supplies.

Miscellaneous Durable Goods.

Wholesale Trade – Nondurable Goods including only the following:

Paper and Paper Products.

Drugs, Drug Proprietaries and Druggists' Sundries.

Apparel, Piece Goods, and Notions.

Groceries and Related Products.

Beer, Wine, and Distilled Alcoholic Beverages.
Books, Periodicals, and Newspapers.
Flowers, Nursery Stock, and Florists' Supplies.
Tobacco and Tobacco Products.
Miscellaneous Nondurable Goods, Not Elsewhere Classified.

Retail Trade including only the following:
Lumber and other Building Materials Dealers.
Paint, Glass and Wallpaper Stores.
Hardware Stores.
Retail Nurseries, Lawn and Garden Supply Stores.
Gasoline Service Stations.
Furniture, Home Furnishings, and Equipment Stores.

Services including only the following:
Laundry, Cleaning, and Garment Services.
Business Services.
Automotive Repair, Services and Garages.
Miscellaneous Repair Services.

Amusement and Recreation Services including only the following:
Commercial Sports.
Miscellaneous Amusement and Recreation Services.

Health Services including only the following:
Medical and Dental Laboratories.
Health and Allied Services.

Educational Services including only the following:
Correspondence Schools and Vocational Schools.

Research/Development and Testing Services.

Miscellaneous Services.

Public Administration including only the following:
Executive, Legislative, and General Government.
Police Protection.
Fire Protection.

Adult-Related Business.

By permit:

Eating Establishments: (all uses, excluding outdoor seating).
Utilities:
Water Supply storage.
Sewage Treatment Plants.
Adult Entertainment Establishments
Parking facilities for Tractor Trailers
Short-Term Loan Establishments*

The other districts add little to this list, other than an airport.

Notes and Questions

1. Do you have a good idea of how big a 3-acre lot is? A 5,000-square foot house? By way of comparison, the average McDonald's restaurant is about 4,000 square feet, not including the parking lot. For a video depicting an acre of land with an American football field on it, see smallpicture, *How Big Is an Acre of Land?*, Oct. 23, 2010.

B. Nonconforming Uses, Variances and Exceptions

At times, new zoning precludes uses that were previously allowed. The remaining allowed uses may be inappropriate for a particular parcel of land within a zone. Conditions may have changed, making previous zoning inappropriate, or developers may wish to build more than current zoning allows. Zoning authorities may have determined that particular uses are acceptable, but only under specified conditions

* Subject to further regulation, including to avoid "over-concentration," meaning "a similar use within two miles of the proposed establishment or more than one such establishment per 10,000 population." Where an over-concentration of such uses is found, permit shall be granted. Distance, hours, and other restrictions apply, including that the property shall not also be used to issue money orders, cash checks, or sell lottery tickets; no repossessed property or cars can be stored on site; no extra advertising materials are allowed, including balloons, lights, flags, etc.; no writing, printing, or color is allowed on the exterior except for phone number and office hours in two-inch letters and numbers; and security guards are required.

requiring a more detailed permit process. All these possibilities require some way of addressing unusual conditions and ongoing change. This section reviews various techniques zoning authorities use in such circumstances.

1. Nonconforming uses

When zoning first began, there were a number of existing uses that would be prohibited by the new regimes. Zoning authorities expected these to die out naturally, but in fact, they often persisted for decades, in part because they often had local monopolies – a nonconforming use might be the only gas station in a residential neighborhood, for example. Many supporters of zoning wanted to do more to get rid of such uses.

Moreover, because zoning often changes – usually in the direction of becoming more restrictive – existing uses that were fine under the previous zoning regime can become newly unlawful. This is especially true when an unanticipated use begins and the rest of the neighbors want to change the zoning in response. But what about the interests of the property owner with the disfavored use, now known as a nonconforming use?

Hoffmann v. Kinealy

389 S.W.2d 745 (Mo. 1965)

A. P. STONE, Jr., Special Judge.

This is an appeal by Carl O. Hoffmann, Jr., and Mrs. Geraldine St. Denis (herein called relators), the owners of two adjoining lots (frequently referred to as the lots) in the 3100 block of Pennsylvania in the City of St. Louis, from the judgment of the Circuit Court of the City of St. Louis affirming, upon review by certiorari, a decision of the board of adjustment sustaining a decision of the building commissioner which denied relators' application for a certificate of occupancy of the lots for a pre-existing lawful nonconforming use, to wit, for the open storage of lumber, building materials and construction equipment.

… Portions of the block, i.e., that portion in which the lots are located, [and certain other parcels], are in a 'B' two-family dwelling district, while the remainder of the block, … is in a 'J' industrial district and is used for the operation of a planing mill

and for open storage of lumber. A small building housing the general offices of Hoffmann Construction Company, relators' business in connection with which the lots have been used, is located in the 'B' two-family dwelling district … just across the alley from the lots.

Google Earth image, 2015, with contested block in center

The exhibits presented at the hearing before the board of adjustment, and brought to us with the transcript on appeal, indicate that there are fourteen buildings in the same portion of the block in which the lots are situate, including a tavern … , one three-family residence, eleven other residences, and at the rear of one residence a building identified on a plat as used for 'tractor parts'; ten buildings in that portion of the block … , including a grocery store …, eight residences (all owned by relators), and at the rear of one residence the above-mentioned office building of Hoffmann Construction Company; and that, on the other three corners … , there are two taverns and a cleaning and pressing shop.

Counsel for the city conceded at the hearing before the board of adjustment, and the subsequent finding of the board (not here disputed) was, that the lots were being used at the time of hearing for the open storage of lumber, building materials and construction equipment and that (in the language of the board's finding) 'these premises have been used for this same purpose continuously since the year 1910.' The front end of the lots is 'landscaped' with a hedge and shrubbery, and the area used for open storage is enclosed with a high fence.

The first comprehensive zoning ordinance of the City of St. Louis became effective in 1926. On April 25, 1950, numerous sections of the zoning code were amended by Ordinance 45309. Section 5 A 1 of that ordinance provided that 'No building or land shall be used for a use other than those permitted in the district in which such premises are located unless . . . such use existed prior to the effective date of this ordinance.' Section 5 B of the same ordinance … provided that 'The use of land within any dwelling district . . . for purposes of open storage . . . which do not conform to the provisions of this ordinance shall be discontinued within six (6) years from the effective date of this ordinance.'

About six years and three months later, to wit, on July 24, 1956, Ordinance 48007 was enacted, amending that portion of Section 5 B of Ordinance 45309, with which we are here concerned, to read as follows: 'The use of land within any dwelling district for the purpose of open storage is hereby prohibited.' [The code was subsequently revised, but not in any way that changed this provision, and the relevant provision was renumbered as Section 903.030.]

… Relators' petition in the circuit court, upon which the writ of certiorari was issued, charged that Section 903.030 of the zoning code was unconstitutional, null and void and was of no effect as to relators' lots because, by prohibiting continuance of the pre-existing lawful nonconforming use of the lots, said section would impair, restrict and deprive relators of vested property rights and thereby would take and damage relators' private property for public use without just compensation in violation of Article 1, Section 26, Missouri Constitution of 1945.

… Respondants' position is that, under the statutory grant of police power in municipal zoning and planning, the city was empowered to enact … a so-called 'amortization' or 'toleration' provision which required discontinuance within six years thereafter of the nonconforming use of land within any dwelling district for purposes of open storage, and that, such six-year 'amortization' or 'toleration' period having run in April 1956, the subsequent absolute prohibition of said nonconforming use of land … was valid.

… Of course, it has long been settled that a comprehensive zoning ordinance operating prospectively, which has a substantial relationship to the public health, safety, morals or general welfare and is not unreasonable or discriminatory, is valid as

a proper exercise of the police power. This is so even though, in restricting future uses, any such ordinance may impose hardship and inflict economic loss upon some property owners, for it is recognized that '[e]very valid exercise of the police power is apt to affect the property of some one adversely.'

In earlier days of zoning legislation, it generally was recognized and conceded that termination of pre-existing lawful nonconforming uses would be unconstitutional…. In Women's Christian Ass'n. of Kansas City v. Brown, 190 S.W.2d 900 (Mo. 1945), involving an attempted change of nonconforming use from a riding academy to a dance hall, this court said that: … "Within a period of another twenty years, a large number of such 'nonconforming' uses will have disappeared, either through the necessity of enlargement and expansion which invariably is forbidden or limited by ordinance, or by the owners realizing that it is unwise and uneconomic to be located in a district which probably is not suitable for the nonconforming purpose, or by obsolescence, destruction by fire or by the elements or similar inability to be used; so that many of these nonconforming uses will 'fade out,' with a resulting substantial and definite benefit to all communities."

… Certainly, the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses, and to that end municipalities have employed various approved regulatory methods such as prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses, and prohibiting or rigidly restricting a change from one nonconforming use to another. Even so, pre-existing lawful nonconforming uses have not faded out or eliminated themselves as quickly as had been anticipated, so zoning zealots have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In so doing, only infrequent use has been made of the power of eminent domain, primarily because of the expense of compensating damaged property owners, but increasing emphasis has been placed upon the 'amortization' or 'tolerance' technique which conveniently bypasses the troublesome element of compensation.

'Stated in its simplest terms, amortization contemplates the compulsory termination of a non-conformity at the expiration of a specified period of time, which period is

equaled (sic) to the useful economic life of the non-conformity.' 'The basic idea is to determine the remaining normal useful life of a pre-existing nonconforming use. The owner is then allowed to continue his use for this period and at the end must either conform or eliminate it.' Courts approving the amortization technique as a valid exercise of the police power rationalize their holdings in this fashion: 'The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer… . If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public.' City of Los Angeles v. Gage, 274 P.2d 34 (Cal. Ct. App. 1954).

Several cases in other jurisdictions have approved the termination of pre-existing nonconforming uses by the amortization technique. However, there are a number of decisions to the opposite effect, and it may be fairly said that there is 'a decided lack of accord' in this area.

… But, although the holdings in other jurisdictions may, in some instances, be enlightening and persuasive, it is neither our duty nor our inclination to rule a question of first impression in this state simply by counting foreign cases and then falling off the judicial fence on the side on which more cases can be found. Rather, our concern should be and is to determine the basic constitutional right of the matter, as we see it. Property is defined as including not only ownership and possession but also the right of use and enjoyment for lawful purposes. In fact, '[t]he substantial value of property lies in its use.' It follows that: "[t]he constitutional guaranty of protection for all private property extends equally to the enjoyment and the

possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution.'

… The amortization provision under review would terminate and take from instant relators the right to continue a lawful nonconforming use of their lots which has been exercised and enjoyed since 1910 – a right of the character to which the courts traditionally have referred as a 'vested right.' To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated immediately. In fact, the contrary is implicit in the amortization technique itself which would validate a taking presently unconstitutional by the simple expedient of postponing such taking for a 'reasonable' time. All of this … prompts us to repeat the caveat of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that '[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' …

… Accordingly, the judgment of the circuit court is set aside and the cause is remanded with directions to enter judgment ordering respondents, constituting the board of adjustment of the City of St. Louis, to issue, or cause to be issued, to relators a certificate of occupancy for continuance of the pre-existing lawful nonconforming use of relators' lots for the open storage of lumber, building materials and construction equipment.

HYDE, Judge (dissenting).

… In the leading case of Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, the Court said that zoning and 'all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.' The court pointed out the following reasons for this use of the police power: '[T]he segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accident, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce

or intensify nervous disorders, preserve a more favorable environment in which to rear children.'…

In view of these applicable principles, it does not seem reasonable to say that the existence of a particular use of vacant land when a zoning ordinance is adopted gives the owner a vested right to continue it in perpetuity, especially the right to pile material on vacant ground.… High piles of stored material are not conducive to the maintenance or development of a good residential environment not only because they are unsightly but also because they could provide a lurking place for thieves and other criminals and also could attract children who might be injured playing there. While such open storage has not been classified as a nuisance, it thus has some of the undesirable characteristics of nuisance in a residential district. Therefore, I would hold the ordinance in this case, for termination of open storage in residential districts after six years, a reasonable exercise of the police power and valid.

Notes and Questions

1. **Amortization.** As the opinion notes, states are divided on whether amortization is an acceptable technique to deal with nonconforming uses. See cases collected at Annotation, Validity of Provisions for Amortization of Nonconforming Uses, 22 A.L.R. 3d (1968 & Supp. 1990).

   Why not allow amortization? Consider the following hypothetical: Troy Barnes and Abed Nadir each buy a parcel of unzoned land for $100,000, each expecting to use the land for a business. Barnes constructs a building for $50,000, while Nadir holds off while he develops his filmmaking career. Barnes' business opens, making $20,000 net each year. Five years after Barnes' business opens, the jurisdiction converts the zoning to residential only. Each parcel, used for residences, is worth only $15,000. If Barnes is given an amortization period of five more years, what is the result for Barnes, assuming the building can't be converted to a residence? How much has Nadir lost? What justifies treating their situations differently?

   Jurisdictions that reject amortization may face some pressure to limit what counts as a nonconforming use. See, e.g., University City v. Diveley Auto Body Co., Inc., 417 S.W.2d 107 (Mo. 1967) (holding that a zoning ordinance

requiring the owner of a signboard to comply with its provisions within three years was a regulation of existing property and not a taking); St. Charles County v. St. Charles Sign & Elec., Inc., 237 S.W.3d 272 (Mo. Ct. App. 2007) (finding that an ordinance mandating that businesses storing inventory outdoors consisting of "reclaimed, junked, salvaged, scrapped or otherwise previously used inventory" must enclose such storage with fencing was a reasonable exercise of the police power but not a zoning ordinance, and therefore no prior nonconforming use exception was required).

2. **Terminating a nonconforming use.** Many situations can justify the end of a nonconforming use exception for a particular parcel. City of Sugar Creek v. Reese, 969 S.W.2d 888 (Mo. Ct. App. 1998):

> In determining the legislative intent, courts consider that "the spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses." Thus, courts have allowed municipalities to regulate and limit nonconforming uses by various means such as prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses and prohibiting or rigidly restricting a change from one nonconforming use to another.

The Missouri Municipal League, Planning and Zoning Procedures for Missouri Municipalities (Sept. 2004), adds that prohibiting enlargement or extension of a nonconforming use is also common. Some zoning ordinances also requires owners of nonconforming uses to receive permits within a certain period after the adoption of the change that makes the use nonconforming, on pain of losing the right to the nonconforming use if they don't get the permit. *City of Sugar Creek* held that such rules aren't prohibited amortization: the existing property right that is protected by the no-amortization rule is the right to the specific existing use, rather than the right to change uses at will. *See also* City of Belton v. Smoky Hill Railway & Historical Society, Inc., 170 S.W.3d 429 (Mo. Ct. App. 2005) (discontinuance

of use for several years meant that prohibition on resuming nonconforming use was not an unconstitutional taking).

What about a change of ownership? Missouri holds that a transfer or change of ownership is not an abandonment of the right to a non-conforming use, because the use follows the land and not the person. Walker v. City of Kansas City, Missouri, 697 F.Supp. 1088 (W.D. Mo. 1988). Could you plausibly argue otherwise?

3. **Uses and rezoning close in time.** The not uncommon situation in which a zoning change is motivated by the appearance of a new, unpopular use is illustrated by *People Tags, Inc. v. Jackson County Legislature*, 636 F.Supp. 1345 (W.D. Mo. 1986), in which People Tags opened an adult bookstore, adult motion picture theater and adult mini motion picture theater within 1,500 feet of a church. Thereafter, the Jackson County legislature passed an ordinance precluding adult bookstore, adult motion picture theater, or adult mini motion picture theaters from being located within 1,500 feet of any church or school, with 120 days allowed for noncompliant businesses to come into compliance. Even in a jurisdiction allowing amortization, would 120 days be sufficient?

   In *People Tags*, the court rejected the legislature's argument that the business was not open long enough to constitute a legitimate nonconforming use. The legislature cited Pearce v. Lorson, 393 S.W.2d 851 (Mo. Ct. App. 1965), in which a chiropodist bought a single family home in a residential area and placed a sign in the window which read "Dr. R.C. Pearce, Chiropodist, Foot Specialist." He had his office at another location and continued his practice at that location throughout the time at issue, but he moved a chair and some supplies into the new building. He also treated one patient in the new office one hour before a new zoning ordinance banned medical offices in the area. The *Pearce* court held that Dr. Pearce hadn't established a nonconforming use before the ordinance passed and that his efforts to do so were a sham. The *People Tags* court distinguished *Pearce*: the adult bookstore opened on September 5, 1984, and the legislature passed the first ordinance requiring it to shut down on September 10, 1984. There was no evidence that the bookstore wasn't open during regular business hours or didn't have a reasonable

inventory in that time. Nor did the bookstore open in response to the anticipated passage of a new zoning ordinance. Thus, the bookstore was a protected nonconforming use.

By contrast, *Acton v. Jackson County*, 854 S.W.2d 447 (Mo. Ct. App. 1993), involved a massage parlor that was a nonconforming use. When the county determined that the proprietor had expanded the massage parlor's activities to the illegal activity of prostitution, that expansion "changed the character of the nonconforming use and, hence, discontinued it." Why not just require the operator to resume non-illegal operations? Would it matter if there were evidence that the massage parlor was also being used for prostitution since its inception, before it became a nonconforming use? The court commented that nonconforming uses "are not favored in law because of their interference with zoning plans. Policy dictates that they should not endure any longer than necessary and should be eliminated as quickly as justice will permit." Thus, zoning ordinances should be strictly construed against them, including "rigidly restricting a change from one nonconforming use to another." *See also* Huff v. Board of Adjustment of City of Independence, 695 S.W.2d 166 (Mo. Ct. App.1985). Relatedly, the burden of proving a nonconforming use is on the party asserting the right. In re Coleman Highlands, 777 S.W.2d 621 (Mo. Ct. App.1989). Are these rules consistent with the heavily pro-property rights rhetoric in the principal case?

Despite this general distrust of nonconforming uses, not all changes or suspension of operations will deprive the owner of the right to continue the use. *See* State ex rel. Keeven v. City of Hazelwood, 585 S.W.2d 557 (Mo. Ct. App. 1979) (city that refused to renew liquor permit or act on liquor store owner's application for special use permit could not claim that nonconforming use as liquor store ended while owner was trying to comply with licensing law). *But see* Matthews v. Pernell, 582 N.E.2d 1075 (Ohio Ct. App. 1990) (where nonconforming massage parlor was shut down for a year because of prostitution on the premises, illegality prevented resumption of nonconforming use).

4. **Vested rights.** As *People Tags* indicates, it can be vitally important to determine which came first, the use or the zoning that makes it a nonconforming use. Must the use be in full swing to trigger a property owner's right to continue the use? Even a state that allows amortization will confront this question, because it will determine whether an amortization period must be allowed.

   In general, a use that is in progress may be a prior nonconforming use if sufficient commitments have been made, such as the construction of a building (with the then-proper permits). In Missouri, as in most states, filing a permit application under a prior zoning regime is insufficient, even if the owner bought the land in anticipation of the use and preparing the application required the investment of resources. *See* State ex rel. Lee v. City of Grain Valley, 293 S.W.3d 104 (Mo. Ct. App. 2009) ("To establish a nonconforming use, one must have at least made a substantial step, and a 'mere preliminary work which is not of a substantial nature does not constitute a nonconforming use.'"). Even receiving a permit is insufficient, if the work completed towards converting the land to the particular use isn't substantial. *See* Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo. Ct. App. 1999); *see also* Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield, 27 S.W.3d 862 (Mo. Ct. App. 2000) (construction of sign that was intended to be illuminated, but was not illuminated, before rezoning did not establish prior nonconforming use; "mere intention does not give rise to a vested property right"). *But see* WASH. REV. CODE § 58.17.033 (rights under zoning ordinance vest as of the filing of a "valid and fully complete building permit application").

5. **Mistakes and Reliance.** What should be the result when a city issues a permit in error, and the developer relies on the permit to start building? In *Parkview Associates v. City of New York*, 519 N.E.2d 1372 (N.Y. 1988), the city and the developer both misinterpreted a zoning map – they looked at an unlabeled version of a map instead of the written description of the same area in the zoning regulation – and the city gave Parkview a permit for a 31-story apartment building where it was only zoned for 19 stories. Parkview began construction. After "substantial" construction, the city discovered the error and issued a stop work order for the top 12 stories, but Parkview kept

building. New York's highest court ruled that "reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error," and held that estoppel was not available against the government. The extra stories had to be torn down at a cost of roughly $14 million. *Should* estoppel be available against the government? *Cf.* State ex rel. Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. Ct. App.1987) (applying equitable estoppel where city was consulted and gave assurances as to a building permit). *But see* Long v. Bd. of Adjustment of City of Columbia, 856 S.W.2d 390 (Mo. App. 1993) (estoppel does not apply to acts of government, including acts relating to zoning); Lichte v. Heidlage, 536 S.W.2d 898 (Mo. App. 1976). Who suffers if the government's error can't be fixed?

The government's error, however, may justify the grant of a variance allowing the continued use in appropriate circumstances, where that error creates sufficient individualized hardship. *See* Section B, *infra*; Taylor v. Board of Zoning Adjustment of the City of Blue Springs, 738 S.W.2d 141 (Mo. Ct. App. 1987) (grant of variance held appropriate due to zoning board's prior erroneous grant of permit resulting in $7,000 expenditure for oversized sign later subject to permit revocation for zoning violation).

