Class 1: What is Property?

Professor James Toomey

Jacque v. Steenberg Homes

- Plaintiffs—the Jacques. Elderly farm owners.
- Defendant—Steenberg Homes. Sell and deliver mobile homes.
- The problem—Steenberg needs to deliver a home; the only road has 7 feet of snow, and it's a straight shot across the Jacques' flat field. But the Jacques' do not grant permission. Steenberg does it anyway.
- Jacques sue Steenberg for trespass.
- Trial court—finds for Jacque. $1 nominal damages, $100,000 punitive damages
- Three question in Wis. Supreme Court:
  (1) Punitive damages in trespass?
  (2) Apply to Steenberg, or only in the future?
  (3) Is $100,000 excessive?

Jacque v. Steenberg Homes

- Held:

(1) Yes—punitive damages necessary for deterrence

- Given the centrality of the right to exclude—"one of the most essential sticks in the bundle of rights commonly characterized as property"
- The inadequacy of the actual damages remedy
- And the flagrancy of the trespass

(2) Yes—trespass was knowing and flagrant

(3) No—$100,000 appropriate

Jacque v. Steenberg—Takeaways

- Property & exclusion
- Trespass—intentional physical invasion of another's land without permission
  - Need intent to enter; do not need to know that the land belongs to another
  - Actual damages not required
  - This is a *strict* tort
- Try to stop your clients from laughing while they are violating other people's legal rights

Hinman v. Pacific Air Transport

- Plaintiff—lives next to airport
- Defendant—airline
- Problem—defendant is flying planes as low as 100 ft over Hinman's farm on the way to the airport.
  - Under common law property principles, a landowner owns *ad caelum et ad infernos* ("from the sky to the depths") above and below their land

Hinman v. Pacific Air Transport

- Held: not a trespass. "*Ad caelum*" is not to be taken literally.
- Why?
  - Landowners only own the sky above them to the extent they make use of it?
    - Locke's theory of property: property is that with which we have "mixed" labor with in the world
  - Policy: property rights don't go to the sky because we need planes to be able to fly, etc. Property rights are what courts say they are.

Hinman v. Pacific Air Transport—*Takeaways*

- Property law can be flexible and practical
- Competing idea of property—courts construct it by considering policy

What is Property?

- No consensus
- Intuition—property law is the law of "things;" of our relationship to "things"
- Two theories:
  - Essentialist (traditional, resurgent)—X is the *essence* of property. X might be:
    - Dominion/control
    - Exclusion
    - Use/labor
    - Essentialist theories accept the intuition that property is the law of our relationship to things
    - And point to the basic legal distinction between persons and things
  - Skeptical (mainstream since Legal Realism)—property is a "bundle of rights" or "bundle of sticks"
    - Not one thing, a bundle
    - Organized/granted by law for policy reasons
    - Skeptical theories reject the intuition that property is the law of our relationship to "things"—it's about rights among *people*
    - And point out that property law is overwhelmingly enforced by tort actions between people

Three Basic Kinds of Property

- Real property—land
- Personal property (“chattels”)—other physical belongings
- Intellectual property—copyright, patent, trademark

Themes of Property

- Exclusion
- Control/dominion (Blackstone)
- Labor/desert (Locke)
- Use
- Possession

Class 2: What Can We Own?

Professor James Toomey

What Can Be Owned

- Easy cases—
  - Land (real property)
  - Tangible objects (chattels/personal property)
- Harder cases—
  - Human body/body parts
  - Information/intellectual property
  - “Inherently” (or traditionally?) public property—beaches

Moore v. Univ. of Cal.

- Plaintiff—has hairy cell leukemia
- Defendant—his doctors
- Facts—doctors recommend removing Moore's spleen for treatment. They intend (but do not tell him) to use the cells in the spleen to derive a valuable immortal cell line. Moore consents. Doctors make an immortal cell line.
- Suit:
  - Conversion—tort for taking someone's personal property; civil analogue to theft
  - Breach of fiduciary duty

Moore v. Univ. of Cal.—Majority

- Held: no conversion. (Yes breach of fiduciary duty—don't worry about this)
- Three reasons:
  (1) Body parts cannot be "owned"
  (2) The immortal cell line is based on genetic information that everyone has
  (3) Effort was the scientists'
- No extension of law because it would harm science (policy)

Moore v. Univ. of Cal.—Concurrence

- Justice Arabian:
  - Human body cannot be owned—immoral
  - Rights in the body should be left to the legislature

Moore v. Univ. of Cal.—Dissent

- Justice Mosk:
  - Property is a bundle of rights:
    - Can craft however we want
    - Courts have a role in doing this
  - People should have "property right" to decide, at a minimum, decide to do with their body what others can. Let people contract.
  - Policy:
    - Prevent abuse
    - We can limit right to preserve research

Moore v. Univ. of Cal.—Takeaways

- Limits of property (?)
  - Personhood/bodies?
  - Information?
- Theories of property make a difference in litigating its boundaries
- Conversion—intentional deprivation of possession of another's personal property

International News v. Associated Press

- Plaintiff (Associated Press; party names are reversed in SCOTUS)—collect news, give to newspapers they have contracts with. Have rules about not giving out the news for others to publish earlier.
- Defendant (International News)—stealing AP's news bulletins to publish early in sensationalist newspapers.
- AP sues INS for "depriving property right" in news (conversion?) and unfair competition

International News—Majority

- AP has a "quasi-property" right in the news. INS ordered to stop its behavior.
- What is "quasi-property"?
  - Don't worry about it; this is made up.
  - Basic idea—it's not literally property because it is not excludable (essentialist theory), but it should be treated as property to reach the right outcome
- Why does AP win?—*Labor*, or *desert*. AP has put in work to gather this, it is *unfair* not to give it something like a property right in it.