6. **Vested rights in easy-to-change uses?** In Missouri, the nonconforming use itself need not be one that requires substantial investment, if there is no doubt it precedes the enactment of the relevant regulation. In *Rose v. Board of Zoning Adjustment Platte County*, 68 S.W.3d 507 (Mo. Ct. App. 2001), Platte County found David Rose in violation of the county's Weed Ordinance for allowing uncultivated weeds to grow more than twelve inches high on his residential property. Rose bought his property in 1976, before the Weed Ordinance was enacted; he had a degree in wildlife management and ten years of work experience as a wetlands manager with the United States Fish and Wildlife Service. He decided to transform the cut-grass yard surrounding his home into a natural woodlands area: He planted additional trees, shrubs and flowering plants and allowed the natural vegetation in the yard to grow. He did not trim or mow the yard. Over the years, the vegetation "matured into a wooded state."

Eventually, "the uncultivated condition of Rose's yard led to an investigation and complaints by the Platte County codes enforcement officer." In 1991, Rose was criminally charged with violating the county's nuisance ordinance for allowing noxious weeds (such as poison ivy and oak) to grow on his property, maintaining other weeds and wooden boards conducive to breeding insects and rodents, and having a decaying wooden deck in a dangerous condition. A jury acquitted Rose on all charges. The codes enforcement officer complained three more times, but the county prosecutor declined to pursue further criminal charges, and in 1999 the county replaced the nuisance ordinance with its new Weed Ordinance, requiring the removal of "weeds" from any parcel of land not zoned for agricultural use. The county found Rose to be in violation of the new ordinance; Rose argued that his prior nonconforming use was protected against suppression. The court of appeals found that there was a dispute over whether Rose had expanded his nonconforming use by allowing the vegetation to "become more dense and overgrown subsequent to the passage of the Weed Ordinance," and held that he was entitled to a hearing on the matter.

Should the court have even allowed Rose to claim a prior nonconforming use? In a state that allowed amortization, what sort of amortization period should Rose have been allowed?

2. Variances

a. Generally

Euclid treated zoning as a legislative judgment deserving substantial deference. Variances are more individualized decisions about specific parcels, and they raise key structural issues: How can an individualized determination avoid arbitrariness? How should courts review these individualized determinations – should they defer to zoning boards as much as they do with overall zoning schemes?

Missouri law empowers city boards of adjustment, "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of [a zoning ordinance], to vary or modify the application of ... such ordinance... so that the spirit of the ordinance shall be observed, public safety and welfare secured and

substantial justice done." Mo.Rev.Stat. § 89.090(3) (1998). This type of provision is common across the nation, though there is some state-to-state variation. The basic requirements for a variance in any state are (1) a showing of individualized hardship and (2) a lack of interference with the basic goals of the zoning scheme. Both must be shown; even substantial hardship is insufficient if granting a variance would do significant harm to the purposes of the zoning. In such a case, only a constitutional challenge or a federal law overriding local zoning could potentially allow the proposed use.

Zoning authorities' basic hostility to variances is well expressed by the Missouri Municipal League, Planning and Zoning Procedures for Missouri Municipalities (Sept. 2004):

> The most common situation in which variances are sought is where a developer divides his land into the greatest possible number of lots, barely meeting minimum standards, and then seeks permission to create substandard lots out of the remaining land. The subdivision regulations are intended to set forth minimum standards for development, not maximums, and the intent of the regulation is to use the remnants of land to increase lot sizes rather than create substandard lots. When variances are granted allowing substandard lots, it weakens the legal position of the city and its regulations and makes it difficult to defend its subdivision standards.

(While there is little systematic empirical evidence about actual board practice, the litigated variance cases tend not to have this "most common" fact pattern.)

b. Procedure

Most jurisdictions have a formal process setting out the deadlines and providing guidance to applicants on what they need to show to get a variance. *See, e.g.*, St. Louis Board of Zoning Adjustment, Citizen's Guide to the Board of Zoning Adjustment Variance Process (n.d.). By contrast, the city of Ladue has no formal variance procedure at all. Instead, an applicant must seek a permit, and after the permit is denied, the City of Ladue Building Department sends the applicant a formal denial letter with Zoning Board of Adjustment instructions for an appeal.

Zoning Hearing, Valdosta County, Georgia, by John S. Quarterman, Aug. 26, 2013, CC-BY*

Matthew v. Smith

707 S.W.2d 411 (Mo. 1986)

WELLIVER, Judge.

This is an appeal from a circuit court judgment affirming the Board of Zoning Adjustment's decision to grant Jim and Susan Brandt a variance. The Brandts purchased a residential lot containing two separate houses upon a tract of land zoned for a single-family use. The court of appeals reversed the circuit court judgment, and the case was then certified to this Court by a dissenting judge. We reverse and remand.

The Brandts own a tract of land comprising one and one-half plotted lots. When they purchased the property in March of 1980, there already were two houses on the land, one toward the front of Erie Street and one in the rear. Each of the buildings is occupied by one residential family as tenants of the Brandts. The two houses apparently have been used as separate residences for the past thirty years, with only intermittent vacancies. The property is zoned for Single Family Residences. At the

* See http://www.l-a-k-e.org/blog/2013/09/dollar-general-teramore-development-glpc-2013-08-26.html for a detailed recap of a zoning hearing and many more pictures.

suggestion of a city official, the Brandts applied for a variance which would allow them to rent both houses with a single family in each house. After some delay, including two hearings by the Board of Zoning Adjustment of Kansas City, the Board granted the application. Appellant, Jon Matthew, a neighboring landowner challenged the grant of the variance and sought a petition for certiorari from the Board's action. The circuit court affirmed the Board's order; on appeal, the court of appeals held that the Board was without authority to grant the requested variance. A dissenting judge certified the case to this Court….

Under most zoning acts, these boards have the authority to grant variances from the strict letter of the zoning ordinance. The variance procedure "fulfil [s] a sort of 'escape hatch' or 'safety valve' function for individual landowners who would suffer special hardship from the literal application of the ... zoning ordinance." It is often said that "[t]he variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation." The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.

Both the majority of courts and the commentators recognize two types of variances: an area (nonuse) variance and a use variance.

The two types of variances with which cases are customarily concerned are "use" variances and "nonuse variances." The latter consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions governing miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

Many zoning acts or ordinances expressly distinguish between the two types of variances. When the distinction is not statutory, "the courts have always distinguished use from area variances." Some jurisdictions, whether by express statutory directive or by court interpretation, do not permit the grant of a use variance.

[The Brandts] seek a variance to use the property in a manner not permitted under the permissible uses established by the ordinance. The ordinance clearly permits only the use of the property for a single family residence. The applicant is not seeking a variance from the area and yard restrictions which are no doubt violated because of the existence of the second residence. Such an area variance is not necessary because the applicant has a permissible nonconforming structure under the ordinance.

… [T]he express language of § 89.090, RSMo 1978, … grants the Board the "power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the *use*, construction or alteration of buildings or structures, or the use of land" (emphasis added). We, therefore, hold that under the proper circumstances an applicant may obtain a use variance.

Section 89.090, RSMo 1978 delegates to the Board of Adjustment the power to grant a variance when the applicant establishes "practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance ... so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." ….

Almost all jurisdictions embellished the general concepts of "unnecessary hardship" or "practical difficulties" by further defining the conditions an applicant must satisfy before obtaining a variance….

Unfortunately, any attempt to set forth a unified structure illustrating how all the courts have treated these conditions would, according to Professor Williams, prove unsuccessful. Williams observes that the law of variances is in "great confusion" and that aside from general themes any further attempt at unifying the law indicates "either (a) [one] has not read the case law, or (b) [one] has simply not understood it. Here far more than elsewhere in American planning law, muddle reigns supreme." Yet, four general themes can be distilled from variance law and indicate what an applicant for a variance must prove:

(1) relief is necessary because of the unique character of the property rather than for personal considerations; and

(2) applying the strict letter of the ordinance would result in unnecessary hardship; and the

(3) imposition of such a hardship is not necessary for the preservation of the plan; and

(4) granting the variance will result in substantial justice to all.

Although all the requirements must be satisfied, it is generally held that "'[u]nnecessary hardship' is the principal basis on which a variance is granted."

Before further examining the contours of unnecessary hardship, jurisdictions such as Missouri that follow the New York model rather than the Standard Act need to address the significance of the statutory dual standard of "unnecessary hardship" or "practical difficulties." Generally, this dual standard has been treated in one of two ways. On the one hand, many courts view the two terms as interchangeable. On the other hand, a number of jurisdictions follow the approach of New York, the jurisdiction where the language originated, and hold that "practical difficulties" is a slightly lesser standard than "unnecessary hardship" and only applies to the granting of an area variance and not a use variance. The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.

In light of our decision to permit the granting of a use variance, we are persuaded that the New York rule reflects the sound approach for treating the distinction between area and use variances. To obtain a use variance, an applicant must demonstrate, inter alia, unnecessary hardship; and, to obtain an area variance, an applicant must establish, inter alia, the existence of conditions slightly less rigorous than unnecessary hardship.

… It is generally said that Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939) contains the classic definition of unnecessary hardship:

> Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. "Reasonable return is not maximum return." Rather, the landowner must demonstrate that he or she will be deprived of all beneficial use of the property under any of the permitted uses:

A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from any permitted use. Lack of a reasonable return may be shown by proof that the owner has been deprived of all beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.

Most courts agree that mere conclusory and lay opinion concerning the lack of any reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence. In a well-reasoned opinion, Judge Meyer of the New York Court of Appeals stated:

> Whether the existing zoning permits of a reasonable return requires proof from which can be determined the rate of return earned by like property in the community and proof in dollars and cents form of the owner's investment in the property as well as the return that the property will produce from the various uses permissible under the existing classification.

N. Westchester Prof. Park v. Town of Bedford, 458 N.E.2d 809 (N.Y. 1983). Such pronouncements and requirements of the vast majority of jurisdictions illustrate that, if the law of variances is to have any viability, only in the exceptional case will a use variance be justified.

…[T]he record is without sufficient evidence to establish unnecessary hardship. The only evidence in the record is the conclusory opinion of Brandt that they would be deprived of a reasonable return if not allowed to rent both houses. No evidence of land values was offered; and, no dollars and cents proof was presented to demonstrate that they would be deprived of all beneficial use of their property. Appellant, in fact, was not permitted to introduce such evidence. The Board, therefore, was without authority to grant a use variance upon this record.

The record, however, indicates that the Brandts may be entitled to a nonconforming use under the ordinance.…

ROBERTSON, Judge, concurring in result. [Judge Robertson concurred on the ground that the Brandts sought an area variance, not a use variance, but, under the zoning ordinance, they still needed to demonstrate that the property couldn't earn a reasonable return without the variance.] [A separate concurrence is omitted.]

Notes and Questions

1. Were the Brandts seeking a use variance or an area variance?

2. Note that the prior nonconforming use alternative is both more stringent and more relaxed than the variance: it requires the use to predate the zoning, but it also requires no showing of hardship once that priority is established.

3. **Judicial Review of Administrative Decisions.** Although the standard of review is supposed to be deferential, reversals of zoning board decisions are not uncommon. *See, e.g.*, Housing Authority of the City of St. Charles, Mo. v. Board of Adjustment of the City of St. Charles, 941 S.W.2d 725 (Mo. Ct. App. 1997) (board abused discretion in denying variances for lot size and setbacks where unusual size of parcel, which was laid out before zoning was enacted, meant that no conforming building could be erected, and where numerous other nearby properties had similar lot sizes and setbacks); State ex rel. Klawuhn v. Board of Zoning Adjustment of the City of St. Joseph, 952 S.W.2d 725 (Mo. Ct. App. 1997) (board wrongly granted three variances to allow owners to build a storage building on a vacant lot and store various vehicles and equipment in it; asserted hardship was personal to owners, "namely the large quantity of vehicles and equipment they wished to store

inside the proposed storage building," even though housing the vehicles inside a structure might be more aesthetically appealing to neighbors than keeping them in open view; when asked whether he could get by with a smaller storage shed, owner responded, "Not and put what ... I have to put in it").

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

5. **Purchase with knowledge of the problem.** Suppose undeveloped land is purchased by someone who knows or should know that the land can't be developed in accordance with current restrictions without a variance. Does purchase with knowledge of a hardship count as a self-inflicted harm, disentitling the owner to a variance? See, e.g., Conley v. Town of Brookhaven Zoning Bd. of Appeals, 40 N.Y.2d 309 (N.Y. 1976) (self-imposed hardship through purchase with notice of restrictions didn't preclude the zoning board from granting an area variance); Somol v. Board of Adjustment of the Borough of Morris Plains, 649 A.2d 422 (N.J. Super. Ct. Law Div. 1994) (as long as a prior owner didn't create the hardship, purchase with knowledge of the restrictions is no barrier to a variance); In re Gregor, 627 A.2d 308 (Pa. Commw. Ct. 1993) ("The right to develop a nonconforming lot is not personal to the owner of property at the time of enactment of the zoning ordinance but runs with the land, and a purchaser's knowledge of zoning restrictions alone is insufficient to preclude the grant of a variance unless the purchase itself gives rise to the hardship."). In what way could a prior owner or a purchase create the hardship?

   For use variances, by contrast to area variances, purchase with knowledge precludes a claim for a variance. Why distinguish area variances from use variances in this context?

6. **Can refusal to sell be a self-inflicted hardship?** In *Wolfner v. Board of Adjustment of City of Warson Woods*, 114 S.W.3d 298 (Mo. Ct. App. 2003), the owners bought one lot in 1939 and built a house on it, before zoning began in 1941, thus creating a prior nonconforming use. After 1941, they acquired an

adjacent lot that was too small to be built on under the 1941 zoning. Until 1995, the owners used the adjacent lot as a sideyard. The surviving owner then sold the main lot, but not the adjacent lot. The buyer of the main lot tried to buy the adjacent lot, but the owner rejected the offer, along with other offers from surrounding property owners. She requested a variance allowing a home to be built on the adjacent lot – it was only 7,500 square feet and 60 feet wide, less than the required 8,750 square feet and 70-foot width. The Board denied her request, and that of subsequent purchasers, the Wolfners, whose purchase was conditional on getting the variance. The Wolfners agreed to pay $80,000 for the lot on the hope they could build on it; the Board found that this was not the kind of harm that merited a variance.

The court upheld the denial, noting that it was still possible that neighboring owners would be interested in buying the lot at its fair market value as a side yard. Is this fair? Note that if the original owners had *not* owned an adjacent lot, they would almost certainly have been entitled to the variance because their property was otherwise unbuildable. *Compare, e.g.*, Detwiler v. Zoning Hearing Board, 596 A.2d 1156 (Pa. Comm. Ct. 1991) (holding owners of oddly shaped parcel entitled to variance even though they bought after the zoning began); Commons v. Westwood Zoning Board of Adjustment., 410 A.2d 1138 (N.J. 1980) (similar result; although neighbors might be entitled to denial of variance if they were willing to buy the undersized parcel at fair market value, fair market value was to be calculated according to the value of the parcel with the variance, not the much lower value of the parcel without it).

7. **The law in action.** The legal standards governing variances are fairly easy to state, but doctrine doesn't necessarily control outcomes; facts on the ground are much more important. See Kathryn Moore, *The Lexington-Fayette Urban County Board of Adjustment: Fifty Years Later*, 100 KY. L.J. 435 (2011-2012) (law professor who served on zoning board commented on "the Board's tendency to make decisions that seem fair and practical rather than technically legally correct. Indeed, I am not sure that it is possible or even reasonable to expect a lay body to prefer technically legally correct decisions to practical and fair decisions, especially when the staff recommends the practical decision over the legally correct decision."). The conventional wisdom is that courts reverse

the grant of variances more often than their denial. Do you share the judicial intuition that an issued variance is more likely to be problematic than a denied one? The individual entity seeking a variance usually has a more focused interest in getting it than the rest of the neighbors have in blocking it. Some people who seek variances have even bribed zoning authorities.

William A. Fischel, *The Evolution of Zoning since the 1980s: The Persistence of Localism* **(Sept. 2010)**[*]

… Two reflections about zoning boards might be useful to scholars. The first is that all board members are put on edge by lawyers. This includes the several lawyers who served on the board during my tenure. Having an attorney make the presentation while the applicant sits in the back of the room (or worse, fails to attend at all) makes board members assume that something is fishy about the proposal. Less articulate but sincere presentation by principals (or, for elaborate projects, their engineers and architects) are cut more slack than their polished and practiced legal agents.

The other reflection is how much actually visiting the site in question matters. Our board would hear applicants and then, in the week between the hearing and the deliberation session, travel individually to the location of the proposed project and tramp around the lot and the neighborhood. (Though its resident population is only 10,000, Hanover is a busy employment center, and its land area is the size of Boston, so locations were often unfamiliar.) Site visits could change our views of the case enormously. An applicant showed charming pictures of his antique-car hobby and sought a variance only to park some storage trailers. A visit revealed that he actually harbored a private junkyard. (Neighbors had not previously complained because the junkyard had been there before their homes were built, and the owner was a nice guy.) A barn that was proposed within a wetland setback turned out to be as high and dry as any location in Hanover. (Wetland definitions do not actually require water to be evident.)

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* [*Eds.*—Prof. Fischel, an economist, studies zoning; he also sat on a zoning board for several years in order to better understand its workings. Excerpts reprinted with permission.]

I mention the importance of local knowledge because there is a literature on zoning boards, most often by attorneys, that finds fault with their decisions. Among the earlier and better known critiques was titled, "The Zoning Board of Adjustment: A Case Study in Misrule" (Dukeminier and Stapleton 1962). A more recent study was by an attorney who statistically examined variance decisions in five New Hampshire towns, one of which was Hanover, during the years 1987-1992, when I was on the zoning board. His chief finding, reported in high dudgeon, was that variances are disproportionately granted if abutters do not object (Kent 1993, cited with similar studies in Ellickson and Been 2000, pp. 330-31). To which most board members would say, privately and with palms up, "Nu? Who knows better whether the variance will have an adverse effect?" The practice illustrates the recurrence of an early, grass-roots approach to land use regulation, which required nonconforming uses to obtain permission of local property owners. The practice was struck down as unlawful delegation of the police power in several early cases such as Eubank v. City of Richmond, 226 U.S. 137 (1912), but most local zoning boards informally operate as if it were still in effect.

Mr. Kent, the New Hampshire critic of zoning boards (and himself a New Hampshire lawyer), neglected to point out that four of the five towns in his sample have administrative officers who could discourage applicants with weak cases (Hanover's certainly did), but none of the other "misrule-by-variance" studies worries much about selection bias, either. Kent also reported (accurately) that during the period he examined, the New Hampshire Supreme Court overturned all of the ten towns whose opponents appealed their granting of variances. This seems to support his conclusion that local boards were prodigal in this regard. However, a 2001 decision, Simplex v. Newington, 145 N.H. 727, changed the court's previous zoning variance criteria, on which Kent had relied as the source of proper variances, to a less exacting standard that more closely reflected actual practice.

Legal error is not practical error, much less economic harm. While the articles critical of boards mention the possibility of variances degrading the neighborhood, even anecdotal evidence in support of that contention is scarce. Without visiting the site in question, it is often extremely difficult to tell whether the variance was warranted by legal, practical, or economic criteria. An underappreciated study by David Bryden (1977) established this more systematically. Bryden examined scores of Minnesota

lakeshore building and septic variances (of which he had no part in granting) and concluded that what looked like a travesty from the legal record in almost all cases made perfectly good sense to local board members who were acquainted with the details of the sites in question. For example, building setback variances, which by themselves seemed to have been issued with little regard to the state's standard criteria, were granted most often to allow septic systems to be even farther from the lake than the state required. The local officials knew the sites and made what Bryden inferred were appropriate tradeoffs between the serious risk of septic-tank pollution of water bodies and the less-consequential aesthetic concerns of building set-backs.

This is not to say that zoning boards are faultless. Some members can be, in my experience, petty busybodies or inclined to promote a political agenda. (My guess is that the selectboard originally suspected me of being in the latter category.) Though I never had reason to suspect corruption, I sometimes thought that favoritism and score-settling flavored some members' votes. But even the least sophisticated zoning boards have an asset that is almost never available to appellate judges or to statistical analysts: They know at least the neighborhood and usually the specific site from personal experience. Critics need to take that into account.

c. The Americans with Disabilities Act/Fair Housing Act

Both the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) have provisions that can affect local zoning and variance procedures.* People with disabilities, defined as a substantial impairment to a major life activity such as walking or seeing, as well as people who are perceived as having disabilities, are entitled to

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* The ADA had even more profound effects on local building codes, which mandate particular building features. Along with fire and electrical codes, building codes—which specify matters such as the minimum width of doors and the maximum pitch of stairs—also profoundly shape the built environment, though we will not separately consider them here. Under the ADA, new construction of places of public accommodation must be accessible, which includes considerations such as entrance ramps and Braille labeling. *See* U.S. Architectural and Transportation Barriers Compliance Board (Access Board), Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities (2002).

reasonable accommodations for their disabilities, which means that otherwise applicable laws and regulations may have to be waived.

U.S. Department of Justice, Civil Rights Division, Disability Rights Section, The ADA and City Governments: Common Problems (n.d.)