International News—Dissent 1

- Justice Holmes:
  - Property is a creation of law for policy ends (skeptical theory)
  - Legislature is proper place to weigh policy ends

International News—Dissent 2

- Justice Brandeis:
  - Information cannot be owned, property is about *control* or *exclusion*, not *desert* (essentialist)
  - Legislatures can create things like property for policy reasons, but not courts

International News—Takeaways

- Information—controversial question as to whether it can be owned
  - Not excludable
  - But produced by labor
  - Compare intellectual property—largely functions like property, but created and regulated by federal statute

State of Oregon ex rel. Thornton v. Hay

- William and Georgianna Hay own a tourist facility on the beach
  - And want to fence in the "dry-sand" area between the "mean high-tide line" (owned by State, by statute) and the "vegetation line" (owned by Hays)
- Dry-sand area included in Hays deed
  - But "[t]he dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history."
- Question—can the Hays fence in this portion of the beach?

State of Oregon ex rel. Thornton v. Hay

- Held—no
- Longstanding Oregon ***custom*** that dry-sand area is accessible by the public
  - Understood by buyers and sellers
  - Ownership of the "dry-sand area" does not include the right to exclude within the "bundle"
  - (Maybe) because of erosion, accretion, and unsuitability for building, this is not the sort of thing that can be owned

State of Oregon ex rel. Thornton v. Hay—Takeaways

- ***Custom*** can play a role in defining the boundaries of what can be owned, and what ownership means
  - Purchasers of property might be thought to be buying a mutually-understood bundle of rights
  - And custom can play a role in establishing what that bundle is
- Some (limited) property thought to be "***inherently public***"—not really that it *can't* be owned privately, but because of its characteristics it is somehow better thought owned by the public
  - Beaches are the prime example

Class 3: Protections for Property Rights

Professor James Toomey

Criminal Penalties—Personal Property

- Larceny—taking personal property from the possession of another without legal authority
- Robbery—taking personal property without permission in a way that directly endangers persons
- Criminal mischief—damaging but not taking

Criminal Penalties—Real Property

- Criminal trespass (comparatively mild; generally a misdemeanor)
- Arson—causing fire to a building or occupied structure
- Burglary—unlawfully entering a building with the purpose to commit a crime therein

Civil Actions—Real Property

- Trespass—possessor of land's action against an intruder
- Ejectment—title owner of land's action against someone living on their land
- Nuisance—neighbor is using their land in a way that inhibits your use and enjoyment of your land

Civil Actions—Personal Property

- Conversion—permanent taking of personal property (money damages)
- Replevin—action for the return of converted property
- Trespass to personal property—interference with personal property less than conversion

Self-Help

- Law generally grants owners the privilege to use reasonable, peaceable self-help to protect property rights
  - e.g., fences, locks, security guards, cameras, safes, tracking systems
  - Controversial when used to *recover* possession, or involves the use of force

Intel Corp. v. Hamidi

- Disgruntled former employee Hamidi sends tens of thousands of emails to Intel employees
  - Criticizing Intel
- Intel attempts to stop it
  - But Hamidi is sending the emails from different computers, and Intel cannot, as a technical matter, block it
- Hamidi's campaign is causing Intel ongoing costs, in efforts to prevent emails
  - But has not damaged servers
  - Nor made them unable to function in an ordinary manner
- Intel sues Hamidi for ***trespass to personal property/chattels***
  - Seeking an order enjoining Hamidi from sending these emails
- Question—can trespass to personal property action be maintained without a showing of actual damage to the personal property?

Intel Corp. v. Hamidi

- Held—no
- ***Trespass to personal property/chattels*** is an intentional invasion of chattels
  - ***Less than*** conversion (not permanent taking)
  - And ***requires*** showing of actual damage to the chattel
    - Prosser & Keaton: "Such scanty authority as there is, however, has considered that the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie."
- Here, there is intentional invasion of the servers, but no actual damage
  - Because no damage to the servers
  - And they continue to function normally

Intel Corp. v. Hamidi—Dissent 1

- Justice Brown—
  - Court is sanctioning an ongoing violation of Intel's conceded right to exclude
  - Intel may legally use self-help to prevent these intrusions
  - But, because it is technically not possible to do so, Intel needs a legal remedy
  - The right to exclude from personal property ought to be protected the same way as land

Intel Corp. v. Hamidi—Dissent 2

- Justice Mosk—
  - These intentional intrusions are causing damage to Intel's internal intranet
  - And ought to be punishable by trespass to chattels action

Intel Corp. v. Hamidi—Takeaways

- **Trespass to Chattels/Personal Property**—
  - Property tort designed to protect certain rights with respect to personal property
  - A cause of action for an invasion *less than* conversion
  - But which (most courts have held) requires a showing of actual damages to the chattel
  - Long obscure until relied on in disputes about intrusions into servers that don't permanently deprive the owner of use and possession of the server

Berg v. Wiley

- Landlord Rodney Wiley leases real property to Kathleen Berg to use as a restaurant. Lease—
  - Tenant may make no structural changes without prior authorization by landlord
  - Tenant must operate restaurant in a "lawful and prudent manner"
  - Landlord reserves right to "retake possession" "[s]hould the Lessee fail to meet the conditions of this Lease"
- Berg is continuously remodeling without permission and operating restaurant in violation of health code
- Wiley notifies Berg of violations, gives her two weeks to fix or he threatens to take possession
  - She doesn't fix, closes after two weeks for remodeling
  - After a series of conflicts between Wiley and Berg, he goes to the restaurant while she isn't there, with a police officer and locksmith, and changes the locks
- Berg sues Wiley for wrongful eviction
- Question—did Wiley unlawfully exercise self-help in retaking the premises?

Berg v. Wiley

- Held—yes
- Common law rule—
  - Landlord may rightfully use self-help where—
    - Landlord has a right to present possession
      - Presumably true here
    - Landlord's means of entry are peaceable
      - Court holds Wiley's entrance was not peaceable
      - "[T]he singular reason why actual violence did not erupt at the moment of Wiley's changing of the locks was Berg's absence and her subsequent self-restraint"
- New rule—
  - "[S]elf-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises."