Common Problem:

City governments may fail to consider reasonable modifications in local laws, ordinances, and regulations that would avoid discrimination against individuals with disabilities.

Result:

Laws, ordinances, and regulations that appear to be neutral often adversely impact individuals with disabilities. For example, where a municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district, installing a ramp to ensure access for people who use wheelchairs may be impermissible without a variance from the city. People with disabilities are therefore unable to gain access to businesses in the city.

City zoning policies were changed to permit this business to install a ramp at its entrance.

Requirement:

City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks.

Notes and Questions

1. Suppose a business will be in violation of the ADA if it doesn't install a ramp, in violation of a setback requirement. Is it *entitled* to a variance under this guidance? What if the business should have known about the problem before constructing its building? (In that case, the zoning authority is also implicated – it shouldn't have approved any buildings that would violate the ADA. *See* United States Dep't of Justice, Civil Rts. Div., ADA Standards for Accessible Design (2010).) What considerations might nonetheless justify denying the variance? What if the board argues that ramps are ugly and will decrease the value of the area? What if the board has safety concerns because the ramp will extend far enough to interfere with bicyclists? The rule that ADA requires reasonable modifications to zoning laws may mean that the standard requirement of exceptional and undue hardship to the property owner isn't applicable. But another element of the test, detriment to the overall value of the area, is relevant in determining whether a modification is reasonable.

2. Variances usually preclude consideration of personal characteristics that aren't inherent in the land. Where the entity seeking a variance is a business, that question isn't particularly important – even if the business changes hands, the next owner will need a ramp to make the store accessible. But suppose zoning regulations require a particular elevation for residential beachfront property, in order to address concerns about danger from flooding. A property owner uses a wheelchair and wants a variance from the elevation requirement because otherwise he won't be able to get into his house. Does the ADA require the variance?

3. Special exceptions and zoning amendments

There are a variety of other refinements or complications in the zoning process that provide flexibility. In theory, they should all have to conform to the general development plan or the plan itself should have to be changed; practice is somewhat more messy. This section provides only a brief introduction to the relevant concepts. A class in land use law or local government will provide substantially more detail.

a. Special exceptions/special uses/conditional uses

A **special exception** (varyingly known as a **special use** or **conditional use** in different states) is a ban on particular types of uses, such as apartment buildings, unless certain criteria are met. One might wonder how they differ from variances. The basic idea is that variances are necessary though not desirable, designed to deal with unexpected situations in which land uses that are otherwise banned should be allowed, usually for parcel-specific and therefore unpredictable reasons. We know that there is, in general, a need for the ability to grant variances, but we don't know which variances we will need. So the standards for variances are worded generally.

By contrast, special exceptions are authorized when the zoning body anticipates that particular uses will be appropriate, but should be carefully scrutinized. When a special exception is authorized by the zoning code, that reflects a determination that the use is generally appropriate for the zone. As a result, the zoning board must not be left with only vague criteria that do not constrain its discretion when assessing whether a particular application should be granted. With variances, the risk of arbitrary decisions has to be borne to provide the necessary flexibility. But when the zoning authority can anticipate the issues that will predictably arise with a particular use – apartments, for example, are likely to raise questions about how many parking spaces are needed – then there is no need to take the risk of arbitrary or biased enforcement. "The issuing of a permit is a ministerial act, not a discretionary act, which may not be refused if the requirements of the applicable ordinance have been met." State ex rel. Kugler v. City of Maryland Heights, 817 S.W.2d 931 (Mo. Ct. App. 1991); *see also* Curry Inv. Co. v. Board of Zoning Adjustment of Kansas City, 399 S.W.3d 106 (Mo. Ct. App. 2013) (finding that the zoning board unlawfully made approval of a special use permit conditional on the removal of two nonconforming

signs; signs were lawful as prior nonconforming uses, and the board's staff concluded that all the criteria for a special use permit were met); Waeckerle v. Board of Zoning Adjustment, 525 S.W.2d 351 (Mo. Ct. App. 1975) (allowing the zoning board to treat a conditional use application as requiring a variance "would amount to permitting the Board to exercise legislative power," conflicting with its administrative role; zoning board cannot repeal authorization for uses given by legislature). Relatedly, no special showing of hardship is required to grant a special use permit, unlike a variance. The inevitable legal debate over when rules are preferable to standards, or vice versa, is actualized in zoning by using both.

When a state is concerned about equalizing the burden of particular uses, it may mandate that a sub-state jurisdiction provide for them through special exceptions. Missouri law, for example, requires municipalities with more than 500 persons to allow substance abuse treatment facilities as a permitted, conditional special use. Municipalities may establish density standards and require that exterior appearance conform to area standards. Section 89.143 RSMo.

b. Floating zones

Floating zones are something like special exceptions, in that they contemplate that a particular use or combination of uses will be appropriate for an area under certain circumstances, but it's not yet clear exactly where that use should be. Once a development plan is proposed by a developer and accepted by the zoning authority, the floating zone "lands." *See* Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. 1980) (accepting floating zones so long as the determination to rezone a particular piece of property in a floating zone is not arbitrary, capricious or unreasonable). Floating zones are useful for extensively planned developments that may need more flexibility in use than the current zoning allows. The plan can also be overlaid onto an existing zoning district if there's a proposal with no need to "float"; either way, the rezoning usually only takes place once a plan is approved. See, e.g., Heidrich v. City of Lee's Summit, 916 S.W.2d 242 (Mo. Ct. App. 1995) (dealing with a planned district); McCarty v. City of Kansas City, 671 S.W.2d 790 (Mo. Ct. App. 1984) (approval of plan is a legislative act).

c. Planned Unit Development (PUD).

A **Planned Unit Development (PUD)** is a self-contained development, often with a mixture of housing types and densities, in which the subdivision and zoning controls are applied to the project as a whole rather than to individual lots. Densities are thus calculated for the entire development, which allows clustering of houses and common open spaces. *See* Turner v. City of Independence, 186 S.W.3d 786 (Mo. Ct. App. W.D. 2006) (upholding high density residential mixed use planned unit development rezoning ordinance enacted by City as lawful and reasonable). Within a PUD, the number of uses expressly permitted is limited and the number of conditional uses is expanded, allowing the zoning authority more control over the development of the land. Developers may use a PUD to get more flexibility in terms of open space, parking, and setback requirements, in return for giving zoning authorities more control than they would normally have in matters of building appearance and landscaping. *See, e.g.*, State ex rel. Helujon, Ltd. v. Jefferson County, 964 S.W.2d 531 (Mo. Ct. App. 1998) (accepting PUD as legitimate legislative rezoning technique); State ex rel. Helujon, Ltd. v. Jefferson County, 964 S.W.2d 531 (Mo. Ct. App. 1998). Ladue has now provided for a PUD in its zoning ordinance:

> This section is intended to enable the creation of a Planned Unit Development (P.U.D.) District on properties with a minimum size of twelve (12) acres that abut a City border.
>
> The purpose of the Planned Unit Development District overlay is to provide a means of achieving greater flexibility in development of land in a manner not possible in the underlying zoning district; to encourage development of downsized luxury housing; to encourage a more environmentally sustainable development; to promote a more desirable community environment; and to maintain maximum control over both the structure and future operation of the development.
>
> A Planned Unit Development District overlay is not a rezoning of the property; only those uses permitted in the underlying zoning classification shall be allowed …. Lot area, yard setbacks, lot frontage, lot width, and other requirements and regulations contained in the underlying zoning districts may be altered or amended as set forth in the authorized Planned Unit

> Development District. There shall be no increase in unit density in residentially zoned districts….

Ladue, Missouri's Zoning Ordinance, Ordinance 1175, as amended through Jan. 2015.

d. Rezoning

Rezoning more generally is exactly what it sounds like. As long as it is part of a comprehensive plan, it is usually acceptable, even if it changes the rules substantially (and doesn't just exclude specific businesses, the way the rezoning in prior nonconforming use cases often does).

Missouri Municipal League, Planning and Zoning Procedures for Missouri Municipalities (Sept. 2004)

> [Under Missouri law, t]he requirement for passage of the rezoning ordinance is a simple majority. It takes a two-thirds vote, however, if the owners of thirty percent or more of the land within 185 feet of the boundaries of the area of land (exclusive of streets and alleys) that is being rezoned sign and acknowledge (before a notary public) a written protest against the rezoning.
>
> In some cities there are additional self-imposed limitations on rezoning amendments. These limitations state that, if the planning commission recommends against the proposed amendment, then it will take a three-fourths vote of the council to overturn that action.

Should we treat rezoning as legislative in nature, and thus entitled to very deferential judicial review the way the initial adoption of a zoning plan is treated under *Euclid*, or rather as quasi-judicial like a variance and subject to less deference? The courts are divided on this question.

e. Contract zoning

Contract Zoning is an often derogatory term for a rezoning in which a developer promises to provide certain benefits to the zoning jurisdiction in return for zoning that allows the developer to accomplish its goals. In theory, it should not be allowed, because it makes the idea of general planning seem like a sick joke. In practice, it is

hard to distinguish from acceptable rezoning, and courts have increasingly tolerated it, perhaps reflecting the commodification of all other values. Christopher Serkin, Local Property Law: Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883 (2007). Nonetheless, most suburban communities have not accepted contract zoning, as a political matter.

f. Spot zoning

Spot Zoning is another kind of rezoning, in which a particular parcel is rezoned (rather than being given a variance, for which the standard would be much higher). Because it can be used as a variance workaround when the zoning board is on the owner's side, some courts are skeptical of spot zoning. The classic scenario involves a parcel that is zoned to "higher" use, often single-family residential, but abuts a less restrictive zone. The developer wishes to use the parcel for apartments, and argues that the neighborhood is already transitional in character and that another apartment building will be consistent with the overall area. What responses can you imagine the residential neighbors making?

Because of the potential for collusion between a zoning board and the owner of a benefitted parcel, spot zoning is more often the legal conclusion of a court striking down a zoning change than a characterization adopted by a zoning board to describe what it is doing. Courts tend to be particularly suspicious when a change confers unique benefits on a specific parcel, making it distinctly more valuable than its neighbors. It is not necessary that the new use cause hardships to the neighbors; the problem is one of unjustified favoritism.

g. Upzoning and downzoning

You may expect that rezoning often favors developers trying to take advantage of desirable locations. In fact, "downzoning"—making it harder to build at higher densities, which are the most profitable for developers—may often be more successful than upzoning. Homevoters, it seems, are likely to have the political power to protect new housing from coming in and diluting the value of prized locations, or attracting the "wrong" sorts of residents. *See* Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. Empir. Leg. Stud. 227 (2014) (finding, in study of New York City, that

areas in proximity to high-quality infrastructure and services were more likely to have zoning changes than other areas, but almost always in the direction of downzoning, so that parcels in high-performing school districts were 43% more likely than the typical parcel to be upzoned but 392% more likely to be downzoned; downzoning was also highly correlated with race, with parcels in areas that were 80% white more than seven times more likely to be downzoned than parcels in areas that were under 20% white.).

15. Common-Interest Communities

A. In General

As you have already seen, one prevalent application of restrictive covenants is in real estate development schemes that purport to subject many disparately held parcels within a community to a common scheme or plan. Neponsit and Bethany Beach are both communities that were initially developed under such a common scheme. Like zoning ordinances, the restrictive covenants that burden privately owned land within such developments may serve to quite comprehensively regulate the uses of land by members of the community.

Indeed, one major American city—Houston—relies largely (though not exclusively) on restrictive covenants to do the work that most other municipalities achieve by zoning. When zoning swept the nation in the 1920s, Houston was a growing, libertarian city, and sometimes-overheated rhetoric led Houstonians to reject zoning as communistic government interference with liberty. Later attempts to introduce zoning also failed due to the persistence of anti-zoning movements. *See* Barry J. Kaplan, *Urban Development, Economic Growth, and Personal Liberty: The Rhetoric of the Houston Anti-Zoning Movements, 1947-1962*, 84 SOUTHWESTERN HISTORICAL Q. 133 (1980); *see also* Houstonians for Responsible Growth, How Houston "Got It Right": The World Takes Notice (n.d) (collecting numerous encomiums to Houston's freedom and prosperity as the result of lack of zoning). The absence of zoning doesn't mean that land use in Houston is unregulated—the city code imposes minimum lot size and parking restrictions that have made the city the most sprawling American metropolis, and the most heavily dependent on privately-owned automobiles for transportation. But more detailed restrictions are often the work of private covenants.

Private covenants are common in Houston, replicating many of the standard functions of zoning, particularly separation of uses. Houston encourages covenant creation by allowing their creation by a majority vote of subdivision residents. Houstonians separate homes from businesses through restrictive covenants that specify the appropriate use for each lot in a subdivision, and enable every lot owner individually to sue. This regime works most effectively in wealthy neighborhoods.

Houston's city code, unlike that of most American cities, also allows the city attorney to sue to enforce restrictive covenants. The city may seek civil penalties of up to $1000 per day for a violation, and the city prioritizes enforcement of use restrictions, rather than other covenants such as aesthetic rules. In essence, the city has recreated "single use zoning" as covenant enforcement.

Both within and outside of Houston, such uses of restrictive covenants may allow—like the covenants in *Neponsit*—for centralized *private* authority to administer and enforce the covenants through a corporation or association constituted from among the property owners in the community. This kind of collective governance of land uses via restrictive covenants is what the Third Restatement refers to as a **common-interest community**. There are three primary types of common-interest community in the United States: the **homeowners association** (or **"HOA"**), the **condominium** (or **"condo"**), and the **cooperative** (or "**co-op**"). State statutes provide for the creation of these legal entities. According to the Community Associations Institute—an international research, education, and advocacy nonprofit organization that promotes and supports common-interest communities—there were over 330,000 common-interest communities in the United States in 2014, encompassing 26.7 million housing units and 66.7 million residents. COMMUNITY ASSOCIATIONS INSTITUTE STATISTICAL REVIEW FOR 2014, at 1, available at http://www.cairf.org/research/factbook/2014_statistical_review.pdf.

1. Homeowners Associations

The homeowners association is the most common type of common-interest community in the United States—over half of all common interest communities in the United States are HOAs. *Id.* In an HOA, the creation of community-wide restrictive covenants typically happens at the planning stage: a real estate developer plans out a subdivision of a contiguous parcel of undeveloped or underdeveloped land, and files with the local clerk or register of deeds a **subdivision plat** mapping out a survey of the separate lots of the planned community and a **declaration of covenants, conditions, and restrictions** ("**CC&Rs**") to bind each of those lots as restrictive covenants. When the subdivided lots are initially sold, the developer writes the same covenants into the deed to every lot, either explicitly or incorporating the CC&Rs of the declaration by reference. The CC&Rs will typically delegate

enforcement to a homeowners association—a legal entity that is incorporated or otherwise created for the purpose of managing the common-interest community (as with the property owners' association in *Neponsit*). The association's membership is comprised of all owners of real property in the subdivision. These members are entitled to elect a board of managers to act on behalf of the association, though votes are usually not equally distributed to all residents; typically votes are allocated according to some proxy for property value, such as lot size.

The association itself may hold title to real property in common areas of the subdivision—such as private roads, parks and other recreational facilities, and common utilities. It may also contract on behalf of the community for common services, such as professional security guards. But its main function is to administer, modify as necessary, and enforce the restrictive covenants that bind the real property in the subdivision. This includes the collection of HOA dues—such as the fees that were at issue in *Neponsit*—that go toward the maintenance of the subdivision and other expenses incurred by the association (for example, professional fees for attorneys, accountants, etc.). The association is typically also empowered to levy special assessments against property owners in the subdivision as it deems necessary. *See* Restatement, § 6.5. The authority of the association to act is governed both by the CC&Rs and by a set of bylaws—like the bylaws of any other corporation—that set forth in detail what actions the managers may take according to what procedures, what actions require a vote of all members of the association, and whether there is any supermajority requirement for certain actions. As we will see, the association may also enact regulations regarding use and maintenance of privately owned property in the subdivision that go beyond the CC&Rs.

2. Condominiums

A **condominium** is very similar to a homeowners association, except it typically covers either a single multi-unit structure or several structures comprising attached residences on a single contiguous lot. Like a homeowners association, a condominium is established by filing with the appropriate public official a **condominium declaration**, which like the homeowners association declaration will contain the CC&Rs that will govern the condominium, and will provide for a condominium association to administer the CC&Rs and otherwise act on behalf of

the community. State statutes typically impose a bit more regulation on condominiums than on subdivision HOAs, sometimes setting forth substantive rules limiting the powers of condominium associations or subjecting them to certain procedural requirements. But condominium associations typically have the same types of powers as HOAs, including the power to assess dues and special assessments from individual owner/members.

One important distinction between condominiums and homeowners associations has to do with how title to property is held in each. In a condominium, each unit owner holds title to their individual unit in fee simple, but the individual unit owners collectively own all common areas of the condominium property (hallways, common outdoor spaces, lobbies, recreation areas, etc.) as tenants in common. State statutes prohibit condominium owners from seeking partition of these commonly owned spaces. As with voting rights in the condominium association, each owner's fractional share in this tenancy in common is typically determined by some proxy for the value of the owner's particular unit, such as square footage.

3. Cooperatives

By far the least common form of common-interest community is the **cooperative**. In a cooperative, title to all real property in the community (typically an apartment building) is held by a cooperative corporation, whose shareholders are the residents of individual units. As with the other common-interest communities, the number of shares each individual unit owner holds is typically proportional to some proxy for the value of their residence—such as square footage. Each resident's shares are "appurtenant" (i.e., connected) to a **proprietary lease** for a particular unit—a lease whose term is tied to the resident's ownership of their shares in the cooperative. Co-op owners therefore have a dual relationship with their common-interest community: they are formally tenants, but at the same time they are shareholders of the (corporate) landlord. The proprietary lease typically plays the role that CC&Rs serve in HOAs and condominiums: it contains the covenants restricting residents' use of their own unit and any common spaces, and in lieu of rent it obliges residents to pay maintenance fees—which typically represent a fractional share of both operating expenses and carrying costs of the entire property (such as mortgage payments and property taxes).

The board of directors of a cooperative corporation typically wields significant power over the property and its residents. In addition to administering and enforcing the terms of the proprietary lease and managing the property on behalf of all the residents, co-op boards are typically empowered to create and enforce additional rules to govern the community via their own by-laws and, sometimes, separate and potentially quite intrusive "house rules." Beyond this, the governing documents of most co-operatives reserve to the board a right to withhold consent to any transfer of shares in the corporation (and, thus, of the proprietary lease to any unit in the cooperative). Absent violation of the anti-discrimination laws, boards are generally free to arbitrarily withhold such consent. One justification for this power is that residents of a co-operative depend on one another for the financial stability of their homes: a shareholder who fails to pay maintenance on time could threaten not only themselves but the entire community with foreclosure of a mortgage or a tax lien, and the board therefore has an interest in screening new shareholders for financial wherewithal and reliability. But another theory justifying such power is that a cooperative is, as its name implies, a form of collective governance of an intimate residential community, which limits the appropriate degree of outside legal interference. As the New York Court of Appeals put it: "there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes." Weisner v. 791 Park Ave. Corp., 160 N.E.2d 720, 724 (N.Y. 1959).

Cooperatives exist almost exclusively in New York City, where they account for the majority of owner-occupied apartments in Manhattan. Given the tremendous power co-operative boards can exercise over admission of new shareholders, it is perhaps unsurprising that co-ops constitute the form of ownership for many of the city's most exclusive residential apartment buildings. Tom Wolfe famously profiled these co-ops in the heady days of the 1980s bull market:

> These so-called Good Buildings are forty-two cooperative apartment houses built more than half a century ago. Thirty-seven of them are located in a small wedge of Manhattan's Upper East Side known as the Triangle[,]… an area defined by Fifty-seventh Street from Sutton Place to Fifth Avenue on the south, Fifth [Avenue] to Ninety-eighth Street on the west, and a diagonal back

> down to Sutton on the east…. The term Good Building was originally uttered sotto voce. Before the First World War it was code for "restricted to Protestants of northern European stock"…. Today Good certainly doesn't mean democratic, but it does pertain to attributes that are at least more broadly available than Protestant grandparents: namely, decorous demeanor, dignified behavior, business and social connections, and sheer wealth. In short, bourgeois respectability. The co-op boards want quiet, conservatively dressed families, although not with too many children. Children tie up the elevators and make noise in the lobby…. The boards raise and lower their financial requirements, as well as their social requirements, with the temperature of the market…. The first requirement is that the buyer be able to pay for the apartment in cash…. The second, in many buildings, is that he not be dependent on his job or profession to pay for his monthly maintenance fees and keep up appearances…. The prospects and their families are also expected to drop by the building for "cocktails," which is an inspection of dress and deportment…. The stiffest known financial requirements are at a Good Building on Park Avenue in the seventies, where the board asks that a purchaser of an apartment demonstrate a net worth of at least $30 million.*

Tom Wolfe, *Proper Places*, ESQUIRE (June 1985), at 194, 196-200.

B. Rulemaking Authority

As noted above, the governing documents of a common-interest community can significantly regulate the lives of its residents, and the governing bodies of the community are usually empowered to impose additional regulations. How expansive is this rulemaking authority?

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

Hidden Harbour Estates, Inc. v. Norman

309 So. 2d 180 (Fla. Dist. Ct. App. 1975)

DOWNEY, Judge.

The question presented on this appeal is whether the board of directors of a condominium association may adopt a rule or regulation prohibiting the use of alcoholic beverages in certain areas of the common elements of the condominium.

Appellant is the condominium association formed, pursuant to a Declaration of Condominium, to operate a 202 unit condominium known as Hidden Harbour. Article 3.3(f) of appellant's articles of incorporation provides, inter alia, that the association shall have the power 'to make and amend reasonable rules and regulations respecting the use of the condominium property.' A similar provision is contained in the Declaration of Condominium.

Among the common elements of the condominium is a club house used for social occasions. Pursuant to the association's rule making power the directors of the association adopted a rule prohibiting the use of alcoholic beverages in the club house and adjacent areas. Appellees, as the owners of one condominium unit, objected to the rule, which incidentally had been approved by the condominium owners voting by a margin of 2 to 1 (126 to 63). Being dissatisfied with the association's action, appellees brought this injunction suit to prohibit the enforcement of the rule. After a trial on the merits at which appellees showed there had been no untoward incidents occurring in the club house during social events when alcoholic beverages were consumed, the trial court granted a permanent injunction against enforcement of said rule. The trial court was of the view that rules and regulations adopted in pursuance of the management and operation of the condominium 'must have some reasonable relationship to the protection of life, property or the general welfare of the residents of the condominium in order for it to be valid and enforceable.' In its final judgment the trial court further held that any resident of the condominium might engage in any lawful action in the club house or on any common condominium property unless such action was engaged in or carried on in such a manner as to constitute a nuisance.

With all due respect to the veteran trial judge, we disagree. It appears to us that inherent in the condominium concept is the principle that to promote the health,

happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed.

Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. Of course, this means that each case must be considered upon the peculiar facts and circumstances thereto appertaining.

Finally, restrictions on the use of alcoholic beverages are widespread throughout both governmental and private sectors; there is nothing unreasonable or unusual about a group of people electing to prohibit their use in commonly owned areas.

Accordingly, the judgment appealed from is reversed and the cause is remanded with directions to enter judgment for the appellant.

Notes and Questions

1. What is the difference between the standard applied by the trial judge and that applied by the Court of Appeal in *Norman*? Don't both merely require rules promulgated by an association to be "reasonable"?

2. The Hidden Harbour development was back before the Florida District Court of Appeal six years later over a different dispute involving a resident's private well. In Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. Dist. Ct. App. 1981), the court opined:

There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. Thus, although case law has applied the word "reasonable" to determine whether such restrictions are valid, this is not the appropriate test....

The rule to be applied in the second category of cases, however, is different. In those cases where a use restriction is not mandated by the declaration of condominium per se, but is instead created by the board of directors of the condominium association, the rule of reasonableness comes into vogue. The requirement of "reasonableness" in these instances is designed to somewhat fetter the discretion of the board of directors. By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. In cases like the present one where the decision to allow a particular use is within the discretion of the board, the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual unit owners.

The Restatement draws the same distinction between the standard for validity of covenants set forth in the CC&Rs of a declaration and the standard for validity of rules enacted by the governing body of a common-interest community. Thus, restrictions in a condominium declaration are valid—even if unreasonable—unless they are illegal, unconstitutional, or against public policy, (Restatement § 3.1), while house rules and their enforcement are subject to a reasonableness standard (Restatement § 6.7 & Reporter's Note).

Does this distinction make sense? The court in *Basso* notes that "house rules," unlike CC&Rs, may be adopted *after* a resident acquires their property and thus without the notice that recording of the declaration provides before a resident invests in the community.* Does that distinction justify the diverging standards for validity? Is such a justification consistent with the reasoning of *Norman*?

3. Not all jurisdictions follow the distinction drawn by *Basso* and the Restatement. Consider the following case.

Nahrstedt v. Lakeside Village Condominium Assoc., Inc.
878 P.2d 1275 (Cal. 1994)

KENNARD, Justice.

A homeowner in a 530–unit condominium complex sued to prevent the homeowners association from enforcing a restriction against keeping cats, dogs, and other animals in the condominium development. The owner asserted that the restriction, which was contained in the project's declaration recorded by the condominium project's developer, was "unreasonable" as applied to her because she kept her three cats indoors and because her cats were "noiseless" and "created no nuisance." Agreeing with the premise underlying the owner's complaint, the Court of Appeal concluded that the homeowners association could enforce the restriction only upon proof that

* Typically, either under state law or by a declaration's own terms (or both), the CC&Rs in a declaration may only be amended by a supermajority vote of all members of the association.

plaintiff's cats would be likely to interfere with the right of other homeowners "to the peaceful and quiet enjoyment of their property."

Those of us who have cats or dogs can attest to their wonderful companionship and affection. Not surprisingly, studies have confirmed this effect…. But the issue before us is not whether in the abstract pets can have a beneficial effect on humans. Rather, the narrow issue here is whether a pet restriction that is contained in the recorded declaration of a condominium complex is enforceable against the challenge of a homeowner. As we shall explain, the Legislature, in Civil Code section 1354, has required that courts enforce the covenants, conditions and restrictions contained in the recorded declaration of a common interest development "unless unreasonable."

Because a stable and predictable living environment is crucial to the success of condominiums and other common interest residential developments, and because recorded use restrictions are a primary means of ensuring this stability and predictability, the Legislature in section 1354 has afforded such restrictions a presumption of validity and has required of challengers that they demonstrate the restriction's "unreasonableness" by the deferential standard applicable to equitable servitudes. Under this standard established by the Legislature, enforcement of a restriction does not depend upon the conduct of a particular condominium owner. Rather, the restriction must be uniformly enforced in the condominium development to which it was intended to apply unless the plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner. Here, the Court of Appeal did not apply this standard in deciding that plaintiff had stated a claim for declaratory relief. Accordingly, we reverse the judgment of the Court of Appeal and remand for further proceedings consistent with the views expressed in this opinion.

I

Lakeside Village is a large condominium development in Culver City, Los Angeles County. It consists of 530 units spread throughout 12 separate 3–story buildings. The residents share common lobbies and hallways, in addition to laundry and trash facilities.

The Lakeside Village project is subject to certain covenants, conditions and restrictions (hereafter CC & R's) that were included in the developer's declaration recorded with the Los Angeles County Recorder on April 17, 1978, at the inception of the development project. Ownership of a unit includes membership in the project's homeowners association, the Lakeside Village Condominium Association (hereafter Association), the body that enforces the project's CC & R's, including the pet restriction, which provides in relevant part: "No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit."[3]

In January 1988, plaintiff Natore Nahrstedt purchased a Lakeside Village condominium and moved in with her three cats. When the Association learned of the cats' presence, it demanded their removal and assessed fines against Nahrstedt for each successive month that she remained in violation of the condominium project's pet restriction.

Nahrstedt then brought this lawsuit against the Association, its officers, and two of its employees, asking the trial court to invalidate the assessments, to enjoin future assessments, to award damages for violation of her privacy when the Association "peered" into her condominium unit, to award damages for infliction of emotional distress, and to declare the pet restriction "unreasonable" as applied to indoor cats (such as hers) that are not allowed free run of the project's common areas. Nahrstedt also alleged she did not know of the pet restriction when she bought her condominium.…

The Association demurred to the complaint. In its supporting points and authorities, the Association argued that the pet restriction furthers the collective "health, happiness and peace of mind" of persons living in close proximity within the Lakeside Village condominium development, and therefore is reasonable as a matter of law. The trial court sustained the demurrer as to each cause of action and dismissed Nahrstedt's complaint. Nahrstedt appealed.

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[3] The CC & R's permit residents to keep "domestic fish and birds."

A divided Court of Appeal reversed the trial court's judgment of dismissal…. On the Association's petition, we granted review to decide when a condominium owner can prevent enforcement of a use restriction that the project's developer has included in the recorded declaration of CC & R's….

II

Today, condominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as "common interest" developments. …Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement…. The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on—or prohibit altogether—the keeping of pets.

Restrictions on property use are not the only characteristic of common interest ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. Because of its considerable power in managing and regulating a common interest development, the governing board of an owners association must guard against the potential for the abuse of that power. As Professor Natelson observes, owners associations "can be a powerful force for good or for ill" in their members' lives. Therefore, anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts "the risk that the power may be used in a way that benefits the commonality but harms the individual." Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.

Thus, subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development.…

Notwithstanding the limitations on personal autonomy that are inherent in the concept of shared ownership of residential property, common interest developments have increased in popularity in recent years, in part because they generally provide a more affordable alternative to ownership of a single-family home….

…When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability? In California, as we explained at the outset, our Legislature has made common interest development use restrictions contained in a project's recorded declaration "enforceable ... *unless unreasonable*." (§ 1354, subd. (a), italics added.) …In other words, such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

This interpretation of section 1354 is consistent with the views of legal commentators as well as judicial decisions in other jurisdictions that have applied a presumption of validity to the recorded land use restrictions of a common interest development. As these authorities point out, and as we discussed previously, recorded CC & R's are the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development.… When courts accord a presumption of validity to all such recorded use restrictions and measure them against deferential standards of equitable servitude law, it discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC & R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions.

How courts enforce recorded use restrictions affects not only those who have made their homes in planned developments, but also the owners associations charged with

the fiduciary obligation to enforce those restrictions. When courts treat recorded use restrictions as presumptively valid, and place on the challenger the burden of proving the restriction "unreasonable" under the deferential standards applicable to equitable servitudes, associations can proceed to enforce reasonable restrictive covenants without fear that their actions will embroil them in costly and prolonged legal proceedings. Of course, when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly.

There is an additional beneficiary of legal rules that are protective of recorded use restrictions: the judicial system. Fewer lawsuits challenging such restrictions will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating such restrictions are clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individual residents in condominiums and other shared-ownership developments.

…Refusing to enforce the CC & R's contained in a recorded declaration, or enforcing them only after protracted litigation that would require justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development. It would frustrate owners who had purchased their units in reliance on the CC & R's. It would put the owners and the homeowners association in the difficult and divisive position of deciding whether particular CC & R's should be applied to a particular owner. Here, for example, deciding whether a particular animal is "confined to an owner's unit and create[s] no noise, odor, or nuisance" is a fact-intensive determination that can only be made by examining in detail the behavior of the particular animal and the behavior of the particular owner. Homeowners associations are ill-equipped to make such investigations, and any decision they might make in a particular case could be divisive or subject to claims of partiality.

Enforcing the CC & R's contained in a recorded declaration only after protracted case-by-case litigation would impose substantial litigation costs on the owners through their homeowners association, which would have to defend not only against owners contesting the application of the CC & R's to them, but also against owners

contesting any case-by-case exceptions the homeowners association might make. In short, it is difficult to imagine what could more disrupt the harmony of a common interest development….

Under the holding we adopt today, the reasonableness or unreasonableness of a condominium use restriction that the Legislature has made subject to section 1354 is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole. As we have explained, when, as here, a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development *unless* the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy.

Accordingly, here Nahrstedt could prevent enforcement of the Lakeside Village pet restriction by proving that the restriction is arbitrary, that it is substantially more burdensome than beneficial to the affected properties, or that it violates a fundamental public policy. For the reasons set forth below, Nahrstedt's complaint fails to adequately allege any of these three grounds of unreasonableness.

We conclude, as a matter of law, that the recorded pet restriction of the Lakeside Village condominium development prohibiting cats or dogs but allowing some other pets is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents of a high-density condominium project such as Lakeside Village, which includes 530 units in 12 separate 3–story buildings.

Nahrstedt's complaint alleges no facts that could possibly support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable and should not be enforced. Also, the complaint's allegations center on Nahrstedt and her cats (that she keeps them inside her condominium unit and that they do not bother her neighbors), without any reference to the effect on the condominium development as a whole, thus rendering the allegations legally insufficient to overcome section 1354's presumption of the restriction's validity….

LUCAS, C.J., and MOSK, BAXTER, GEORGE and WERDEGAR, JJ., concur.

ARABIAN, Justice, dissenting.

"There are two means of refuge from the misery of life: music and cats."[1]

I respectfully dissent. While technical merit may commend the majority's analysis,[2] its application to the facts presented reflects a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency. In my view, the resolution of this case well illustrates the conventional wisdom, and fundamental truth, of the Spanish proverb, "It is better to be a mouse in a cat's mouth than a man in a lawyer's hands."

As explained below, I find the provision known as the "pet restriction" contained in the covenants, conditions, and restrictions (CC & R's) governing the Lakeside Village project patently arbitrary and unreasonable within the meaning of Civil Code section 1354. Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals. Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract. It certainly does not promote "health, happiness [or] peace of mind" commensurate with its tariff on the quality of life for those who value the companionship of animals. Worse, it contributes to the fraying of our social fabric.

…Generically stated, plaintiff challenges this restriction to the extent it precludes not only her but anyone else living in Lakeside Village from enjoying the substantial pleasures of pet ownership while affording no discernible benefit to other unit owners if the animals are maintained without any detriment to the latter's quiet enjoyment of their own space and the common areas. In essence, she avers that when pets are kept out of sight, do not make noise, do not generate odors, and do not otherwise create a nuisance, reasonable expectations as to the quality of life within the

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[1] Albert Schweitzer.

condominium project are not impaired. At the same time, taking into consideration the well-established and long-standing historical and cultural relationship between human beings and their pets and the value they impart[,] enforcement of the restriction significantly and unduly burdens the use of land for those deprived of their companionship. Considered from this perspective, I find plaintiff's complaint states a cause of action for declaratory relief.

…Our true task in this turmoil is to strike a balance between the governing rights accorded a condominium association and the individual freedom of its members…. Pet ownership substantially enhances the quality of life for those who desire it. When others are not only undisturbed by, but *completely unaware of,* the presence of pets being enjoyed by their neighbors, the balance of benefit and burden is rendered disproportionate and unreasonable, rebutting any presumption of validity….

I would affirm the judgment of the Court of Appeal.

Notes and Questions

1. A few years after *Nahrstedt* was decided, the California legislature later enacted a statute providing that common-interest community governing documents cannot prohibit the keeping of "at least one pet." Cal. Civ. Code § 4715.

2. Did Natore Nahrstedt lose because the pet restriction is reasonable in general, because the restriction is reasonable as applied to indoor cats, or because the fines levied by the board were a reasonable means of enforcing the restriction?

3. Is the reasonableness standard applied in *Nahrstedt* the same standard applied by the court in *Norman* and *Basso*? If not, how do the standards differ? How does the reasonableness standard of *Nahrstedt* differ from the standard Florida applies to CC&Rs?

C. Enforcement of Rules and Covenants by Common-Interest Communities

What happens if a resident of a common interest community breaches a covenant? How can the governing body of the community—the HOA managers, the condo

board, or the co-op board—enforce the rules laid down in the restrictive covenants against breaching community members? *Neponsit* provides one answer: the breach of a covenant to pay money—such as dues and assessments—will serve as an equitable lien on the breaching resident's property in the community. This lien could be foreclosed, or more commonly the threat of foreclosure and the encumbrance of the lien can be used to leverage payment if and when the resident ever tries to sell her home. The governing body could also sue to recover unpaid sums, but because this involves significant additional expense it is typically an unattractive option reserved as a last resort.

But what about covenants that restrict use of property in the community—or rules that govern the conduct of residents on the community's property? The Restatement suggests that the governing bodies of common-interest communities enjoy wide latitude to enforce the restrictions in governing documents. Section 6.8 provides: "In addition to seeking court enforcement, the association may adopt reasonable rules and procedures to encourage compliance and deter violations, including the imposition of fines, penalties, late fees, and the withdrawal of privileges to use common recreational and social facilities." Typically the governing documents will empower the association or board to levy fines against residents for their breach of such rules of conduct or use. Those fines, like unpaid dues or assessments, can also become an equitable lien on the resident's property if state law and/or the declaration so provide.

How should we assess the "reasonableness" of any particular enforcement action? And how searching a review should courts take of such actions if and when they are challenged by aggrieved members of the common-interest community?

40 West 67th Street v. Pullman

790 N.E.2d 1174 (N.Y. 2003)

ROSENBLATT, J.

In *Matter of Levandusky v. One Fifth Ave. Apt. Corp.,* 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990] we held that the business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations. In the case before us, defendant is a shareholder-tenant in the plaintiff

cooperative building. The relationship between defendant and the cooperative, including the conditions under which a shareholder's tenancy may be terminated, is governed by the shareholder's lease agreement. The cooperative terminated defendant's tenancy in accordance with a provision in the lease that authorized it to do so based on a tenant's "objectionable" conduct….

I.

Plaintiff cooperative owns the building located at 40 West 67th Street in Manhattan, which contains 38 apartments. In 1998, defendant bought into the cooperative and acquired 80 shares of stock appurtenant to his proprietary lease for apartment 7B.

Soon after moving in, defendant engaged in a course of behavior that, in the view of the cooperative, began as demanding, grew increasingly disruptive and ultimately became intolerable. After several points of friction between defendant and the cooperative,[1] defendant started complaining about his elderly upstairs neighbors, a retired college professor and his wife who had occupied apartment 8B for over two decades. In a stream of vituperative letters to the cooperative—16 letters in the month of October 1999 alone—he accused the couple of playing their television set and stereo at high volumes late into the night, and claimed they were running a loud and illegal bookbinding business in their apartment. Defendant further charged that the couple stored toxic chemicals in their apartment for use in their "dangerous and illegal" business. Upon investigation, the cooperative's Board determined that the couple did not possess a television set or stereo and that there was no evidence of a bookbinding business or any other commercial enterprise in their apartment.

Hostilities escalated, resulting in a physical altercation between defendant and the retired professor.[2] Following the altercation, defendant distributed flyers to the cooperative residents in which he referred to the professor, by name, as a potential

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[1] Initially, defendant sought changes in the building services, such as the installation of video surveillance, 24-hour door service and replacement of the lobby mailboxes. After investigation, the Board deemed these proposed changes inadvisable or infeasible.

[2] Defendant brought charges against the professor which resulted in the professor's arrest. Eventually, the charges were adjourned in contemplation of dismissal.

"psychopath in our midst" and accused him of cutting defendant's telephone lines. In another flyer, defendant described the professor's wife and the wife of the Board president as having close "intimate personal relations." Defendant also claimed that the previous occupants of his apartment revealed that the upstairs couple have "historically made excessive noise." The former occupants, however, submitted an affidavit that denied making any complaints about noise from the upstairs apartment and proclaimed that defendant's assertions to the contrary were "completely false."

Furthermore, defendant made alterations to his apartment without Board approval, had construction work performed on the weekend in violation of house rules, and would not respond to Board requests to correct these conditions or to allow a mutual inspection of his apartment and the upstairs apartment belonging to the elderly couple. Finally, defendant commenced four lawsuits against the upstairs couple, the president of the cooperative and the cooperative management, and tried to commence three more.

In reaction to defendant's behavior, the cooperative called a special meeting pursuant to article III (First) (f) of the lease agreement, which provides for termination of the tenancy if the cooperative by a two-thirds vote determines that "because of objectionable conduct on the part of the Lessee * * * the tenancy of the Lessee is undesirable."[3] The cooperative informed the shareholders that the purpose of the meeting was to determine whether defendant "engaged in repeated actions inimical to cooperative living and objectionable to the Corporation and its stockholders that make his continued tenancy undesirable."

Timely notice of the meeting was sent to all shareholders in the cooperative, including defendant. At the ensuing meeting, held in June 2000, owners of more than 75% of the outstanding shares in the cooperative were present. Defendant chose not attend. By a vote of 2,048 shares to 0, the shareholders in attendance passed a

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[3] The full provision authorizes termination "if at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of that part of its capital stock which is then owned by Lessees under proprietary leases then in force, at a meeting of such stockholders duly called to take action on the subject, that because of objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, the tenancy of the Lessee is undesirable."

resolution declaring defendant's conduct "objectionable" and directing the Board to terminate his proprietary lease and cancel his shares. The resolution contained the findings upon which the shareholders concluded that defendant's behavior was inimical to cooperative living. Pursuant to the resolution, the Board sent defendant a notice of termination requiring him to vacate his apartment by August 31, 2000. Ignoring the notice, defendant remained in the apartment, prompting the cooperative to bring this suit for possession and ejectment, a declaratory judgment cancelling defendant's stock, and a money judgment for use and occupancy, along with attorneys' fees and costs….

II. The *Levandusky* Business Judgment Rule

The heart of this dispute is the parties' disagreement over the proper standard of review to be applied when a cooperative exercises its agreed-upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct. In the agreement establishing the rights and duties of the parties, the cooperative reserved to itself the authority to determine whether a member's conduct was objectionable and to terminate the tenancy on that basis. The cooperative argues that its decision to do so should be reviewed in accordance with *Levandusky*'s business judgment rule. Defendant contends that the business judgment rule has no application under these circumstances and that RPAPL 711 requires a court to make its own evaluation of the Board's conduct based on a judicial standard of reasonableness.