Berg v. Wiley—Takeaways

- Majority rule—landlords may not use self-help to retake premises
  - Typically, there are expedited judicial processes to litigate the question of landlord's right to possession
  - And issue a court order if so
  - Landlord *must* avail themselves of these remedies, or be liable for wrongful eviction
- Some jurisdictions still permit self-help (without breach of the peace) in these circumstances

Williams v. Ford Motor Credit Company

- Cathy and David Williams purchase and finance a car together
  - The car is collateral on outstanding loan
- In divorce, Cathy gets the car; David the responsibility to pay the loan
  - David defaults
  - And signs voluntary repossession authorization to FMCC
- At 4:30am, Cathy wakes to two "S&S Recovery" men hooking up her car to a tow truck and taking it away
  - She doesn't attempt to use force to stop them
  - Protests, but not extensively
  - Asks for personal property from car back, they give it to her
- Question—was FMCC's use of self-help appropriate?

Williams v. Ford Motor Credit Company

- Held—yes
- Rule—creditors may use self-help to recover personal property as collateral, so long as it does not breach the peace
  - No violence here
  - No particular likelihood of violence
  - "Appellees deserve something less than commendation for the taking during the night time sleeping hours, but it is clear that viewing the facts in the light most favorable to Williams, the taking was a legal repossession under the laws of the State of Arkansas."

Williams v. Ford Motor Credit Company—Dissent

- A 4:30am unannounced raid to repossess a car is clearly the sort of thing that raises likelihood of violence
- “The confrontation did not result in violence only because Ms. Williams did not take such steps and was otherwise powerless to stop the crew.”

Williams v. Ford Motor Credit Company—Takeaways

- Self-help without breach of the peace generally authorized for creditors repossessing collateral
  - No need for judicial authorization
- Law is all over the place for other kinds of efforts to regain possession of personal property
  - See n. 1 pg. 367

Class 4: Powers of Ownership

Professor James Toomey

Some Powers of Ownership

- Allow people on (or kick them off)—licenses (*Wood v. Leadbitter*)
- Lend to people—bailments (*Allen v. Hyatt Regency*)
- Abandon—*Pocono Springs Civic Association v. Mackenzie*
- Destroy—*Eyerman v. Mercantile*

Licenses

- Property owner (licensor) grants ***permission*** to another (licensee) to come on or use property
  - ***Waiver*** of the right to exclude
    - Can be subject to/governed by contract, express or implied
  - ***Not*** considered a property right

Wood v. Leadbitter

- Lord Eglintoun owns a racetrack, and sells tickets
  - Tickets understood to entitle buyers to "come into the stand, and the inclosure surrounding it, and to remain there every day during the races"
- Wood purchases a ticket
- During races, Eglintoun has his agent tell Wood to leave, and when he doesn't, agent physically escorts him out without "unnecessary violence"
- Question—does Wood have some sort of irrevocable right to be on the property for the races?

Wood v. Leadbitter

- Held—no
- Ticket granted a ***license***, which is revocable at will by the owner
  - At which point the licensee becomes a trespasser
- ***Even though*** the ticket guaranteed entry
  - Wood may have a claim for breach of contract, if revoking the license violated their contract
  - But this would not give him permission to come on the land, just money damages

Wood v. Leadbitter—Takeaways

- ***Licenses***—
  - A property owner's grant of ***permission*** to come onto land, or use personal property
  - Revocable by property owner at any time, for any or no reason, at which point continued presence/use of property becomes a trespass
  - ***Even if*** the owner is contractually obligated not to revoke
  - In which case licensee has a cause of action for breach of contract, but will not get back the license

Bailments

- Personal property owner (bailor) lends/temporarily gives property to another (bailee)
  - ***Temporary transfer*** of the right to exclude and control
    - With respect to third parties, the bailee is like the owner (can sue for conversion, for example)
  - Largely contractual

Allen v. Hyatt Regency-Nashville Hotel

- Edwin Allen parks his wife's car in a parking garage in downtown Nashville
  - When he returns in a few hours, it is gone
- Parking garage set-up—
  - Drive in, take a ticket from machine
  - Park yourself
  - Keep keys
  - Take ticket when driving out, give to only person you interact with and pay
- Question—does parking a car in a garage like this one create a bailment relationship, and does it impose a duty of care on the garage?

Allen v. Hyatt Regency-Nashville Hotel

- Held—yes and yes
- Bailment (from dissent)—
  - "The creation of a bailment in the absence of an express contract requires that possession and control over the subject matter pass from the bailor to the bailee."
- Majority—
  - Because drivers have to present ticket to a person, and the employees have taken some responsibility for the safety of the cars, there is enough transfer of control for a bailment
  - Though it's not a clear fit with traditional bailment law, and other courts have reached the same conclusion on different grounds
- Dissent—
  - No real transfer of control here, this can't be a bailment
  - Maybe a license or lease of the spot, nothing to do with the car

Allen v. Hyatt Regency-Nashville Hotel—Takeaways

- ***Bailments***—
  - Owner (bailor) lends property to another (bailee)
  - Transfer of control and right to exclude from owner to bailee
  - Structured by express or implied contract
- Big issue with bailments—duty of care owed by bailee to bailor with respect to property

Abandonment

- General rule—property owners have the right to "abandon" (at least personal) property
  - Give up property with the intent to abandon
    - Note role of convention in displaying intent to abandon—putting a chair on the curb is abandonment; on your porch is not
  - Property becomes unowned
  - And the first person to claim it can become owner

Pocono Springs Civic Association v. Mackenzie

- Mackenzies buy a lot in Pocono Springs Development in 1969. Under Pocono Springs Development bylaws, they must pay Association fees.
  - Lot turns out to be useless, because can't build a septic tank, so can't build on it.
  - Mackenzies try to abandon it:
    - Try to give back to Pocono Springs Development (refuse)
    - Give it as a gift to the community (refuse)
    - Stop paying taxes
    - Publish a letter declaring that they intend to abandon the property
    - Don't accept mail
- Question—do Mackenzies still own this lot?

Pocono Springs Civic Association v. Mackenzie

- Held—Mackenzie's still own the lot.
- Abandonment:
  - General rule—owner can abandon property by intending to abandon it and taking some act to show they mean to abandon it
  - *Exception—real property* cannot be abandoned

Pocono Springs Civic Association v. Mackenzie—Takeaways

- Owners generally have a right to abandon
- Real property cannot be abandoned

Right to Destroy

- General rule—property owners have the right to destroy their property

Eyerman v. Mercantile Trust Co.