Levandusky established a standard of review analogous to the corporate business judgment rule for a shareholder-tenant challenge to a decision of a residential cooperative corporation. The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. The rule has been long recognized in New York. In *Levandusky*, the cooperative board issued a stop work order for a shareholder-tenant's renovations that violated the proprietary lease. The shareholder-tenant brought a CPLR article 78 proceeding to set aside the stop work order. The Court upheld the Board's action, and concluded that the business judgment rule "best balances the individual and collective interests at stake" in the residential cooperative setting (*Levandusky*, 75 N.Y.2d at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*id.* at 538, 554 N.Y.S.2d 807, 553 N.E.2d 1317). In adopting this rule, we recognized that a cooperative board's broad powers could lead to abuse through arbitrary or malicious decisionmaking, unlawful discrimination or the like. However, we also aimed to avoid impairing "the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit" (*id.* at 537, 554 N.Y.S.2d 807, 553 N.E.2d 1317). The Court concluded that the business judgment rule best balances these competing interests and also noted that the limited judicial review afforded by the rule protects the cooperative's decisions against "undue court involvement and judicial second-guessing" (*id.* at 540, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Although we applied the business judgment rule in *Levandusky*, we did not attempt to fix its boundaries, recognizing that this corporate concept may not necessarily comport with every situation encountered by a cooperative and its shareholder-tenants. Defendant argues that when it comes to terminations, the business judgment rule conflicts with RPAPL 711(1) and is therefore inoperative.[5] We see no such conflict. In the realm of cooperative governance and in the lease provision before us, the cooperative's determination as to the tenant's objectionable behavior stands as competent evidence necessary to sustain the cooperative's determination. If that were not so, the contract provision for termination of the lease-to which defendant agreed-would be meaningless.

We reject the cooperative's argument that RPAPL 711(1) is irrelevant to these proceedings, but conclude that the business judgment rule may be applied

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[5] RPAPL 711(1), in pertinent part, states: "A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable."

consistently with the statute. Procedurally, the business judgment standard will be applied across the cases, but the manner in which it presents itself varies with the form of the lawsuit. *Levandusky*, for example, was framed as a CPLR article 78 proceeding, but we applied the business judgment rule as a concurrent form of "rationality" and "reasonableness" to determine whether the decision was "arbitrary and capricious" pursuant to CPLR 7803(3).

Similarly, the procedural vehicle driving this case is RPAPL 711(1), which requires "competent evidence" to show that a tenant is objectionable. Thus, in this context, the competent evidence that is the basis for the shareholder vote will be reviewed under the business judgment rule, which means courts will normally defer to that vote and the shareholders' stated findings as competent evidence that the tenant is indeed objectionable under the statute. As we stated in *Levandusky*, a single standard of review for cooperatives is preferable, and "we see no purpose in allowing the form of the action to dictate the substance of the standard by which the legitimacy of corporate action is to be measured" (id. at 541, 554 N.Y.S.2d 807, 553 N.E.2d 1317).

Despite this deferential standard, there are instances when courts should undertake review of board decisions. To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith.

III.

The Cooperative's Scope of Authority

Pursuant to its bylaws, the cooperative was authorized (through its Board) to adopt a form of proprietary lease to be used for all shareholder-tenants. Based on this authorization, defendant and other members of the cooperative voluntarily entered into lease agreements containing the termination provision before us. The cooperative does not contend that it has the power to terminate the lease absent the termination provision. Indeed, it recognizes, correctly, that if there were no such provision, termination could proceed only pursuant to RPAPL 711(1).

The cooperative unfailingly followed the procedures contained in the lease when acting to terminate defendant's tenancy. In accordance with the bylaws, the Board called a special meeting, and notified all shareholder-tenants of its time, place and purpose. Defendant thus had notice and the opportunity to be heard. In accordance with the agreement, the cooperative acted on a supermajority vote after properly fashioning the issue and the question to be addressed by resolution. The resolution specified the basis for the action, setting forth a list of specific findings as to defendant's objectionable behavior. By not appearing or presenting evidence personally or by counsel, defendant failed to challenge the findings and has not otherwise satisfied us that the Board has in any way acted ultra vires. In all, defendant has failed to demonstrate that the cooperative acted outside the scope of its authority in terminating the tenancy.

B. Furthering the Corporate Purpose

Levandusky also recognizes that the business judgment rule prohibits judicial inquiry into Board actions that, presupposing good faith, are taken in legitimate furtherance of corporate purposes. Specifically, there must be a legitimate relationship between the Board's action and the welfare of the cooperative. Here, by the unanimous vote of everyone present at the meeting, the cooperative resoundingly expressed its collective will, directing the Board to terminate defendant's tenancy after finding that his behavior was more than its shareholders could bear. The Board was under a fiduciary duty to further the collective interests of the cooperative. By terminating the tenancy, the Board's action thus bore an obvious and legitimate relation to the cooperative's avowed ends.

There is, however, an additional dimension to corporate purpose that *Levandusky* contemplates, notably, the legitimacy of purpose—a feature closely related to good faith. Put differently, all the shareholders of a cooperative may agree on an objective, and the Board may pursue that objective zealously, but that does not necessarily mean the objective is lawful or legitimate. Defendant, however, has not shown that the Board's purpose was anything other than furthering the over-all welfare of a cooperative that found it could no longer abide defendant's behavior.

C. Good Faith, in the Exercise of Honest Judgment

Finally, defendant has not shown the slightest indication of any bad faith, arbitrariness, favoritism, discrimination or malice on the cooperative's part, and the record reveals none. Though defendant contends that he raised sufficient facts in this regard, we agree with the Appellate Division majority that defendant has provided no factual support for his conclusory assertions that he was evicted based upon illegal or impermissible considerations. Moreover, as the Appellate Division noted, the cooperative emphasized that upon the sale of the apartment it "will 'turn over [to the defendant] all proceeds after deduction of unpaid use and occupancy, costs of sale and litigation expenses incurred in this dispute"'. Defendant does not contend otherwise.

Levandusky cautions that the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decisionmaking or favoritism. We reaffirm that admonition and stress that those types of abuses are incompatible with good faith and the exercise of honest judgment. While deferential, the *Levandusky* standard should not serve as a rubber stamp for cooperative board actions, particularly those involving tenancy terminations. We note that since *Levandusky* was decided, the lower courts have in most instances deferred to the business judgment of cooperative boards but in a number of cases have withheld deference in the face of evidence that the board acted illegitimately.[8]

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[8] *See e.g. Abrons Found. v. 29 E. 64th St. Corp.,* 297 A.D.2d 258, 746 N.Y.S.2d 482 [1st Dept.2002] [tenant raised genuine issues of material fact as to whether board acted in bad faith in imposing sublet fee meant solely to impact one tenant]; *Greenberg v Board of Mgrs. of Parkridge Condominiums,* 294 A.D.2d 467, 742 N.Y.S.2d 560 [2d Dept.2002] [affirming injunction against board because it acted outside scope of authority in prohibiting tenant from erecting a succah on balcony]; *Dinicu v. Groff Studios Corp.,* 257 A.D.2d 218, 690 N.Y.S.2d 220 [1st Dept.1999] [business judgment rule does not protect cooperative board from its own breach of contract]; *Matter of Vacca v Board of Mgrs. of Primrose Lane Condominium,* 251 A.D.2d 674, 676 N.Y.S.2d 188 [2d Dept.1998] [board acted in bad faith in prohibiting tenant from displaying religious statue in yard]; *Johar v 82-04 Lefferts Tenants Corp.,* 234 A.D.2d 516, 651 N.Y.S.2d 914 [2d Dept.1996] [board vote amending bylaws to declare plaintiff tenant ineligible to sit on cooperative board not shielded by business judgment rule]. While we do not undertake to address the correctness of the rulings in all of these cases, we list them as illustrative.

The very concept of cooperative living entails a voluntary, shared control over rules, maintenance and the composition of the community. Indeed, as we observed in *Levandusky*, a shareholder-tenant voluntarily agrees to submit to the authority of a cooperative board, and consequently the board "may significantly restrict the bundle of rights a property owner normally enjoys" (75 N.Y.2d at 536, 554 N.Y.S.2d 807, 553 N.E.2d 1317). When dealing, however, with termination, courts must exercise a heightened vigilance in examining whether the board's action meets the *Levandusky* test….

Notes and Questions

1. For further background on this dispute, including quotes from David Pullman himself, see Dan Barry, *Sleepless and Litigious in 7B: A Co-op War Ends in Court*, N.Y. TIMES (June 7, 2003), available at https://nyti.ms/2leMd9c.

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

3. The Restatement does not adopt the business judgment rule for review of board actions, instead applying a "reasonableness" standard. The Reporter's comments suggest that the reasonableness of an enforcement action will depend on any number of factors, including its proportionality to the resident's offensive conduct (*e.g.*, no $1,000 fines for a single instance of failing to sort an aluminum can for recycling), the logical relationship between the offensive conduct and the remedy (*e.g.*, no revocation of parking privileges for breach of a pet restriction), and whether the resident was provided with sufficient notice and opportunity to respond to the managers' complaint before any enforcement action was taken. *See* Restatement § 6.8 & cmt. b. Elsewhere the Restatement states that board members and officers have duties of care, prudence, and fairness toward members of the community. *Id.* § 6.13 & cmt. b. Is the Restatement position consistent with *Pullman*? If not, how does it differ?

4. The Court of Appeals did not consider the question whether the provision in Pullman's proprietary lease allowing the cooperative to kick him out on

grounds that he was "objectionable" should be enforceable as a general matter. If it had, what do you think would have been the result? Does it matter which standard—reasonableness or the more permissive standard applicable to CC&Rs—applies? Which do you think ought to apply to the covenants in the proprietary leases of a cooperative?

5. Say you live in a residential neighborhood unencumbered by any restrictive covenants. Could you and your neighbors come together and decide to sell an unfriendly neighbor's house over his objection? If not, what additional facts make it possible for the residents of 40 West 67th Street (a tudor-style luxury pre-war apartment building half a tree-lined block from Central Park) to vote Pullman out of the apartment he bought in their building?

6. Common-interest communities are sometimes likened to miniature private governments. (Recall *Norman's* description of condominium owners as "a little democratic sub society.") The analogy holds up somewhat: they hold elections, the elected leaders can pass rules that all are bound to follow; they can assess fines for breaking the rules; they can levy the equivalent of taxes to fund common services. There are, of course, important differences—not least failure to adhere to the principle of one-person-one-vote. But *Pullman* suggests another distinction: could any government officer or entity in the United States do to one of its citizens what Pullman's neighbors did to him? If not, what are the limits on government authority that would prevent such action, and what are the justifications for those limits? Do these justifications carry less force in the context of the enforcement of servitudes by the managers of a common-interest-community?

16. Takings

We now address a final method of resolving incompatible property uses. **Eminent domain** is the inherent power of the state to transfer title of private property into state hands. In the United States, when the government "takes" land in this manner, it must pay the owner "just compensation." This is a constitutional requirement, as the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." This brief constitutional provision encompasses three distinct issues that we will deal with in this chapter (though not in this order): (1) has there been a "taking" of private property? (2) Is the taking for "public use"; and (3) has "just compensation" been provided?

Precedent under the Takings Clause regulates the manner in which the state directly exercises its eminent domain power. As we will see, however, the clause also limits the ability of the state to regulate. Property owners sometimes challenge property regulations as being so onerous that it is as if the state has appropriated property and compensation is therefore due. Much of the Supreme Court's takings caselaw concerns these so-called "regulatory takings."

A. Rationales

The power to take property is recognized (but not granted) by the Constitution and long historical practice, but what justifies it? Simply calling it an attribute of sovereignty does not provide a reason for its use. Property ownership usually encompasses the right to say no. If I want to ship a mobile home across your field, but we don't agree on a price, it's my duty to stay out. I cannot declare your property mine in exchange for a judicially determined measure of "just compensation." What makes the state different?

One traditional explanation concerns the transaction costs of government enterprises. In a normal market, buyers can choose from among competing sellers. If houses in town A are too expensive, you can look for one in town B, and if you are priced out of the market, so be it. The state is often more constrained. Imagine a planned road that will connect two cities. Building the road requires assembling multiple, connected parcels. The number of plausible routes is finite, and increasingly constrained as plans

progress. Owners along the planned route therefore may hold out for higher sale values, knowing the state has few alternatives. The absence of a functioning market depletes the social surplus of the road and may kill the project altogether. Eminent domain enables the government to engage in projects like these without the risk that a single property owner might exercise a veto.[68] Of course private entities sometimes undertake large projects. Why might they succeed despite lacking the eminent domain power? For one argument, *see* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 5 (2006) ("[T]akings for the benefit of private parties are generally unnecessary--even if a private project potentially also has a public benefit--because private parties can avoid the holdout problem using secret buying agents. These undisclosed agents overcome the holdout problem by purchasing property without revealing the identity of the assembler or the nature of the assembly project to existing owners.").

A second question concerns the requirement of compensation. Why do you think it is required? Fairness? Perhaps, but life is unfair. Moreover, we have insurance to protect against life's calamities. Why couldn't we insure against government takings? Might the answer have something to do with the nature of government action? Unlike forces of nature, it is susceptible to outside influence. Can you think of other rationales? For a discussion, *see* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003). If the government did not have a duty to compensate, how would its behavior change?

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[68] And courts sometimes *do* require property owners to take the money and bear an intrusion. For example, private condemnation statutes allow landlocked owners to obtain access to public roads so long as they pay compensation. Likewise, recall that *Boomer* required nuisance plaintiffs to accept a de facto servitude on their land upon payment of permanent damages by the defendant cement plant. Both situations may be described as involving high transaction costs either in the form of bilateral monopoly or problems of coordinating numerous parties.

B. "Public Use"

The Fifth Amendment declares that if private property is taken "for public use" compensation is required. What function does the term "public use" play in the clause? One could read the phrase as descriptive, i.e., as describing situations in which the government takes property via eminent domain (as opposed to taking it via the exercise of other powers, like taxation or punishment for a criminal offense). Under that reading, the only limit to the state's taking authority is its willingness to pay (and the operation of other Constitutional requirements, like Equal Protection, Due Process, or the like). The Supreme Court takes a different view. Its precedent treats the term "for public use" as a *substantive* limitation to the takings power, albeit not a strong one.

Kelo v. City of New London, Conn.
545 U.S. 469 (2005)

Justice STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500

people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process.… Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4–acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final

stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. The NLDC successfully negotiated the purchase of most of the real estate in the 90–acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7–day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of

the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." Next, relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), and *Berman v. Parker,* 348 U.S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use and, second, whether the takings were for "reasonably foreseeable needs." The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass.

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation.

On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.…

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." [*Midkiff,* 467 U.S.] at 244. Indeed, while many state courts in the mid–19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.,* what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society.… Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531 (1906). We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." The public use underlying the taking was unequivocally affirmed:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." Reaffirming *Berman's* deferential

approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use.…

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.… For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive

suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question…. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.… The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent.… The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.…

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.…

Justice KENNEDY, concurring.

…. This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241

(1984). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.…

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. [Justice Kennedy went on to observe that the trial court made findings that supported the conclusion "that benefiting Pfizer was not 'the primary motivation or effect of this development plan'".] ….This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause.…

…. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.…

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

…. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.,* given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does,

that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.…

….Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e.g., Berman v. Parker,* 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).…

…. We are guided by two precedents about the taking of real property by eminent domain. In *Berman,* we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by

employing all means necessary and appropriate for the purpose," including eminent domain. Mr. Berman's department store was not itself blighted. Having approved of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot.

In *Midkiff,* we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title.…

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.…

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134–135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a " '[P]ublic

[P]urpose' " Clause (or perhaps the "Diverse and Always Evolving Needs of Society" Clause (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational." This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'CONNOR powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.…

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.…

…. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman,* cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of

these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.…

Notes and Questions

7. If the state pays compensation and bears the political costs, what is wrong with taking from A and giving to B? Suppose the state wants land to be used for a particular purpose. Is it sensible to require the state to conduct operations or might turning them over to private actors enhance efficiency? Or is a "public use" requirement more about policing local political processes, deterring corruption or special interest capture? If so, is this an efficient mechanism?

8. *Kelo* provoked a strong public reaction and a flurry of state legislative activity designed to control abuses of eminent domain. By 2009, 43 states had enacted eminent domain restrictions. Does this mean that democracy works? Are there advantages to the Supreme Court's setting limits on eminent domain? *Compare* Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561, 565 (2008) ("[P]ost-*Kelo* legislation symbolizes the government's effort to remedy the breach of the public's trust caused by *Kelo* regardless of one's substantive view of those legislative measures. Furthermore, the robust post-*Kelo* legislative response is a testament to the strength of one of the core principles of our government—federalism."), *with* Ilya Somin, *The*

Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100, 2105 (2009) ("Only seven states that had recently engaged in significant numbers of economic development and blight condemnations have enacted post-Kelo legislative reforms with any real teeth."). Can one's answer be independent of one's prior views on the legitimate uses of eminent domain?

9. As Justice Thomas's dissent notes, one criticism of the eminent domain power has been that it has been used in either a discriminatory or racially disproportionate manner. Which way does this consideration cut in *Kelo*? After all, the practice of labeling of minority communities as "blighted" is a matter of historical record. Might the Court's approval of eminent domain's use on *Kelo*'s facts improve the politics of eminent domain law by making clear that anyone could be on the receiving end of a condemnation? And to the extent the problem with eminent domain is discriminatory application, why isn't the Constitution's Equal Protection Clause a preferable safeguard? Or does the history cited by Justice Thomas answer that question?

10. Most of the affected homeowners in New London negotiated a purchase price with the New London Development Corporation (NLDC). For her part, Kelo reportedly turned down a purchase offer that would have netted her a $22,000 profit on her home. The decision to litigate, while not letting her keep her property, did lead to a higher purchase price. The public outcry in the wake of the *Kelo* ruling led to favorable settlements for the holdout landowners. For example,

> Kelo agreed in June 2006 to sell for $442,000 ($392,000 plus a pay-off of her $50,000 mortgage); not too bad for a place she had purchased in August 1997 for $53,500, and NLDC had appraised for condemnation at $123,000 in November 2000. She only sold the lot. Avner Gregory, the same preservationist who had refurbished the house after moving it from its original location to the site where Kelo found it, relocated the house a second time to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as "The Kelo House."

George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the* Kelo *Case*, 42 CONN. L. REV. 925, 954-55 (2010) (footnotes omitted). In 2009 Pfizer announced it would leave New London to cut costs, taking its jobs to its facility in Groton, Connecticut. Patrick McGeehan, "Pfizer to Leave City That Won Land-Use Case," *New York Times*, p. A1 (November 13, 2009), available at http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html?_r=0.

C. Eminent Domain Operations

Local governments carry out condemnations in a variety of ways. There is no standard eminent domain regime. Some states require some sort of pre-condemnation activity (e.g., formal findings that a condemnation is necessary or efforts to negotiate with the landowner); others do not. Some jurisdictions require the condemning authority to initiate a judicial action; others allow an administrative procedure, giving the landowner the right to challenge the taking in court. Some states provide for expedited procedures, "quick take" provisions, either as an independent cause of action or by motion within an ongoing proceeding. 13-79F Powell on Real Property § 79F.06.

In Illinois, for example, the condemning authority files an eminent domain action in the circuit court for the county of the property. The complaint details: "(i) the complainant's authority in the premises, (ii) the purpose for which the property is sought to be taken or damaged, (iii) a description of the property, and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known." 735 Ill. Comp. Stat. Ann. 30/10-5-10. Either the condemning authority or the property owner may request a jury trial. Expedited procedures (called a "quick take" procedure) are also available upon motion. *Id.* § 30/20-5-5.

D. Just Compensation

What is just compensation? The standard approach is fair market value. *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-60 ("[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale."). This amount may include costs directly

attributable to the condemnation. *See id.* § 735 Ill. Comp. Stat. Ann. 30/10-5-62 (providing for compensation of reasonable relocation costs).

Evidentiary difficulties aside, the fair market value metric potentially understates the value of the home from the perspective of the property owner in at least three ways. First, fair market value ignores subjective values. A property owner often values it more than the market (as reflected by the fact that it has not yet been sold for the market price). If the property is a home, it may have high sentimental value (e.g., if it is where one raised children) or offer idiosyncratic amenities that cannot be easily duplicated but are not reflected in market price (e.g., proximity to friends, work, etc.). Second, eminent domain is a forced transaction. The landowner may experience the transaction as a violation of personal autonomy. Third, to the extent the project produces a surplus, the displaced landowner does not get a share. In other words, suppose five lots are each individually worth $10,000, but they can be assembled into a park that confers $100,000 of benefits on the surrounding area. The owners of the condemned lots do not share in the surplus, they still receive only $10,000. *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-60 ("In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and any depreciation in value proximately caused by the improvement").

What happens when only part of a parcel is taken? The general approach is to allow compensation for the effect of the severance on the land retained by the condemnee. Imagine O owns Blackacre and Whiteacre as one parcel with a combined value of $100,000. If Blackacre is taken for a fair market value of $50,000, and the severance leaves Whiteacre worth only $40,000, O is entitled to compensation for the lost $10,000. Note, however, that if O owned *only* Whiteacre, and its value was reduced by $10,000 due to the next-door condemnation of Blackacre, O would receive nothing. 13-79F POWELL ON REAL PROPERTY § 79F.04.

What if a partial taking *enhances* the value of the remainder? *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-55 ("In assessing damages or compensation for any taking or property acquisition under this Act, due consideration shall be given to any special benefit that will result to the property owner from any public improvement to be erected on the property."); Illinois State Toll Highway Auth. v. Am. Nat. Bank &

Trust Co. of Chicago, 642 N.E.2d 1249, 1255 (Ill. 1994) ("[S]pecial benefits are any benefits to the property that enhance its market value and are not conjectural or speculative.").

This mix of rules leads to results that may strike you as unfair. Imagine a government project to build a subway station, and three affected landowners, Alice, Bob, and Charles. Alice's parcel is condemned in its entirety; half of Bob's land is condemned; and Charles's land is untouched. Suppose further that the transit station leads to a doubling in the property values of the surrounding land. On these facts, Alice receives the pre-project value of her land. Bob receives nothing (assuming the appreciation of his retained half matches the pre-project value of the condemned portion); and Charles receives a windfall. Is there any way to avoid these difficulties?

Holders of future interests are also entitled to compensation. *See generally* 2-5 NICHOLS ON EMINENT DOMAIN § 5.02; *see, e.g.*, Cal. Code Civ. Proc. § 1265.420 ("Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following: (a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman; (b) The compensation to be used to purchase comparable property to be held subject to the life tenancy; (c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy; (d) Such other arrangement as will be equitable under the circumstances.").

E. Physical Occupations

Loretto v. Teleprompter Manhattan CATV Corp.

458 U.S. 419 (1982)

Justice MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable

television company to install its cable facilities upon his property. In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing cable television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

> "On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street."

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants. Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—*i.e.*, one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable." The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking."

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief. Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. The Appellate Division affirmed without opinion.

On appeal, the Court of Appeals, over dissent, upheld the statute.… The court … ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when

measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the $1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction.

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co. v. New York City* the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the

interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e.g., Pumpelly, supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot."

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

In *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets.…

Similarly, in *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.…

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.…

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As Part II–A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming

pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means

to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[17]…

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[19]

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[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.…

[19] If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental"; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.[20]…

Justice BLACKMUN, with whom Justice BRENNAN and Justice WHITE join, dissenting.

…. In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." Sax, Takings and the Police Power, 74 Yale L.J. 36, 37 1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided.…

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the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. Appellant, who resides in her building, further testified that the cable installation is "ugly." Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

[20] In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4″ x 4″ x 4″ metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred.…

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, and jurisprudentially sound. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights."

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings.…

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "permanent physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. Yet an examination of each of the

three words in the Court's "permanent physical occupation" formula illustrates that the newly-created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship. If § 828 authorizes a "permanent" occupation, and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." But surely this factor cannot be determinative, since the Court simultaneously recognizes that temporary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking. Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been "physically" touched.…

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "temporary" physical invasions of considerable economic magnitude. Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula."

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to ... provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. A landlord's dispositional rights are affected no more adversely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why

the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property. Appellant freely admitted that she would have had no other use for the cable-occupied space, were Teleprompter's equipment not on her building.

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable. This argument has two flaws. First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space. Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests.…

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination. Like Justice Black, I believe that "the solution of the problems precipitated by ... technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States v. Causby*, 328 U.S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

Notes and Questions

11. Remember Michael Gruen of *Gruen v. Gruen* fame? He became a lawyer and argued the case for Loretto.

12. Loretto's victory at the Supreme Court amounted to little. The Commission on Cable Television decided that $1 sufficed as compensation because cable television access enhances property values, and the Court of Appeals held it was permissible for the compensation to be set by the commission, subject to later judicial review, rather than a court. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434 (N.Y. 1983).

13. **Categorical Rules.** One debate between the majority and the dissent concerns the merits of rules versus standards. As we will discuss in greater detail, the Court had developed a balancing test for determining whether government regulation goes "too far" and becomes a taking. The question thus arose whether that balancing test applies to *all* takings inquiries. Even if *Loretto* had gone the dissent's way, it still would be the case that physical invasions would generally be takings. The dispute was over whether courts have the discretion to treat certain minor intrusions sufficiently *de minimis* as not to require compensation. The Court rejected this approach, clarifying that any permanent physical occupation by or authorized by the government is a taking as a categorical, per se, matter.

14. A consequence of the rule is that certain minor intrusions merit compensation, while more costly regulations may pass muster under the balancing test. That problem aside, Justice Blackmun claims that the per se occupations rule lacks the compensating benefit of ease of application, pointing to the difficulty of distinguishing permanent from temporary occupations. Do you agree?

15. Another point of contention between the majority and dissent is whether it is sensible to allow the state to require by regulation the installation of cable (or other) facilities, but prohibit it from directly authorizing their installation. At some point, might regulation become so extensive that it constitutes a *de facto* occupation? *Yee v. City of Escondido*, 503 U.S. 519 (1992), rejects the argument

that rent control laws fall under *Loretto*'s categorical rule, concluding that the decision of the landlord to lease the premises negates the claim of any forced physical occupation.

16. **Personal property.** How does *Loretto* apply to personal property? *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015), addressed a challenge to a Department of Agriculture program intended to promote stability in the raisin market. The program issued marketing orders that required raisin farmers to set aside a certain percentage of their annual crop. The government took title to the reserved raisins and disposed of them in a variety of ways, including sales in non-competitive markets, returning any net profits to the growers. The Court held this to be a taking under *Loretto*.

> Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them, *Loretto*, 458 U.S., at 435 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," id., at 431 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the [farmers] turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Id., at 432.

135 S. Ct. at 2428. As in *Loretto*, the Court rejected the argument that the reserve requirement was permissible given that the government could achieve the same end by simply prohibiting the farmers from selling a portion of their crop.

> [T]hat distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical

> taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends.

Id. The Court likewise determined that the farmers' retention of a contingent monetary interest in the sale of the reserved raisins did not negate the physical taking. Dissenting, Justice Sotomayor argued that *Loretto*'s *per se* rule applies only when *all* property rights have been taken, and the farmers' contingent interest negates use of the per se rule.

F. Regulatory Takings

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with

certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land-a very valuable estate-and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 Atl. 820. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to the left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the

natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go-and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree-and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.…

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.
Decree reversed.

Mr. Justice BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent 'as to cause the * * * subsidence of * * * any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.' Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character

and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatended is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious-as it may because of further change in local or social conditions-the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. Welch v. Swasey, 214 U. S. 91. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargine cases settled that. Mugler v. Kansas, 123 U. S. 623, 668, 669; Powell v. Pennsylvania, 127 U. S. 678, 682. See also Hadacheck v. Los Angeles, 239 U. S. 394; Pierce Oil Corporation v. City of Hope, 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the

limiting height; but it is settled that the state need not resort to that power. If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the state's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. But even if the particular facts are to govern, the statute should, in my opinion be upheld in this case. For the defendant has failed to adduce any evidence from which it appears that to restrict its mining operations was an unreasonable exercise of the police power. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the Legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power.… Nor can existing contracts between private individuals preclude exercise of the police power.… The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to

rest upon the assumption that in order to justify such exercise of the police power there must be 'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects; or upon adjoining owners, as by party wall. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Notes and Questions

17. **Nuisances.** Justice Brandeis's dissent objects that the Kohler Act simply prohibits a "noxious use." A number of prior precedents, Brandeis argues, established that the state may enjoin such uses even if doing so "deprives the owner of the only use to which the property can then be profitably put." In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), for example, the Court found no taking where an ordinance prohibiting brickyards largely destroyed the value of an existing facility. The land was alleged to be worth $800,000 as a brickyard and $60,000 otherwise. Nonetheless, the Court deemed it within the state's police power to declare previously lawful activities to be nuisances and enjoin them. *Id.* at 410 ("[T]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community."). The principle, that regulating nuisances is never a taking, has been referred to as a second categorical rule in takings law. As we will see below (in our discussion of the *Lucas* case), the actual doctrine is not so simple.

18. **Diminution of value.** How far is too far depends on how one defines the property interest at stake. For Holmes, the Kohler Act "purports to abolish … an estate in land," by preventing the exercise of the mining company's

bargained-for rights. On this logic, the diminution of value is total. Brandeis, by contrast, objected that "[t]he rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole." Analyzing the takings question by looking at the property as a composition of discrete "estates," rather than as an integrated whole has been called "**conceptual severance**." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) ("[T]his strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.").

The issue is also sometimes referred to as the "**denominator problem**." Suppose I have a parcel of land that I could sell for $200,000, but I could also sell the mining rights alone for $100,000. Suppose further that the state enacts a ban on mining, which reduces the market value of the land to $100,000. How do we evaluate the diminution of value? Is it 50% ($100,000/$200,000)? Or is the denominator the mining rights alone, making the diminution 100% ($100,000/$100,000)? If we were to permit conceptual severance, how should the relevant estates be identified? In *Pennsylvania Coal*, Holmes noted that the mining interest at issue was an established one under state law. Is that a satisfactory basis? Can state law define federal rights in this way? What if an anti-regulatory state legislature took advantage of its time in power to create broad new "estates" (e.g., one for oil drilling, one for factory smoke, etc.)?

19. **Support estates revisited.** On this question, note that the Court revisited the takings implications of Pennsylvania statutes designed to protect surface structures from mining. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), upheld a statute whose implementing regulations required coal companies to leave approximately 50% of coal in the ground beneath protected buildings. The Court did so notwithstanding Pennsylvania law's "unique" approach of treating the "support estate" as a discrete interest in land. By a 5-4 vote, the Court concluded that the interest is part and parcel of other mining interests (thus expanding the denominator at issue in considering

diminution of value). "Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process." *Id.* at 501.

This result may seem at odds with *Pennsylvania Coal*. The dissent certainly thought so. The majority read *Pennsylvania Coal* narrowly as reaching only a specific application of the Kohler Act to bargained-for rights to mine under a particular house. The rest, pertaining to the general applicability of the Kohler Act was described as an "uncharacteristically" advisory opinion on Justice Holmes's part. *Id.* at 484. In any case, the majority viewed the Subsidence Act as different than the earlier law in two key respects. First, the Court read the history of the statute as disclosing a public purpose. "None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion are present here." *Id.* at 486. That some private parties *did* benefit was seen as incidental. Second, as noted above, the Court viewed the challengers as retaining valuable mining rights. Unlike "the Kohler Act[, which] made mining of "certain coal" commercially impracticable," the Subsidence Act was not shown to have worked a similar harm, at least for purposes of a facial challenge.

20. **Baseline Games.** Is Justice Brandeis's distinction between "confer[ring] benefits on property owners" and "protect[ing] the public from detriment and danger" persuasive? What Justice Brandeis views as prevention of a harm—preventing the collapse of surface structures overlying coal formations owned by mining interests—Justice Holmes views as conferral of an unbargained-for benefit—a support estate that was willingly bargained away. Is one of them wrong? What is the baseline against which the economic effects of a regulation ought to be evaluated?

21. **"Reciprocity of advantage."** Reciprocity of advantage refers to a sort of implicit compensation of regulation. Suppose you own land in a part of town zoned for residential use. You may not build a factory on your property, but neither can your neighbors. Your property's residential value is enhanced

accordingly. "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491. The principle is often invoked to argue that regulations should not "single out" anyone for disproportionate burdens. That does not mean that everything comes out even. "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens … in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." *Id.* at 491 n.21.

Penn Cent. Transp. Co. v. City of New York

438 U.S. 104 (1978)

Mr. Justice BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed

properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."

New York City, responding to similar concerns and acting pursuant to a New York State enabling Act, adopted its Landmarks Preservation Law in 1965. See N.Y.C. Admin. Code, ch. 8–A, § 205–1.0 *et seq.* (1976). The city acted from the conviction that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205–1.0(a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g.*, fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimul [ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." § 205–1.0(b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,[6] but rather by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions

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[6] The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, The Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329, 330–331, 339–340 (1971).

on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," situated on a particular "landmark site," or will designate an area to be a "historic district." After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated, and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's falling into a state of irremediable disrepair. Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return,"—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption, to ensure that designation does not cause economic hardship.

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f [or]m a series extending to the lot occupied by the

landmark building [, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74–79 (emphasis deleted). In addition, the 1969 amendment permits, in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel.

B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed. The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan.… At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the "city tax block" it occupies a "landmark site." The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a

multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised, called for tearing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.[69]

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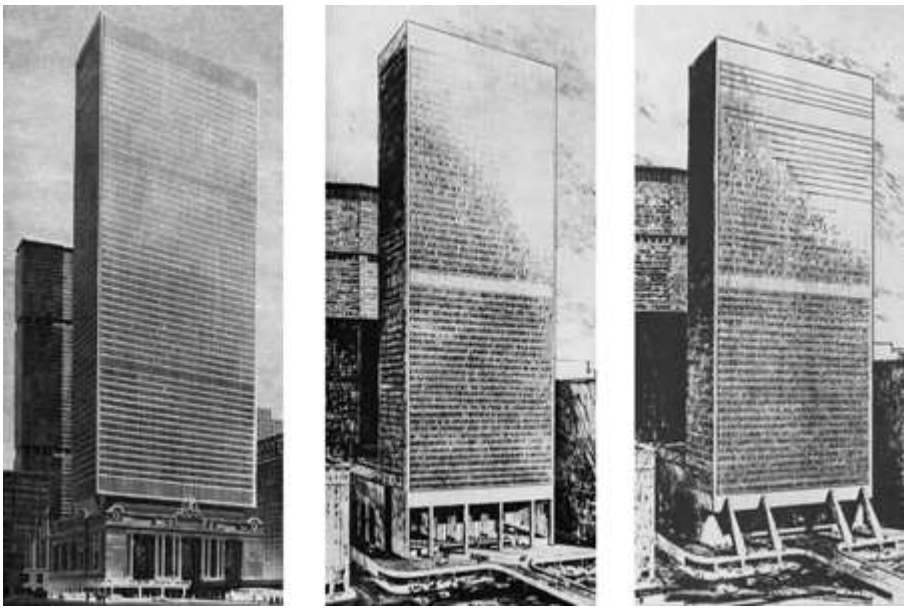
[69] Reproductions of the proposals appear below:



The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan Am Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

> "[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.
>
> "Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it."

(From: http://www.architakes.com/?p=13036).

Appellants did not seek judicial review of the denial of either certificate.… Further, appellants did not avail themselves of the opportunity to develop and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking." [The New York Supreme Court, Appellate Division, reversed, and this ruling was affirmed by the state Court of Appeals.]

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

A

…. The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic

injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, *e. g., United States v. Willow River Power Co.,* 324 U.S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property

interests. Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox,* 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey,* 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene,* 276 U.S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public."

Again, *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses.…

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but

expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Court held that the statute was invalid as effecting a "taking" without just compensation.

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby,* 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.,* 328 U.S., at 262–263, n. 7.

B

…. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra.* They urge that the Landmarks Law has deprived

them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey, supra,* but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead,* 369 U.S. 590 (1962), and the lateral, see *Gorieb v. Fox,* 274 U.S. 603 development of particular parcels.[27] "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2 % diminution in value), and that the "taking"

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[27] These cases dispose of any contention that might be based on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i. e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

issue in these contexts is resolved by focusing on the uses the regulations permit.… [B]ut appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the

context of landmark regulation than in the context of classic zoning or indeed in any other context.

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.[30] Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

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[30] Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual." Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 50 (1964). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid*, and *Goldblatt*.

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States v. Causby*, in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, or a safety regulation prohibiting excavations below a certain level.

C

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the

interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

…[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material and character with [the Terminal]." Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's

transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.
Affirmed.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE and Mr. Justice STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the

words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).…

I

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of

appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause—"property," "taken," and "just compensation."

A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U.S. 373 (1945).…

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state. The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.

B

….[A]n examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.…

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin v. Benson*, 222 U.S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner's property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others' land without compensating him.…

Appellees are not prohibiting a nuisance. The record is clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are

seeking to preserve what they believe to be an outstanding example of beaux-arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States v. Causby*, 328 U.S. 256, 262 (1946), and must compensate the owner for his loss. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

2

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed.…

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property.…

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S., at 326.…

Appellees contend that, even if they have "taken" appellants' property, TDR's constitute "just compensation." Appellants, of course, argue that TDR's are highly imperfect compensation. Because the lower courts held that there was no "taking," they did not have to reach the question of whether or not just compensation has already been awarded.…

Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken."

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416. The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

Notes and Questions

22. **The *Penn Central* test**. The *Penn Central* factors are generally listed as an inquiry into "[1] the regulation's economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). The first factor concerns diminution of value, an issue raised by *Pennsylvania Coal*. As you see, the Court resisted the conceptual severance claim, rejecting the notion that "air rights" were something to be evaluated independently of the property as a whole.

23. **Distinct Investment-Backed Expectations**. The meaning of the second factor as something distinct from the first is a matter of debate. Unhelpfully, the Court later described the question as being one of "reasonable" investment-backed expectations in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The idea is frequently credited to an article by Frank Michelman, who argued that the principle more accurately captures what may rise to the level of a taking than simple diminution of value:

> The customary labels—magnitude of the harm test, or diminution of value test—obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.
>
> The nature and relevance of this inquiry may emerge more clearly if we notice one other familiar line of doctrine … when a new zoning scheme is instituted, for "established" uses which would be violations were the scheme applied with full retrospective vigor. The standard practice of granting dispensations for such "nonconforming uses" seems to imply an understanding that simply to ban them without payment of compensation, thus seriously reducing the property's market value, would be wrong and perhaps unconstitutional. But a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective uses. What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The

> answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 HARV. L. REV. 1165, 1232-34 (1967) (footnotes omitted); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) ("A 'reasonable investment-backed expectation' must be more than a "unilateral expectation or an abstract need." (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). As the excerpted text notes, the principle of nonconforming uses in zoning law reflects the importance of property owner expectations in uses that preexist the arrival of new zoning rules.

Michelman's argument, and some precedent, suggests that investment-backed expectations are less likely to be found where the property in question is purchased against a backdrop of regulation. Does that mean that takings challenges are doomed whenever the property is acquired after the offending regulations are in place? In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held in the negative. Ever straining for eloquence, Justice Kennedy concluded that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle.… Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 627.

24. **Character of the Governmental Action.** Here, too, the Court is less than clear, as its example of how this factor might be weighed in the property owner's favor, a permanent physical invasion, was later held to be a taking as a categorical matter in *Loretto*. That sort of invasion is juxtaposed against an interference "from some public program adjusting the benefits and burdens of

economic life to promote the common good," suggesting room for judgment when a program falls short (e.g., when someone is unfairly singled out for the burdens, whether there is a reciprocity of advantage, etc.). *See, e.g.*, Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 664 (2012) ("Several lower courts have picked up on the idea that the character factor is designed to measure the distributional impact of the challenged governmental action. These courts favor broad-based laws that offer reciprocity of advantage and find suspect laws that single out particular owners for severe burdens while conferring benefits on others.").

25. **Takings and Due Process inquiries distinguished.** The question whether a regulation amounts to a taking is distinct from the issue of whether it violates a liberty or property interest under the Due Process Clause. The latter asks whether the government may impose the challenged regulation at all. The former identifies a subset of cases in which the government regulation is such an intrusion as to require compensation.

    In takings cases, you may encounter citations to *Agins v. City of Tiburon* for the proposition that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. 255, 260 (1980). Does this mean that compensation must be paid if the state cannot meet a higher burden than the one required for regulation under the Due Process Clause? No. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-42 (2005), the Court observed the phrase was "regrettably imprecise" and clarified that "it has no proper place in our takings jurisprudence."

26. Several articles report that the government generally prevails under the Penn Central test in the lower courts. F. Patrick Hubbard et al., Do Owners Have A Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company? 14 DUKE ENVTL. L. & POL'Y F. 121 (2003); Basil H. Mattingly, Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence, 36 WILLAMETTE L. REV. 695 (2000). One such study argues that calling the factors a balancing test misstates what is actually going on.

> The analysis reveals that the Courts of Appeals for the First, Ninth, and Federal Circuits, and the trial courts within the Ninth Circuit, all decided *Penn Central* cases utilizing fewer than three factors in a majority of the cases reaching the merits: on average, the circuit courts of appeals utilized three factors only slightly more than one-third of the time (37.8%). Complementing these findings is data on how often the courts actually applied *Penn Central* as a balancing test. The data shows that applying *Penn Central* as a balancing test is statistically rare. Averaging the cases that reached the merits of a takings claim, the courts applied *Penn* as a balancing test less than 7% of the time. As an average percentage of cases applying all three *Penn Central* factors (cases that themselves are less than half of all cases reaching the merits), courts applied it as a balancing test less than 14% of the time. Together this data indicates that the predominant practice of the federal courts is not to use *Penn Central* as a balancing test.

Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 FED. CIRCUIT B.J. 677, 704 (2013). Pomeroy argues that regulatory takings claims prevail only when the court concludes that the regulation looks like an act that is normally a taking as a categorical matter. *Id.* at 696 ("It seems that instead of balancing factual situations, the courts of appeals have found regulatory takings under *Penn Central* only when a claim falls barely short being a taking under one of the categorical rules."). We have already discussed one such categorical rule in *Loretto*. We now turn to the second.

G. "Wipeouts"

Lucas v. South Carolina Coastal Council

505 U.S. 1003 (1992)

Justice SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the

Beachfront Management Act, S.C.Code Ann. § 48–39–250 *et seq.* (Supp.1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amdt. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. § 1451 *et seq.,* the legislature enacted a Coastal Zone Management Act of its own. See S.C.Code Ann. § 48–39–10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48–39–10(J)) to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48–39–130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the

landward-most "point[s] of erosion ... during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. S.C.Code Ann. § 48–39–280(A)(2) (Supp.1988). In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48–39–290(A). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless." The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50.