- Facts—Louise Woodruff Johnston owns 4 Kingsbury Place in "Kingsbury Place" Development of suburban homes.
  - In her will, she directs that the home be destroyed. It is unclear why.
  - After her death, neighbors sue to prevent the home from being razed.
- Question—may Johnston order the destruction of her house after her death?

Eyerman v. Mercantile Trust Co.— Majority

- Held: enforcing the will and destroying the house violates public policy; will is not enforced.
- Destruction:
  - General rule—owners can destroy their property, and owners may do by will what they can do while alive
  - *But*—right to destroy is weaker after death than for living owners
  - *And*—public policy can prevent exercise of the right to destroy in certain circumstances:
    - Total waste of value ("only $650 of the $40,000 asset would remain")
    - Loss to neighbors ($10,000)
    - Housing shortage in St. Louis
    - House is attractive

Eyerman v. Mercantile Trust Co.— Dissent

- Judge Clemens:
  - Owners have a right to destroy
  - Owners have a right to do by will what they can do while alive
  - Motives are irrelevant—"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."

Eyerman v. Mercantile Trust Co.— Takeaways

- General rules—(1) owners have the right to destroy, (2) can do by will what you can do alive
- Public policy can limit right to destroy
- Practice—if a client wants to do something atypical or controversial, try to have a discussion with them about their reasons.

Class 5: Limits to Ownership Powers

Professor James Toomey

- “Both this court and the Supreme Court recognize the individual’s legal right to exclude others from private property.” — *Jacque v. Steenberg Homes*. But:
  - Necessity (*Ploof v. Putnam*)
  - Custom (*Hay*; *Fisher v. Steward*)
  - Public Policy (*State v. Shack*)
  - Public Accommodations (*Uston v. Resorts International Hotel*)
  - Anti-Discrimination (*Shelley v. Kraemer*)

Ploof v. Putnam

- Plaintiffs—the Ploofs, family that lives on a boat in Lake Champlain
- Defendant—owner of an island in Lake Champlain
- Facts—there's a storm, and to avoid injury, the Ploofs tie their boat to Putnam's dock. Putnam has his servant untie the boat, and the Ploofs are injured.
- Suit:
  - Procedurally a bit old and complicated; basic question is whether what the Ploofs did was a trespass, and whether Putnam's response was a lawful response

Ploof v. Putnam

- Held—Ploofs did not trespass; Putnam had to allow them on
- *Necessity* is a defense to trespass
- Other examples:
  - Dog chasing sheep on landowners' land, was unable to call it back before it went on someone else's
  - Obstruction in the roadway
  - Save goods in danger of being destroyed by fire or water
- Other examples preserving human life:
  - Run from assault
  - Sacrifice property to save life
- Damages—Ploofs would have been liable for any actual damages (pg. 372, *Vincent v. Lake Erie Transp. Co.*)

Ploof v. Putnam—Takeaways

- Necessity is an exception to trespass

Fisher v. Steward

- Plaintiff finds swarm of bees (and honey) on defendant's land
  - Marks tree, notifies defendant
  - Defendant chops down tree and keeps honey
- Plaintiff sues for damages, on the ground that the honey was his
  - Because of a local custom under which the finder of bees gets the honey, even if on someone else's land
- Question—did the plaintiff own the honey?

Fisher v. Steward

- Held—no
- Court does not recognize local custom, because it does not hold throughout the state
- Default principle is that landowners own trees on their land and things within them
- And plaintiff was trespassing

Fisher v. Steward—Takeaways

- In some jurisdictions, custom limits rural landowners rights to exclude others for hunting, fishing, or hiking purposes
- But not all, and other jurisdictions don't recognize these customary limitations

State v. Shack

- Plaintiff—"state;" *criminal* trespass
  - Landowner—Tedesco; large-scale farmer who employs migrant farmworkers who live on his land
- Defendants—Shack & Tejeras, aid workers trying to help the migrant farmworkers
- Facts—Shack & Tejeras attempt to provide aid to migrant farmworkers on Tedesco's land. Tedesco refuses to allow them to meet privately with farmworkers in their housing.
- Suit:
  - Shack & Tejeras are prosecuted for criminal trespass
  - Raise a variety of challenges to convictions, including that it violates public policy to recognize right of owners to exclude in situation like this

State v. Shack

- Held: "[O]wnership of real property does not include the right to bar access to governmental services available to migrant workers . . . ." pg. 381
  - *No trespass*
- Reasoning:
  - "Property rights serve human values. They are recognized to that end, and are limited by it." pg. 381
  - "A man's right in his real property of course is not absolute." pg. 382

State v. Shack—Takeaways

- Public policy potential limit on exclusion rights
- Most clearly developed by courts in N.J.—other states have similar principles in legislation

Uston v. Resorts International Hotel

- Resorts International Hotel bans Kenneth Uston for counting cards in blackjack
- Counting cards was not against the rules of blackjack, as promulgated by the Casino Control Commission, at the time
  - Commission apparently did not want to make it against the rules because it would diminish casinos' take
  - But supported excluding Uston
- Question—can the Casino ban Uston?

Uston v. Resorts International Hotel

- Held—no
- "Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use."
  - Longstanding right of reasonable access by the public to common carriers and other businesses catering to public needs
  - Balance the owner's right to exclude against the public's interest in access
- Excluding Uston was unreasonable because he had not violated the rules
  - And casino could exclude him for other reasons (disruption), but didn't have any other reason

Uston v. Resorts International Hotel—Takeaways

- **Public Accommodations Doctrine—**Some jurisdictions limit owners' right to exclude from certain businesses open to the public
  - And require the right to exclude be exercised reasonably
  - All jurisdictions recognize this obligation on the part of common carriers and many places of accommodation
- Others (n.2 pg. 391) affirm owner's right to exclude for any or no reason in general

Fair Housing Act (1968)

- Prohibits discrimination based on ***race, color, religion, sex, familial status, disability or national origin*** in ***selling or renting*** residential property
- But doesn't apply to:
  - Single-family home sold or rented by owner (three or fewer properties; no broker)
  - Dwellings with less than four or fewer units in which the owner lives

Shelley v. Kraemer—Background

- Fourteenth Amendment—provides that "*No State* shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."
  - State Action Doctrine—14A not violated by *purely private action*
- Restrictive Covenants—agreements among property owners to restrict future uses of their property
  - We'll talk more about these later in the semester

Shelley v. Kraemer

- Facts—landowners in 1911 agree to restrictive covenants on their land to only be occupied by persons "of the Caucasian race"
  - In 1945, Shelleys (black family) buy one of these houses, unaware of covenant
  - Neighbors sue to enforce the covenant and take back title from the Shelleys
  - Shelleys are in possession and living in the house throughout the proceedings
- Question—does enforcing the restrictive covenant violate the Equal Protection Clause?