[The Supreme Court of South Carolina reversed, concluding that regulation "to prevent serious public harm" is not a taking regardless no matter the effect on property values.].…

III

A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 12 Wall. 457, 551 (1871), or the

functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago,* 99 U.S. 635 (1879). Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70–odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962)). We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking even though the facilities occupied at most only 1 ½ cubic feet of the landlords' property.

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner*

economically viable use of his land." *Agins, supra,* 447 U.S., at 260 (citations omitted) (emphasis added).[7]

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego,* 450 U.S., at 652 (dissenting opinion). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.,* 438 U.S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on

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[7] Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City,* 42 N.Y.2d 324, 333–334, 366 N.E.2d 1271, 1276–1277 (1977), aff'd, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497–502 (1987) (nearly identical law held not to effect a taking); see also *id.,* at 515–520 (REHNQUIST, C.J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S.Cal.L.Rev. 561, 566–569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.,* whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.,* at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.…

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[8]

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.[9] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements,

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[8] Justice STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.…

[9] This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits that the finding was erroneous.

that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion.… [and] within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas,* 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene,* 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead,* 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.…

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve. Whether one or

the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.[12]

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent

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[12] In Justice BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard,* 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title. We believe similar treatment must be accorded confiscatory regulations, *i.e.,* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.,* Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e.g., id.,* §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g., id.,* §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.,* § 827, Comment *g.* So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas.* As we have said, a "State, by *ipse dixit,* may not transform private property into public property without compensation...." Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.…

Justice KENNEDY, concurring in the judgment.

…. In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property.…

Justice BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case.…

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.…

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." The General Assembly also found that "development unwisely has been sited too close to the [beach/dune]

system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property."

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 491–492 (1987) (internal quotation marks omitted). The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner.…

The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.…

Clearly, the Court was eager to decide this case.…

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle.

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced" if all economic value has been lost.

If one fact about the Court's takings jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." *Agins,* 447 U.S., at 261. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 131 (1978).…

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use. Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public.…

Ultimately even the Court cannot embrace the full implications of its *per se* rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State

prohibits uses that would not be permitted under "background principles of nuisance and property law."[15]

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance. The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety.…

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation. The Court, however, fails to explain how its proposed common-law alternative escapes the same trap.

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction" is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be.…

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[15] Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, The Boundaries of Nuisance, 65 L.Q.Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 999–1000 (1966); J. Stephen, A General View of the Criminal Law of England 105–107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

The Court's decision in *Keystone Bituminous Coal* illustrates this principle perfectly. In *Keystone,* the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 U.S., at 501. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. The dissent, however, characterized the support estate as a distinct property interest that was wholly destroyed. The Court could agree on no "value-free basis" to resolve this dispute.

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." Once one abandons the level of generality of *sic utere tuo ut alienum non laedas,* one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the " 'long recognized' " "understandings of our citizens." These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." It is not clear from the Court's opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.…

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners.…

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Takings Clause indicates that the Clause was limited by the common-law nuisance doctrine.…

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new takings doctrine. Instead, the Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not.…
I dissent.

Justice STEVENS, dissenting.

…. In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.…

Although in dicta we have sometimes recited that a law "effects a taking if [it] ... denies an owner economically viable use of his land," *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), our *rulings* have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking.…

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S.C. Acts 634, § 3. Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors

(who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in *Mugler,* the brickyard in *Hadacheck,* and the gravel pit in *Goldblatt* all could be put to "other uses" and that, therefore, those cases did not involve total regulatory takings.[3]

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single- family homes would render the investor's property interest "valueless." In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing.

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[3] Of course, the same could easily be said in this case: Lucas may put his land to "other uses"—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "*economically* beneficial or productive use" (emphasis added) of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are developmental uses.

First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not greatly hinder important governmental functions—but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner ... without economically beneficial ... use ... carry with them a heightened risk that private property is being pressed into some form of public service." … I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: A regulation may single out a property owner without depriving him of all of his property; and it may deprive him of all of his property without singling him out. What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U.S. Reports. No sooner does the Court state

that "total regulatory takings must be compensated," than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." The Court thus rejects the basic holding in *Mugler v. Kansas,* 123 U.S. 623 (1887). There we held that a state-wide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted.…

Under our reasoning in *Mugler,* a State's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon,* 260 U.S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois,* 94 U.S. 113 (1877).…

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered

species, the importance of wetlands, and the vulnerability of coastal, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance.…

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.…

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy.…

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State.… Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, and what is equally significant, from repairing erosion control devices, such as seawalls.… In addition, in some situations, owners of developed land were required to "renouris[h] the beach ... on a yearly basis with an amount ... of sand ... not ... less than one and one-half times the yearly volume of sand lost due to erosion." In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike. This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their

seawalls to deteriorate effects a taking. The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.…

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.…

Statement of Justice SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that … the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.…

Notes and Questions

27. For some before-and-after photos of the Lucas lot, visit http://www.dartmouth.edu/~wfischel/lucasupdate.html. Writing about *Lucas*, Carol Rose observes that much of what made the case seem unfair to the reviewing courts—the "singling out" of Lucas's lot—was a byproduct of an effort to limit political opposition to the state's coastal preservation program by curtailing its regulatory reach. It also limited the ability of the regulations to combat the problems of development. Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea* at 24, in ENVIRONMENTAL STORIES (Richard J. Lazarus and Oliver A. Houck, eds.,

Foundation Press, 2005), *available at* http://ssrn.com/abstract=706637. Bad optics notwithstanding, Rose notes that the impacts of development do not accumulate in a linear manner. It may very well make sense to impose restrictions after a period of unchecked growth.

…Environmental resources typically have some threshold below which use is not harmful, but beyond which marginal costs rise not just additively but exponentially. Bodies of water, for example, can tolerate some organic materials, but over a threshold, each increment of additional waste is not just additively but exponentially more damaging to wildlife, vegetation, and water quality. The smoke from an old-fashioned house furnace or two will dissipate without damage, but if you burn enough, you run the risk of a killer fog. Beachfront management is another clear example of this pattern of exponentially rising costs. A single revetment or seawall would have had little impact on South Carolina's beaches or their ability to replenish themselves; what threatened to become devastating was the accumulation of ever more armored structures ….

That is why a conventional notion of equality is inadequate with respect to environmental uses, including land uses. If early uses are relatively harmless, it would be pointless and overly intrusive to try to regulate them. But something has to be done when later uses slice far enough out on the salami. At that later point, it can be an invitation to environmental disaster to look around at pre-existing uses, and to say that new users should all receive the same old lax treatment, as Scalia suggested in Lucas. (*Id.* at 38.)

28. What if someone "comes to" the regulation by purchasing a property *after* the objected-to regulation has been imposed. Does that preclude a takings challenge? As noted previously, the Court held that takings claims remain available lest the state "put an expiration date on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

29. **Can judges take?** On the question of nuisance definition, what if the state actor declaring/redefining property interests is a court? In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, a four-Justice plurality opinion

would have recognized judicial takings as a viable claim (though in the case at hand it would have found no taking). 560 U.S. 702, 715 (2010) (plurality) ("[T]he Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking."). But don't judges adjust the contours of property law all the time? How could this basic function of the courts continue if challengeable as a taking? Some of these issues were taken up in the concurrences in *Stop the Beach* and the (extensive) academic commentary that followed.

30. **"Inverse condemnation" procedures.** In regulatory takings cases, the government typically denies that a taking has occurred, so there is no condemnation proceeding. Instead, the property owner brings suit seeking relief. The Tucker Act provides an avenue for federal claimants. The statute waives United States sovereign immunity for claims founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. 28 U.S.C. § 1491(a)(1). The "Little Tucker Act," § 1346(a)(2), establishes concurrent jurisdiction in the district courts for claims of less than $10,000. If a state government is the offending regulator, the property owner may look to available state remedies, but may also proceed under the federal civil rights statute. 42 U.S.C. § 1983; *see, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (holding that inverse condemnation claim under § 1983 could be submitted to a jury).

31. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), held that compensation is required for temporary takings. This opened the door to the argument that regulations temporarily suspending certain land uses are takings under the *Lucas* categorical rule. The Court addressed the claim in the following case.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

535 U.S. 302 (2002)

Justice STEVENS delivered the opinion of the Court.

The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of

property requiring compensation under the Takings Clause of the United States Constitution. This case actually involves two moratoria ordered by respondent Tahoe Regional Planning Agency (TRPA) to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth. The first, Ordinance 81–5, was effective from August 24, 1981, until August 26, 1983, whereas the second more restrictive Resolution 83–21 was in effect from August 27, 1983, until April 25, 1984. As a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months. Although the question we decide relates only to that 32–month period, a brief description of the events leading up to the moratoria and a comment on the two permanent plans that TRPA adopted thereafter will clarify the narrow scope of our holding.

I

The relevant facts are undisputed. The Court of Appeals, while reversing the District Court on a question of law, accepted all of its findings of fact, and no party challenges those findings. All agree that Lake Tahoe is "uniquely beautiful," 34 F.Supp.2d 1226, 1230 (D.Nev.1999), that President Clinton was right to call it a " 'national treasure that must be protected and preserved,' " *ibid.,* and that Mark Twain aptly described the clarity of its waters as " 'not *merely* transparent, but dazzlingly, brilliantly so,' " *ibid.* (emphasis added) (quoting M. Twain, Roughing It 174–175 (1872)).

Lake Tahoe's exceptional clarity is attributed to the absence of algae that obscures the waters of most other lakes. Historically, the lack of nitrogen and phosphorous, which nourish the growth of algae, has ensured the transparency of its waters. Unfortunately, the lake's pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin (Basin) has threatened the " 'noble sheet of blue water' " beloved by Twain and countless others. As the District Court found, "[d]ramatic decreases in clarity first began to be noted in the late 1950's/early 1960's, shortly after development at the lake began in earnest." The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.

The upsurge of development in the area has caused "increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development."…

Given this trend, the District Court predicted that "unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity."

Those areas in the Basin that have steeper slopes produce more runoff; therefore, they are usually considered "high hazard" lands. Moreover, certain areas near streams or wetlands known as "Stream Environment Zones" (SEZs) are especially vulnerable to the impact of development because, in their natural state, they act as filters for much of the debris that runoff carries. Because "[t]he most obvious response to this problem ... is to restrict development around the lake—especially in SEZ lands, as well as in areas already naturally prone to runoff," conservation efforts have focused on controlling growth in these high hazard areas.

In the 1960's, when the problems associated with the burgeoning development began to receive significant attention, jurisdiction over the Basin, which occupies 501 square miles, was shared by the States of California and Nevada, five counties, several municipalities, and the Forest Service of the Federal Government. In 1968, the legislatures of the two States adopted the Tahoe Regional Planning Compact. The compact set goals for the protection and preservation of the lake and created TRPA ….

The 1980 Tahoe Regional Planning Compact (Compact) redefined the structure, functions, and voting procedures of TRPA and directed it to develop regional "environmental threshold carrying capacities"—a term that embraced "standards for air quality, water quality, soil conservation, vegetation preservation and noise."… The Compact also contained a finding by the legislatures of California and Nevada "that in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." Accordingly, for the period prior to the adoption of the final plan ("or until May 1, 1983, whichever is earlier"), the Compact itself prohibited the development of new subdivisions, condominiums, and apartment buildings, and also

prohibited each city and county in the Basin from granting any more permits in 1981, 1982, or 1983 than had been granted in 1978.

During this period TRPA was also working on the development of a regional water quality plan to comply with the Clean Water Act, 33 U.S.C. § 1288 (1994 ed.). [Because it could not meet the Compact's timetables,] "[o]n June 25, 1981, it therefore enacted Ordinance 81–5 imposing the first of the two moratoria on development that petitioners challenge in this proceeding. The ordinance provided that it would become effective on August 24, 1981, and remain in effect pending the adoption of the permanent plan required by the Compact.

The District Court made a detailed analysis of the ordinance, noting that it might even prohibit hiking or picnicking on SEZ lands, but construed it as essentially banning any construction or other activity that involved the removal of vegetation or the creation of land coverage on all SEZ lands, as well as on class 1, 2, and 3 lands in California. Some permits could be obtained for such construction in Nevada if certain findings were made. It is undisputed, however, that Ordinance 81–5 prohibited the construction of any new residences on SEZ lands in either State and on class 1, 2, and 3 lands in California.…

[TRPA later] adopted Resolution 83–21, "which completely suspended all project reviews and approvals, including the acceptance of new proposals," and which remained in effect until a new regional plan was adopted on April 26, 1984. Thus, Resolution 83–21 imposed an 8–month moratorium prohibiting all construction on high hazard lands in either State. In combination, Ordinance 81–5 and Resolution 83–21 effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months. It is these two moratoria that are at issue in this case.…

II

Approximately two months after the adoption of the 1984 plan, petitioners filed parallel actions against TRPA and other defendants in federal courts in Nevada and California that were ultimately consolidated for trial in the District of Nevada. The petitioners include the Tahoe–Sierra Preservation Council, Inc., a nonprofit

membership corporation representing about 2,000 owners of both improved and unimproved parcels of real estate in the Lake Tahoe Basin, and a class of some 400 individual owners of vacant lots located either on SEZ lands or in other parts of districts 1, 2, or 3. Those individuals purchased their properties prior to the effective date of the 1980 Compact primarily for the purpose of constructing "at a time of their choosing" a single-family home "to serve as a permanent, retirement or vacation residence." When they made those purchases, they did so with the understanding that such construction was authorized provided that "they complied with all reasonable requirements for building."

Petitioners' complaints gave rise to protracted litigation that has produced four opinions by the Court of Appeals for the Ninth Circuit and several published District Court opinions. For present purposes, however, we need only describe those courts' disposition of the claim that three actions taken by TRPA—Ordinance 81–5, Resolution 83–21, and the 1984 regional plan—constituted takings of petitioners' property without just compensation. Indeed, the challenge to the 1984 plan is not before us …. Thus, we limit our discussion to the lower courts' disposition of the claims based on the 2–year moratorium (Ordinance 81–5) and the ensuing 8–month moratorium (Resolution 83–21).

The District Court began its constitutional analysis by identifying the distinction between a direct government appropriation of property without just compensation and a government regulation that imposes such a severe restriction on the owner's use of her property that it produces "nearly the same result as a direct appropriation." The court noted that all of the claims in this case "are of the 'regulatory takings' variety."… [The District Court concluded that there was no taking under the *Penn Central* factors.]

The District Court had more difficulty with the "total taking" issue. Although it was satisfied that petitioners' property did retain some value during the moratoria, it found that they had been temporarily deprived of "all economically viable use of their land." The court concluded that those actions therefore constituted "categorical" takings under our decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). It rejected TRPA's response that Ordinance 81–5 and Resolution 83–21 were "reasonable temporary planning moratoria" that should be excluded from *Lucas'*

categorical approach. The court thought it "fairly clear" that such interim actions would not have been viewed as takings prior to our decisions in *Lucas* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987)…. After expressing uncertainty as to whether those cases required a holding that moratoria on development automatically effect takings, the court concluded that TRPA's actions did so, partly because neither the ordinance nor the resolution, even though intended to be temporary from the beginning, contained an express termination date. Accordingly, it ordered TRPA to pay damages to most petitioners for the 32–month period from August 24, 1981, to April 25, 1984, and to those owning class 1, 2, or 3 property in Nevada for the 8–month period from August 27, 1983, to April 25, 1984.

Both parties appealed. TRPA successfully challenged the District Court's takings determination…. Petitioners did not, however, challenge the District Court's findings or conclusions concerning its application of *Penn Central.*… Accordingly, the only question before the court was "whether the rule set forth in *Lucas* applies—that is, whether a categorical taking occurred because Ordinance 81–5 and Resolution 83–21 denied the plaintiffs 'all economically beneficial or productive use of land.' " Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking.

Contrary to the District Court, the Court of Appeals held that because the regulations had only a temporary impact on petitioners' fee interest in the properties, no categorical taking had occurred.…

III

Petitioners make only a facial attack on Ordinance 81–5 and Resolution 83–21. They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence, they "face an uphill battle," *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 495 (1987), that is made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development. Under their proposed rule, there is no need to evaluate

the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction. For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred. Petitioners assert that our opinions in *First English* and *Lucas* have already endorsed their view, and that it is a logical application of the principle that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

We shall first explain why our cases do not support their proposed categorical rule—indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case.…

IV

…. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.… But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, *Block v. Hirsh,* 256 U.S. 135 (1921); that bans certain private uses of a portion of an owner's property, *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); or that forbids the private use of certain airspace, *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. Escondido,* 503 U.S. 519, 523 (1992).

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," *Eastern Enterprises v. Apfel,* 524 U.S. 498, 522 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central,* 438 U.S., at 124.

Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases. Instead, they rely principally on our decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)—a regulatory takings case that, nevertheless, applied a categorical rule—to argue that the *Penn Central* framework is inapplicable here.…

As we noted in *Lucas,* it was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), that gave birth to our regulatory takings jurisprudence. In subsequent opinions we have repeatedly and consistently endorsed Holmes' observation that "if regulation goes too far it will be recognized as a taking."…

In the decades following that decision, we have "generally eschewed" any set formula for determining how far is too far, choosing instead to engage in " 'essentially ad hoc, factual inquiries.' " *Lucas,* 505 U.S., at 1015 (quoting *Penn Central,* 438 U.S., at 124). Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine "a number of factors" rather than a simple "mathematically precise" formula. Justice Brennan's opinion for the Court in *Penn*

Central did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.' "

This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard,* 444 U.S. 51 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox,* 274 U.S. 603 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S., at 498, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus,* 444 U.S., at 65–66.

While the foregoing cases considered whether particular regulations had "gone too far" and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established. In his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621, 636 (1981), Justice Brennan identified that question and explained how he would answer it:

> "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."

Justice Brennan's proposed rule was subsequently endorsed by the Court in *First English,* 482 U.S., at 315, 318, 321. *First English* was certainly a significant decision, and nothing that we say today qualifies its holding. Nonetheless, it is important to recognize that we did not address in that case the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking.

In *First English,* the Court unambiguously and repeatedly characterized the issue to be decided as a "compensation question" or a "remedial question." And the Court's statement of its holding was equally unambiguous: "We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (emphasis added). In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged.…

Similarly, our decision in *Lucas* is not dispositive of the question presented. Although *Lucas* endorsed and applied a categorical rule, it was not the one that petitioners propose. Lucas purchased two residential lots in 1988 for $975,000. These lots were rendered "valueless" by a statute enacted two years later. The trial court found that a taking had occurred and ordered compensation of $1,232,387.50, representing the value of the fee simple estate, plus interest. As the statute read at the time of the trial, it effected a taking that "was unconditional and permanent."…

The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central.*

Certainly, our holding that the permanent "obliteration of the value" of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32–month period has the same legal effect. Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32–month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question. Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7–9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.…

V

Considerations of "fairness and justice" arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of seven different theories. First, even though we have not previously done so, we might now announce a categorical rule that, in the interest of fairness and justice, compensation is required whenever government temporarily deprives an owner of all economically

viable use of her property. Second, we could craft a narrower rule that would cover all temporary land-use restrictions except those "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" which were put to one side in our opinion in *First English*. Third, we could adopt a rule like the one suggested by an *amicus* supporting petitioners that would "allow a short fixed period for deliberations to take place without compensation—say maximum one year—after which the just compensation requirements" would "kick in." Fourth, with the benefit of hindsight, we might characterize the successive actions of TRPA as a "series of rolling moratoria" that were the functional equivalent of a permanent taking. Fifth, were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact. Sixth, apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest. Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis.

As the case comes to us, however, none of the last four theories is available. The "rolling moratoria" theory was presented in the petition for certiorari, but our order granting review did not encompass that issue; the case was tried in the District Court and reviewed in the Court of Appeals on the theory that each of the two moratoria was a separate taking, one for a 2–year period and the other for an 8–month period. And, as we have already noted, recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact. Recovery under a *Penn Central* analysis is also foreclosed both because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it. Nonetheless, each of the three *per se* theories is fairly encompassed within the question that we decided to answer.

With respect to these theories, the ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the

relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," [*First English*,] 482 U.S., at 321, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee. Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon,* "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.…

In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process.… [M]oratoria like Ordinance 81–5 and Resolution 83–21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy.…

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.…

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not

unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim …. We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

[The dissenting opinions of Chief Justice Rehnquist (joined by Justice Scalia and Justice Thomas) and of Justice Thomas (joined by Justice Scalia) are omitted.]

Notes and Questions

32. Oral argument for the planning agency was handled by John Roberts, the current Chief Justice, while in private practice.

33. How do you reconcile *Tahoe* with the fact that holders of future interests and leaseholders may be entitled to compensation when land is condemned? 2-5 NICHOLS ON EMINENT DOMAIN § 5.02.

34. *Tahoe*'s rejection of conceptual severance still left an important question. Even if a court focuses on the "parcel as a whole," it must still define the parcel. What if the claimant owns multiple lots? Do we measure regulatory effects on individual lots or the property owner's aggregate holdings? *See Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (focusing on the extent to which the owner treated distinct parcels as "a single economic unit"). The Supreme Court turned to the issue in its 2016 term.

Murr v. Wisconsin

137 S. Ct. 1933 (2017)

Justice KENNEDY delivered the opinion of the Court.

[Petitioners, the Murrs, owned two adjacent lots, Lot E and Lot F, that were subject to state and local regulations that limited development of lots with less than one acre of suitable land. Neither lot met the size requirement individually. The regulations contained a grandfather clause allowing development of preexisting undersized lots,

but a merger provision prohibited undersized adjacent lots under common ownership from sale or development as separate lots. Lots E and F came under the common ownership of the Murrs in 1995, making them subject to the merger provision. The regulations thus interfered with the Murrs' plan to move a cabin on Lot F and sell Lot E to pay the costs of doing so. They filed a regulatory takings claim. In rejecting it, the Wisconsin Court of Appeals concluded that the relevant parcel for takings analysis was the combination of Lots E and F, refusing to consider the regulations' effect on Lot E individually.]

. . . .

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)).

As commentators have noted, the answer to this question may be outcome determinative. This Court, too, has explained that the question is important to the regulatory takings inquiry. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 644 (1993). . . .

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central,* for example, the Court rejected a challenge to the denial of a permit to build an office tower above

Grand Central Terminal. The Court refused to measure the effect of the denial only against the "air rights" above the terminal . . . .

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state-court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law. . . .

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.

Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course, unquestionable that the law must recognize those legitimate expectations in order to give proper weight to the rights of owners and the right of the State to pass reasonable laws and regulations. . . .

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. . . .

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. . . .

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances.

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today.

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the

Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel. . . .

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas,* as they have not been deprived of all economically beneficial use of their property. They can use the property for residential purposes, including an enhanced, larger residential improvement. The property has not lost all economic value, as its value has decreased by less than 10 percent.

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central.* The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a

reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land. . . .

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

Chief Justice ROBERTS, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Murr family owns two adjacent lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of buildable land. Wis. Admin. Code § NR 118.08(4)(a)(2) (2017). The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property"—adopted solely "for purposes of th[e] takings inquiry"—undermines that protection.

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the "private property" at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent. . . .

Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co. v. New York City,* we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." In that case, the owner of Grand Central Terminal in New York City argued that a restriction on the owner's ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the "property" at issue, concluding that the correct unit of analysis was the owner's "rights in the parcel as a whole.". . .

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central.* This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. States may define those plots differently—some using metes and bounds, others using

government surveys, recorded plats, or subdivision maps. But the definition of property draws the basic line between, as P.G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.

Following state property lines is also entirely consistent with *Penn Central*. Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*—and claim a complete taking based on that strand alone. That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates ... property" to avoid a successful takings claim. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of "private property."

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner's possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. . . .

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning

those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." Those factors, says the majority, show that Lots E and F of the Murrs' property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking.

In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a "taking." Cramming them into the definition of "private property" undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking* ' " under *Penn Central*. *Ruckelshaus,* 467 U.S., at 1004 (emphasis added). And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. Both of these inquiries presuppose that the relevant "private property" has already been identified. There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central* : create a litigation-specific definition of "property" designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one "parcel," solely for purposes of resisting a particular claim. And under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 325 (1893), by considering the effect of a regulation on specific property rights as they are established at state law. But the majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—

based on all the circumstances and the nature of the regulation—Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property ... should not *necessarily* preordain the outcome in *every* case." (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" for another. This is just another opportunity to gerrymander the definition of "private property" to defeat a takings claim. . . .

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented

them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. The Murrs argued that the ordinance amounted to a taking of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel.". . .

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. These facts speak to "the economic impact of the regulation," interference with "investment-backed expectations," and the "character of the governmental action"—all things we traditionally consider in the *Penn Central* analysis.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, "the security of Property" is one of the "great object[s] of government." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Takings Clause was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a "taking" of one of those property rights is, properly enough, a fact-intensive task that relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 349 (1986) (alterations and internal quotation marks omitted). But basing the definition of "property" on a judgment call, too, allows the

government's interests to warp the private rights that the Takings Clause is supposed to secure.

I respectfully dissent.

Justice THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent because it correctly applies this Court's regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), the Court announced a "general rule" that "if regulation goes too far it will be recognized as a taking." But we have since observed that, prior to *Mahon,* "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases,* 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago,* 99 U.S. 635, 642 (1879)." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992). In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. See generally Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008) (describing the debate among scholars over those questions).

Notes and Questions

35. How confident are you in your ability to apply the majority's test? Is it a fair objection that the analysis inappropriately smuggles considerations applicable to substantive takings analysis into the distinct preliminary issue of defining the private property in question? Or are preexisting lot lines too arbitrary?

36. If the dissent had prevailed, would property owners have an incentive to break their parcels up into smaller lots to increase the likelihood of prevailing in a takings case? Chief Justice Roberts asserts that such efforts would be easy to "detect and disarm." But what would be the mechanism for doing so? And

what if a piece of property had been owned and transferred as an undifferentiated whole for decades, but nevertheless encompassed portions that had once been sold as individual, smaller lots? Should they be treated separately in a regulatory takings case?

37. What incentives would states have if the dissent carried the day? Might they make it harder to multiply parcels (e.g., by enacting barriers to subdividing land)? For a blog exchange on this point, *see* http://prawfsblawg.blogs.com/prawfsblawg/2017/06/a-half-hearted-two-cheers-for-the-victory-of-federalism-over-property-rights-in-murr-v-wisconsin.html and https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/more-on-murr-a-response-to-rick-hills/?utm_term=.0ec494a5c86c.

38. What do you make of Justice Thomas's dissent? Is he suggesting that the whole of regulatory takings jurisprudence is without a constitutional basis? The Rappaport article he cites argues that even if Takings Clause of the Fifth Amendment does not support regulatory takings jurisprudence, "there are strong reasons, based on history, structure, and purpose, to conclude that the Takings Clause had a different meaning under the Fourteenth Amendment." 45 San Diego L. Rev. at 731.

H. Intellectual Property

Property rights may reach intangible things, and the Takings Clause may apply to these rights. *See generally* 2-5 NICHOLS ON EMINENT DOMAIN § 5.03 (listing examples). What about "intellectual property"? In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court ruled that to the extent state law recognized a property right in trade secrets, they were protected by the Takings Clause.

> Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien

> provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602, (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.

Id. at 1003 (1984). The *Monsanto* plaintiff claimed that disclosure requirements of the Federal Insecticide, Fungicide, and Rodenticide Act would destroy its trade secrets. The Court held that the absence of reasonable investment-backed expectations precluded some of these claims, concluding that the plaintiff had submitted its data under a regulatory scheme that required eventual disclosure. *Id.* at 1007 ("Thus, as long as Monsanto is aware of the conditions under which the data are submitted … a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

Trade secrets exist under state law, to which courts may look in determining whether a property interest exists. What about federal IP rights? The issue is a debated. *Compare, e.g.*, Davida H. Isaacs, *Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007), *with* Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 689 (2007); *see generally* Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529 (1998). ("[T]he law of takings with regard to intellectual property can only be characterized as a muddle within the muddle.").

Should intellectual property receive takings protection? On the one hand, the underlying statutes give them the attributes of property. 35 U.S.C. § 261 ("Subject to the provisions of this title, patents shall have the attributes of personal property."). On the other, IP rights lack many of the traditional attributes of property. Not only are they intangible, but they constitute a government delegation to private parties of regulatory power over the actions of others. To the extent the government wishes to curtail these rights—or otherwise adjust the governing regime, introducing takings doctrine may upset its ability to adjust a regulatory regime to changing circumstances.

Moreover, the malleability of the concept of "property" complicates matters, for the question whether an intangible interest is property may arise in a context independent of any takings issues. Once the property switch is flipped, however, the complexities of takings analysis kick in. Recall, for example, the issue covered earlier as to whether domain names are property for purposes of state law. *Kremen v. Cohen*'s answer in the affirmative afforded a remedy for a wronged party in a conversion action, but the classification could ripple through other bodies of law. For example, the Anticybersquatting Consumer Protection Act (ACPA) allows trademark holders to claim domain names containing the marks from those who registered them with a "bad faith intent to profit." 15 U.S.C. § 1125(d). But if a domain name is property—one that one acquires by registering it—how is ACPA's operation not a taking without just compensation? Worse, how is it not taking from A and giving to B as prohibited by the "Public Use" Clause? To date, courts have not been receptive to this argument, *DaimlerChrysler v. The Net Inc.*, 388 F.3d 201 (6th Cir. 2004), but it suggests the difficulties with casually applying the label of property to interests that exist outside the common law property tradition.

I. Exactions

The state has broad powers to regulate land use. What if a state regulator agrees to limit regulation power in return for a strip of land? The transaction is voluntary, but had the state just taken the land, it would have had to pay just compensation. Since the government isn't obligated to allow the project, doesn't the offer leave the landowner better off? Or is this a form of extortion?

These types of conditional grants of permits or other dispensations under land use regulations are called **exactions**. In *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987) the Court opened the door to closer scrutiny of these exchanges, declaring that permit conditions must serve the same purpose as the reason to withhold permission in the first place. Absent an "essential nexus" between the condition and the reason for the restriction, the demand is a taking. *Id.* at 837.

Nollan involved a permit request to tear down and rebuild a beachfront house. Because the project would reduce views of the ocean, the California Coastal Commission conditioned the permit on the Nollans' granting a public easement on their property to access the beach. The Court ruled this condition lacked the requisite

nexus. To the extent that the project would impair sightlines to the beach, the state could condition permit approval on ameliorative steps, like size restrictions, limits on fencing, or provision of a platform to improve the public's view of the beach. But the majority found it "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

The outcome of *Nollan* rested on the majority's conclusion that there was *no* logical relationship between the condition demanded by the Coastal Commission and the harm it claimed to be regulating: a right to cross the Nollan's land wouldn't improve the public's view of the beach from behind their house. What if there is *some* logical relationship, but it is (at least arguably) somewhat attenuated?

Dolan v. City of Tigard

512 U.S. 374 (1994)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973.… Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel.…

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems.…

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

> "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan."

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted.… The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." Based on this anticipated increased storm water

flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." The Tigard City Council approved the Commission's final order, subject to one minor modification; the city council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city's engineering department.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

[The Oregon Court of Appeals and the Oregon Supreme Court both affirmed.]

II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, "one of the

most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922).…

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra,* we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions.…

III

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan,* 483 U.S., at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the

proposed development. We were not required to reach this question in *Nollan,* because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

A

We addressed the essential nexus question in *Nollan.*… The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house.…

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest.… We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot.… The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry ….

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers ….

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development.…

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] ... and all property 15 feet above [the floodplain] boundary." In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site."

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion."

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test

in *Pioneer Trust & Savings Bank v. Mount Prospect,* 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961). Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." *Id.,* at 381, 176 N.E.2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte,* 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980), where that court stated:

> "The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted." *Id.,* at 248, 292 N.W.2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]."

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.…

.…We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. But the city demanded more-it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna,* 444 U.S., at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.…

If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. But that is not the case here. We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will,* or is *likely to,* offset some of the traffic demand." 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal,* 260 U.S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
It is so ordered.

[The dissenting opinions of Justices Stevens (joined by Justices Blackmun and Ginsburg) and of Justice Souter are omitted.]

Koontz v. St. Johns River Water Management Dist.

133 S. Ct. 2586 (2013)

Justice ALITO delivered the opinion of the Court.

Our decisions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9–acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100–foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's

property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

[Florida law regulates construction that affect state waters. Landowners with construction plans that might affect state waters must obtain a Management and Storage of Surface Water (MSSW) permit, which may impose conditions to protect local water resources. In addition, state law prohibits dredging or filling surface waters without a Wetlands Resource Management (WRM) permit, which is to be granted only if the construction is not against the public interest. To that end, the St. Johns River Water Management District, which regulated Koontz's land, required construction in the wetlands to be offset by activities that benefitted wetlands in other locations.]

Petitioner decided to develop the 3.7–acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11–acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11–acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that

petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent."

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. § 373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

B

….[T]he State Circuit Court held a 2–day bench trial. After considering testimony from several experts who examined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida District Court affirmed, but the State Supreme Court reversed. A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan,* the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money.…

Recognizing that the majority opinion rested on a question of federal constitutional law on which the lower courts are divided, we granted the petition for a writ of certiorari and now reverse.

II

[The Court held that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so."]

III

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. Respondent and the dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim.

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value.…

A

In *Eastern Enterprises, supra,* the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. Although Justice KENNEDY concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.,* at 540 (opinion concurring in judgment and dissenting in part); see *id.,* at 554–556 (BREYER, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"). Relying on the concurrence and dissent in *Eastern Enterprises,* respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Respondent's argument rests on a mistaken premise. Unlike the financial obligation in *Eastern Enterprises,* the demand for money at issue here did "operate upon ... an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. In this case, unlike *Eastern Enterprises,* the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to

the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central* 's "essentially ad hoc, factual inquir[y]," 438 U.S., at 124, at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent. *Brown v. Legal Foundation of Wash.,* 538 U.S. 216 (2003).…

B

Respondent and the dissent argue that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan,* then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

It is beyond dispute that "[t]axes and user fees ... are not 'takings.'" *Brown, supra,* at 243, n. 2 (SCALIA, J., dissenting).… This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown, supra,* at 232, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips v. Washington Legal Foundation,* 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), two earlier cases in which we treated

confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation.

Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. *Brown* is illustrative. Similar to respondent in this case, the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes. But also like respondent here, the *Brown* respondents never claimed that they were exercising their power to levy taxes when they took the petitioners' property. Any such argument would have been implausible under state law; in Washington, taxes are levied by the legislature, not the courts.

The same dynamic is at work in this case because Florida law greatly circumscribes respondent's power to tax. If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary ... that it was not the exertion of taxation but a confiscation of property." *Brushaber v. Union Pacific R. Co.,* 240 U.S. 1, 24–25 (1916).…

C

Finally, we disagree with the dissent's forecast that our decision will work a revolution

in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. Yet the "significant practical harm" the dissent predicts has not come to pass. That is hardly surprising, for the dissent is correct that state law normally provides an independent check on excessive land use permitting fees.…

We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.…

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

In the paradigmatic case triggering review under *Nollan* [and] *Dolan*…, the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money? This case also raises other, more fact-specific issues I will address: whether the government here imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan–Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.,* imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.,* imposes a condition precedent).… So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision.…

I

.…[T]he *Nollan–Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking.… Even the majority acknowledges this basic point about *Nollan* and *Dolan* : It too notes that those cases rest on the premise that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." Only if that is true could the government's demand for the property force a landowner to relinquish his constitutional right to just compensation.

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. I assume for now that the District made that demand (although I think it did not, see *infra*) The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan–Dolan* test apply.

But we have already answered that question no. [Discussion of *Eastern Enterprises v. Apfel* omitted.].…

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the

Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. 524 U.S., at 541. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse because the majority's distinction between monetary "exactions" and taxes is so hard to apply. The majority acknowledges, as it must, that taxes are not takings. But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible "exaction," how is anyone to tell the two apart? The question, as Justice BREYER's opinion in *Apfel* noted, "bristles with conceptual difficulties." And practical ones, too: How to separate orders to pay money from ... well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must confront the same question, as they enforce restrictions on localities' taxing power. And their decisions—contrary to the majority's blithe assertion—struggle to draw a coherent boundary.… Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.… Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule

now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evade the limitations" on exaction of real property interests that those decisions impose. But that is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan,* that simply "go[ ] too far." *Mahon,* 260 U.S., at 415.[3]

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the Takings Clause would otherwise prevent—*i.e.,* take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process, because under *Apfel* such an action does not otherwise trigger the Takings Clause's protections. By extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of "necessary predictability." *Apfel,* 524 U.S., at 542 (opinion of KENNEDY, J.). That decision is

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[3] Our *Penn Central* test protects against regulations that unduly burden an owner's use of his property: Unlike the *Nollan–Dolan* standard, that framework fits to a T a complaint (like Koontz's) that a permitting condition makes it inordinately expensive to develop land. And the Due Process Clause provides an additional backstop against excessive permitting fees …. My argument is that our prior caselaw struck the right balance: heightened scrutiny when the government uses the permitting process to demand property that the Takings Clause protects, and lesser scrutiny, but a continuing safeguard against abuse, when the government's demand is for something falling outside that Clause's scope.

unwarranted—and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit. And second, because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

A

Nollan and *Dolan* apply only when the government makes a "demand[ ]" that a landowner turn over property in exchange for a permit. *Lingle,* 544 U.S., at 546. I understand the majority to agree with that proposition ….

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan–Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer. Hence the need to reserve *Nollan* and *Dolan,* as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State's rapidly diminishing wetlands, Florida law prevents landowners from filling or

draining any such property without two permits. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. At that point, the District could simply have denied the applications; had it done so, the *Penn Central* test—not *Nollan* and *Dolan*—would have governed any takings claim Koontz might have brought.

Rather than reject the applications, however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. Alternatively, the District raised several options for "off-site mitigation" that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, "[n]ot in any great detail." And the District made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands. Even at the final hearing on his applications, the District asked Koontz if he would "be willing to go back with the staff over the next month and renegotiate this thing and try to come up with" a solution. But Koontz refused, saying (through his lawyer) that the proposal he submitted was "as good as it can get." The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition—not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District's only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria. Koontz's failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means*. *Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those decisions require a

condition; and here, there was none.

Indeed, this case well illustrates the danger of extending *Nollan* and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan,* the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance.… Nothing in the Takings Clause requires that folly. I would therefore hold that the District did not impose an unconstitutional condition—because it did not impose a condition at all.

B

And finally, a third difficulty: Even if (1) money counted as "specific and identified propert[y]" under *Apfel* (though it doesn't), and (2) the District made a demand for it (though it didn't), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the Takings Clause. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts.…

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it

requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

Notes and Questions

39. Why aren't taxes takings? Does it make a difference whether there is an individualized determination about a particular use, and which way should an individualized determination cut? That is, suppose in order to deal with global warming, the Miami legislature imposes a new tax of 10% of the assessed value of a parcel every time a new building permit for that parcel is granted. The money will go into a fund to help the city become more flood-resistant. Is this an unconstitutional exaction? If your answer is yes, what about a new tax of 10% of the assessed value of *every* parcel, regardless of whether there's new building on it or not?

40. What if the condition isn't monetary? Suppose the zoning authority says "you may build your building, but only if you comply with building codes that specify a minimum number of exits, minimum width of doors, and multiple other details." Is that an exaction? If not, why not?

41. **Categorical Exclusions.** Just as some government acts are takings as a categorical matter; others are categorically excluded. *Koontz* mentions that taxes and user fees are never takings. Why not? One possibility is the idea that the private property protected by the Takings Clause only protects discrete resources, and does not apply to legally obligated acts like the payment of money. That was the logic of five Justices in *Eastern Enterprises v. Apfel*, which was discussed and distinguished in *Koontz*. E. Enterprises v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting with three other Justices).

    But can we do more than provide a definitional exclusion? Eduardo Peñalver observes:

> As Richard Epstein—one of the few scholars to focus substantial effort on the issue—has noted, "[t]he taxing power is placed in one compartment; the takings power in another," and scholarly discussion of the conflict between the two never really gets off the ground. In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state's power to tax. Specifically, Epstein argued that the Takings Clause required the government to adopt a system of proportional taxation, also known as a "flat tax." This argument flew in the face of settled constitutional orthodoxy, which since the founding era has understood the state's power to tax as being virtually plenary. …
>
> This cool response to Epstein's proposal is unsurprising. The constitutional doctrine defining the state's power to tax is so entrenched that it is nearly axiomatic. In contrast, Takings Clause jurisprudence is characterized by nothing if not the confusion and intense disagreement it generates.…

    Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185-86 (2004) (footnotes omitted). Peñalver draws an opposite conclusion from Epstein's, noting that the seeming conflict between the two powers stems not

from the reach of the taxing power, but from the fact that courts have applied the Takings Clause beyond its original understanding as a simple requirement of compensation when the power of eminent domain is exercised. If the clause were read more narrowly, the apparent tension would disappear. On this view, "Takings are the state's direct appropriation of parcels of property from individuals through the power of eminent domain, and taxes are generally applicable measures, enacted under the state's power to tax, requiring individuals to make payments to the state. Each corresponds to different and nonoverlapping governmental powers." *Id.* at 2188.

There are also government actions that do affect specific pieces of property that are nonetheless excluded from operation of the Takings Clause. We have already seen one example in the rule—discussed in the opinions in *Lucas*—that regulation of a common law nuisance is never a taking. Other examples include government forfeitures, federal control of navigable waterways, and the state's right to destroy property to contain the spread of fire. *See generally* David A. Dana & Thomas W. Merrill, TAKINGS 110-120 (Foundation Press 2002); AmeriSource Corp. v. United States, 525 F.3d 1149, 1153 (Fed. Cir.2008) ("Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause."). What explains these exceptions? Perhaps they, too, may be understood as simply categorically different government powers (i.e., if the Takings Clause is read as simply applying to eminent domain, the existence of regulatory takings notwithstanding). Dana and Merrill suggest that we might understand these exceptions similarly to the nuisance exclusion—the powers are within traditional conceptions of the state's police powers, and they have a long historical pedigree, long enough that property owners may be said to be on imputed notice that they may be exercised.