Shelley v. Kraemer

- Held—Yes. The *restrictive covenant itself* is a voluntary agreement, and if it is self-enforcing, the Fourteenth Amendment is not implicated.
  - *But*, when *state courts* are called upon to enforce it, there is state action.
  - Therefore—racially restrictive covenants are unenforceable

Shelley v. Kraemer—Takeaways

- Antidiscrimination principles are an exception to the right to exclude
- Additional rights of ownership, also limited by antidiscrimination principles:
  - Right to control use of property in the future (restrictive covenants)
  - Right to alienate/sell

Class 6: Acquisition By First Possession

Professor James Toomey

Basic Principle

- The *first possessor* of a thing owns it
  - What is possession?
    - *Pierson v. Post*
    - *Keeble v. Hickeringill*
    - *Johnson v. M'Intosh*
    - *Haslem v. Lockwood*
  - What is the "thing" possessed?
    - Accession—*Edwards v. Sims*
  - What about lost property?
    - *Armory v. Delamirie*
    - *Clark v. Maloney*
    - *Anderson v. Gouldberg*
    - *Hannah v. Peel*

Pierson v. Post

- Lodowick Post—hunter, in hot pursuit of a fox.
- Jesse Pierson—another hunter, lying in wait, sees Post chasing the fox, but kills and carries it off before Post catches it.
- Question—who owns the fox?
  - *Ferae naturae* (wild animals) are unowned, and therefore belong to the first possessor. But who was the first possessor?

Pierson v. Post

- Held—fox to Pierson.
- "Possession" means *physical capture*
  - Maybe mortal wounding, if in hot pursuit; or capture in a net or trap.
  - Based on in depth reading of various legal theorists

Pierson v. Post (dissent)

- Would have held—fox to Post; "possession" means pursuit with *reasonable chance* of capture
- Reasoning:
  1. Property law is flexible, adapts
  2. Incentives—foxes are nuisance, want to incentivize fox-hunting
  3. Custom—"This is a knotty point, and should have been submitted to the arbitration of sportsmen"

Pierson v. Post (Takeaways)

- The first possessor of an unowned thing owns it
- To “possess” a wild animal is to physically capture it

Keeble v. Hickeringill

- Keeble has a trap for ducks on his land—the ducks in question have not entered the trap and been captured but are merely in Keeble's pond
- Hickeringill is firing off shotguns to "damnify" Keeble and scare off the ducks
- Keeble sues Hickeringill for "trespass on the case"—a catch-all action for injury for another's actions
- Question—is Hickeringill liable?

Keeble v. Hickeringill

- Held—Keeble has an action against Hickeringill; for interference with his livelihood & use of property

Keeble v. Hickeringill—Takeaways

- Basically a nuisance case, not totally clear it turns on property interest in the ducks, but often thought of that way in connection with *Pierson v. Post*
  - *Pierson* cites this case, but seemed to be using a wrong reporter that had the case turn on Keeble's ownership in the ducks by owning the land

Johnson v. M'Intosh

- Background—European imperial powers claim vast swaths of land in North America on maps; lands are actually occupied by Native Americans and Europeans/Americans didn't live there
- Land in question—in present-day Illinois. Claimed by the United States (from Virginia, from Britain). Occupied by Illinois & Piankeshaw tribes.
- 1773—Native Americans sell tract to Johnson (plaintiff)
- 1795—Native Americans enter into treaties ceding tracts to United States
- 1818—United States sells tract to M'Intosh (defendant)
- Johnson sues M'Intosh for ejectment
- Question—who owns the land?
  - Was the 1773 sale effective? Can "Indians . . . give, and . . . private individual . . . receive, a title which can be sustained in the Courts of this country"?

Johnson v. M'Intosh

- Held—M'Intosh owns land; Native Americans could not sell their lands to private individuals
- "Principle of Discovery"—European "discovery" of North American lands counts as "first possession"
  - Gives the European nation an exclusive right to deal with the people actually in possession (thought of as a kind of "ownership")
  - Native Americans retain a "right of occupancy"

Johnson v. M'Intosh (Takeaways)

- Most American land titles trace to grants from the federal government
- Compare with *Pierson*; "possession" can be a flexible concept

Class 7: Acquisition By Find

Professor James Toomey

Haslem v. Lockwood

- Travelers' horses defecate on public highway. Plaintiff rakes it into piles on the side of the road. Leaves overnight—needs to arrange transport to get onto his land the next day.
- Next morning, defendant sees piles before plaintiff returns. Claims and carts off manure.
- Plaintiff sues defendant for trover
- Question: who owns the manure?

Haslem v. Lockwood

- Held—plaintiff owned manure; was in continuous possession for a *reasonable time* to arrange transport
  - "Possession" in these circumstances allows a reasonable time for removal

Haslem v. Lockwood (Takeaways)

- Great example of analyzing transfers of ownership
- Compare to *Pierson* and *Johnson*—”possession” can be flexible
  - Practicality
  - Custom
  - Incentives
- “Possession” as labor

Armory v. Delamirie

- Plaintiff—"Chimney sweeper's boy" who found a jewel
- Defendant—jeweler
- Plaintiff takes the jewel he found to defendant "to know what it was," defendant takes it from him and refuses to give back
- Plaintiff sues defendant for trover
- Question: can a finder of lost property sue someone who takes it from them?

Armory v. Delamirie

- Held—"[T]he 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."

Armory v. Delamirie—Takeaways

- Finder of ***lost*** property gets "ownership" of thing as against "the whole world" ***except*** the ***true owner***

Clark v. Maloney

- Logs floating in Delaware Bay
- Plaintiff finds them first, ties them up
- Logs come loose, and are again floating in Delaware Bay
- Defendant finds them and claims them
- Plaintiff sues defendant for trover
- Question: what if a finder of lost property themself loses property and another person finds it?

Clark v. Maloney

- Held—plaintiff (first finder) wins
- Reasoning—first finder has *better* title relative to all but the true owner

Clark v. Maloney (takeaways)

- Controversies between first finder and second finder—goes to first finder

Anderson v. Gouldberg

- Plaintiffs trespass; steal logs from someone's land
- Defendants steal logs from plaintiffs
- Plaintiffs sue defendants for replevin/conversion
- Question: can someone who obtained property by conversion (Converter 1) sue someone who takes the same property from them (Converter 2)?

Anderson v. Gouldberg

- Held—yes. Convertor 1 has better title than Converter 2.

Anderson v. Gouldberg (takeaway)

- Little authority on point—Anderson says Converter 1 wins; other cases Converter 2

Lost Property Principles

Case	Winner	Citation
True Owner v. Finder	True Owner	*Armory v. Delamirie*
Finder v. Anyone Else	Finder	*Armory v. Delamirie*
Finder 1 v. Finder 2	Finder 1	*Clark v. Maloney*
Converter 1 v. Converter 2	?	*Anderson v. Gouldberg*; *Russell v. Hill*

Edwards v. Sims

- Edwardses own land with entrance to cave. They explore the full cave, build a hotel at the entrance, and turn it into a tourist destination.
- Lee, their neighbor, suspects that part of the cave goes underneath his land.
- The procedure is super complicated—basically the question is whether the court will order a survey of the cave, which it is only going to do if, should part of the cave turn out to be under Lee's land, Edwardses would be trespassing
- Question—if the cave extends under Lee's land, are the Edwardses trespassing?

Edwards v. Sims

- Held—survey permitted. Lee owns *ad caelum et ad infernos*, and if part of the cave is under his property, it's a trespass.

Edwards v. Sims (dissent)

- *Ad caelum* is not literal—policy decision; decision related to actual control
- Owner of entrance to cave should own cave
- Labor—Edwardses put in the work to explore the cave and bring it out to the public

Edwards v. Sims (Takeaways)

- *Ad caelum* is an application of the ***principle of accession***—owner of one thing automatically owns some related thing
- Fight here arguably about how the principle of accession cuts—to the owner of surface land or the entrance to the cave

Hannah v. Peel

- Finder vs. property owner
- Finder—Corporal Duncan Hannah, stationed in Gwernhaylod House, finds an old lost brooch, which he reports to his commanding officer
- Property owner—Major Hugh Edward Ethelston Peel, acquired Gwernhaylod House a few years ago, never occupied it before it was requisitioned
- Police can't find true owner, sell brooch, give proceeds to Major Peel. Hannah sues for conversion & replevin.
- Question: finder v. property owner?

Hannah v. Peel—Cases

To the finder

Case	Facts
Armory v. Delamirie	Chimney sweep boy finds jewel. Court says has an ownership interest against all but true owner.
Bridges v. Hawkesworth	Parcel found on business premises by visitor. Court says it goes to visitor

To the property owner

Case	Facts
South Staffordshire Water Co. v. Sherman	Pond cleaner finds two rings in mud at bottom of pond. Court says goes to owner of pond/land.
Elwes v. Brigg Gas Co.	Gas co. with 99-year lease finds ancient buried boat. Court says goes to landowner.

Hannah v. Peel

- Held—brooch to Corporal Hannah.

Hannah v. Peel (Takeaways)

- General Principle 1: ownership of lost property goes to finders as against all but the true owner
- General Principle 2: owners of real property own everything on, above, and within their property
- Hard question when they're in conflict

General Takeaways

- First possessor of unowned or abandoned property becomes the owner.
- First possessor of lost property owns it as against all but the true owner.
- Arbitrary-seeming rules in property law:
  - Policy reasoning
  - Custom
  - Hard-to-remember

Class 8: Adverse Possession

Professor James Toomey

Adverse Possession

- Anyone in *possession* of property becomes the *true owner* after [statutory number of years], if possession has been:
  1. Actual
  2. Exclusive
  3. "Open and Notorious"
  4. Continuous
  5. "Hostile"

“Hostile”

- **Majority** (“CT Rule”)—state of mind irrelevant
- **Small minority** (“ME Rule”)—bad faith (know the property is not yours)
- **Larger Minority**—good faith (think the property is yours)

Possible Additions

- **Color of Title**—asserting ownership under a document (related to good faith)
- **Good faith**—might be listed separately from "hostile" in CT rule states
- **Peaceful**
- **Pay taxes**
- **Enclose or improve**

Scott v. Anderson-Tully Co.

- Scotts—own 600 acre tract. Live on and use land; logging, livestock.
- Anderson-Tully—lumber company
- Disputed tract—wild, rocky, hard to use for much
  - Scotts—deed sort of covers the tract; fence to keep in livestock doesn't cover tract. Never substantially used land.
  - Anderson-Tully—deed super vague, 1969 survey says their land includes tract. Paint line along Scott's fence, puts up flags. Harvest wood a few times, give permission to hunters to use land.
- Deeds too complicated. Q: Does Anderson-Tully own by adverse possession?

Scott v. Anderson-Tully Co.

- Held—Anderson-Tully
- MS Adverse Possession Law (10-year):
  1. Under claim of ownership—painted line, harvested wood, granted permission to hunters
  2. Actual or hostile—periodically actually entered, cause of action for trespass
  3. Open, notorious, and visible—painted line, harvested wood as a true owner would
  4. Continuous and uninterrupted—claimed/used as a true owner would for almost 40 years
  5. Exclusive—granted licenses, implies power to exclude
  6. Peaceful

Scott v. Anderson-Tully Co.—Takeaways

- Review way in which court works through elements (basically the same everywhere; check for jurisdiction-specific rules)
- Theme of adverse possession—was the possessor using the property like a true owner?
- Purposes of adverse possession:
  - Settle title, make it alienable
  - Property to those who use it
- Most prevalent application of adverse possession today—border disputes

Carpenter v. Ruperto

- Carpenters own suburban residential lot. Behind it, there's a field owned by others—used for corn, storing trash, etc. over the years
- In 1952, Carpenters—knowing they don't own it—extend yard by a strip into cornfield
  - Continue using it for decades—propane tank in 1964; driveway in 1975
- McCormicks buy cornfield, assert ownership over the strip
- Carpenters sue to ***quiet title*** by adverse possession. Q—have they adversely possessed the strip?

Carpenter v. Ruperto

- Held—strip to McCormicks.
- Iowa Adverse Possession Law (10-year):
  1. Actual—yes
  2. Exclusive—yes
  3. Open and notorious—yes
  4. Continuous—yes
  5. "Hostile under claim of right"—no. Iowa has good faith requirement—must have some legitimate claim to land or think that it is yours. Carpenters knew it wasn't.

Carpenter v. Ruperto—Takeaways

- Some (minority of) states require good faith belief that the land belongs to adverse possessor
- Most contentious area of adverse possession law
- Quiet title action—action brought by someone (typically adverse possessor) to have court declare ownership of property
  - Everyone with a claim to the property needs to come forward or lose claim

Howard v. Kunto

- 50 ft wide lots along Hood Canal. Problem—each owner has deed describing the lot immediately to the west.
- Kuntos—have deed describing lot to west of theirs (not involved in litigation). Just purchased/occupied previous year.
- Howards—have deed describing house occupied by Kuntos (occupying lot two lots east, not involved in this litigation, which connects at the rear).
- Howards sue to quiet title to Kunto's property. Question—Do Kuntos own lot by adverse possession?
    1. Is it not "continuous" because it was only used during summers?
    2. Is it not "continuous" because lot has passed through several people?

Howard v. Kunto

- Held—lot to Kuntos.
  1. Continuity means *using property as an owner would*. These are all summer homes.
  2. "Tacking"—continuous if subsequent possessors are in privity; privity means "reasonable connection between successive occupants . . . so as to raise their claim of right above the status of wrongdoer or trespasser."

Howard v. Kunto—Takeaways

- "Continuous":
  - Continuous as a true owner might use the property
  - Tacking—continuity can be established by a chain of possessors connected by privity

Songbyrd v. Grossman

- Songbyrd—entity owned by Professor Longhair, blues musician
- Estate of Grossman—estate of Albert Grossman, prominent manager, now controls Grossman's company, Bearsville Records
- Bearsville gets lawful possession of Professor Longhair's masters in 1972.
- Bearsville licenses recordings in 1986 and 1991. Professor Longhair periodically asks for them back, unclear response.
- Q: Has Bearsville adversely possessed the masters? (when did the clock begin to run?)

Songbyrd v. Grossman

- Held—recordings to Bearsville.
- NY—3-year statute of limitations for personal property. When did it start to run?
  - 1972? No, possession was lawful.
  - But no later than 1986—licensing them was acting like an owner—Professor Longhair had cause of action for conversion
  - Suit filed in 1995—too late, Bearsville adversely possessed

Songbyrd v. Grossman—Alternative Rules for Good Faith Purchasers

- **Demand Rule** (*Guggenheim v. Lubell*)—clock doesn't start running until true owner has *demanded* personal property back.
- **Discovery Rule** (*O'Keefe v. Snyder*, NJ)—clock doesn't start running until true owner has *discovered* or *should have discovered* who has the property

Songbyrd v. Grossman—Takeaways

- Adverse possession of personal property. ***Three rules***:
  1. Background (no good faith purchasers)—clock starts running when property is converted
  2. Good faith purchaser option 1 (NY Rule)—clock starts running when owner *demands* return of property
  3. Good faith purchaser option 2 (NJ Rule)—clock starts running when owner *discovers* or *should have discovered* who has the property

Adverse Possession

- Anyone in *possession* of property becomes the *true owner* after [statutory number of years], if possession has been:
  1. Actual (*Scott v. Anderson-Tully*)
     a. Use as a true owner
  2. Exclusive (*Scott v. Anderson-Tully*)
     a. Allowing others suggests you think you can exclude
  3. "Open and Notorious" (*Scott v. Anderson-Tully*)
     a. Not a secret, as open as a true owner
  4. Continuous (*Howard v. Kunto*)
     a. Continuous as a true owner would be
     b. Tacking—add possession-times of those in privity
  5. "Hostile" (claim of right? color of title?)
     a. Majority—just means without permission, state of mind irrelevant
     b. Small minority—requires bad faith
     c. Minority—requires good faith (*Carpenter v. Ruperto*)

Class 9: Transacting With Real Estate I—*nemo dat*

Professor James Toomey

Timeline of Real Estate Transaction

1. Pre-contract
   - Negotiation, offer & acceptance
2. Contract
   - Enforceable contract, seller in possession with "legal title," buyer has "beneficial title" (*Wood v. Donohue*)
   - Buyer acquires financing (mortgage)
   - Buyer inspects property
   - Buyer conducts title search to ensure "marketable title" (*Mugaas v. Smith*)
3. Closing
   - Seller executes deed to buyer
   - Buyer/mortgagor pay seller
   - Buyer signs mortgage note
4. Recording (*Hood v. Webster*)
5. Post-transaction
   - Buyer makes monthly mortgage payments (*Murphy v. Fin. Dev. Corp.*)

Deeds

- **Merger by Deed**—after deed is handed over, buyer only has remedies based on kind of deed; contract is "merged"
- Three kinds:
  1. **General Warranty Deed**—seller guarantees title against defects. Promises to compensate if someone else has a valid claim, and defend against third-party claims in court.
  2. **Quitclaim Deed**—seller transfers seller's interests, but no guarantee about what they are. Buyer has no remedy if someone else has a valid claim (except for seller's intentional fraud)
  3. **Special Warranty Deed**—seller guarantees against defects in title arising from seller's own actions (e.g., prior sale of a portion of the described lot) but not those of others (e.g., prior owner sold portion of the described lot)

Description in Deeds

- **“Metes and bounds”**—prevails in eastern states; physical description of lot
- **Rectangular survey**—prevails in the west; rectangular lots set up by government survey, deeds reference survey

Wood v. Donohue

- Installment land contract—Donohue has a contract to buy from Betty Wood a house for $88k, paid in monthly payments following a $30k down payment
  - Donohue has right to possession in the meantime
  - Wood retains legal title/deed until purchase price paid off
- Donohue wins some money in class action lawsuit related to the property's proximity to uranium processing plant
- Wood sues for 34.59% of the award, because Donohue has paid off 65.41% of the purchase price
- Q: Does Wood get the money?

Wood v. Donohue

- Held—no; full award to Donohue.
- Doctrine of equitable conversion—buyer gets *equitable title* after signing contract but before closing; costs and benefits of property belong to buyer
  1. Doesn't matter that it's an installment land contract rather than traditional pre-closing contract
  2. Doesn't matter that case is about windfall benefit rather than damage to house

Wood v. Donohue—Takeaways

- Equitable conversion—during "contract phase" of real estate transaction (between signing contract and closing), seller retains "legal title," buyer gets "equitable title"
  - Equitable title means buyer stuck with costs, but gets benefits, of anything that happens related to property before closing
- Installment land contract—mortgage alternative where buyer pays *seller* purchase price over time. Modern trend to treat like mortgage

"Nemo Dat"

- Nemo dat quod non habet—one cannot give that which one does not have
- You can't sell what you don't own
- Challenge with real estate—how do you know what a seller owns?
  - And what about good faith purchasers?

Kuntstsammlungen Zu Weimar v. Elicofon

- Two paintings disappear during American occupation of an East German castle in WWII
  - They appear to have been stolen by American servicemen, possibly with German assistance
- Shortly after the war, Elicofon purchases paintings from returning American soldier
  - Soldier tells Elicofon he purchased the paintings from someone in Germany
  - No indication they were stolen
- East German state museum sues to recover the paintings
- Question—does Elicofon have good title to the paintings, such that he can keep them?

Kuntstsammlungen Zu Weimar v. Elicofon

- Held—no; paintings still belong to East German museum
- "It is a fundamental rule of law in New York that a thief or someone who acquires possession of stolen property after theft cannot transfer a good title even to a bona fide purchaser for value . . . ."
- *Nemo dat*—thief doesn't have good title; thief can't transfer good title

Kuntstsammlungen Zu Weimar v. Elicofon—Takeaways

- *Nemo dat*—background principle in all transactions of property
  - A person generally can't give or sell more of an interest in property than they have
  - Thieves do not have good title; *nemo dat* means they generally can't transfer good title (U.S. law)
  - But policy interests compete with *nemo dat* in cases involving good faith purchasers

Kuntstsammlungen Zu Weimar v. Elicofon—Takeaways

- *Nemo dat*—background principle in all transactions of property
  - A person generally can't give or sell more of an interest in property than they have
  - Thieves do not have good title; *nemo dat* means they generally can't transfer good title (U.S. law)
  - But policy interests compete with *nemo dat* in cases involving good faith purchasers

Kotis v. Nowlin Jewelry

- On June 11, Steve Sitton “buys” a gold Rolex watch (worth ~$10K) from Nowlin Jewelry
  - Pays with a forged check, gets possession of the watch
- June 12, Sitton calls Kotis (local used car salesman) to try and sell him the watch for ~$3,500
  - Kotis calls Nowlin Jewelry, learns the watch was purchased yesterday
  - Nowlin calls back to let him know the check has not cleared
  - Kotis “buys” the watch from Sitton for ~$3,500, starts ignoring Nowlin
- Question—who owns the watch? (Was Kotis a “good faith purchaser for value” under the UCC?)

Kotis v. Nowlin Jewelry

- Held—Nowlin owns watch; Kotis was not a good faith purchaser
- Because Sitton didn't steal the watch, but purchased it fraudulently, he had "voidable" title, not void
  - *Could have* sold full title to a good faith purchaser for value under the UCC
  - But Kotis is not a good faith purchaser—he must have known something was up

Kotis v. Nowlin Jewelry

- ***Good faith purchaser*** (of goods, under UCC) ***for value***—an ***exception*** to *nemo dat*
  - One who obtains title to goods by fraud gets "voidable title" that can be transferred as full title to a good faith purchaser for value
  - Statutory violation of *nemo dat* based in the policy interests of the good faith purchaser
  - Contrast with "void title" in *stolen* goods, and note that the purchaser must actually be in good faith

Hauck v. Crawford

- Hauck, owner of a large farm “deeds” one half of the minerals in his farm to Crawford
  - Crawford & friends offered 25c/acre for an oil and gas lease
  - And apparently slip into the documents on that deal the mineral deed
    - Not discussed
    - Hauck told that the documents were all about the oil and gas lease
    - Hauck doesn’t get a copy of these documents
- Crawford sells mineral deed to third party (White & Duncan, in Texas)
  - No evidence White & Duncan knows about fraudulent manner in which deed was procured
- Question—who owns the ½ mineral interest, Hauck or White & Duncan?

Hauck v. Crawford

- Held—remand to determine whether Hauck was negligent in signing the mineral deed
- Court says that property rights obtained by "fraud in the execution" (lying about what is in the document) are ***void***
  - And yet, "even though the deed is void if plaintiff were negligent or committed acts sufficient to create an estoppel he should bear the brunt of such negligence, rather than a bona fide purchaser"

Hauck v. Crawford—Takeaways

- Courts have adopted a number of compromise rules and exceptions to *nemo dat* to protect interests of good faith purchasers
  - Even in the absence of statute

Class 10: Recording Acts

Professor James Toomey

Government Title Records

- ***Recording***, not ***registration***; provide ***information***, don't create ownership
- Contains documents regarding land transactions (mostly deeds)
- **Grantee index**—documents alphabetized by grantee
- **Grantor index**—documents alphabetized by grantor
- **Title search**
  1. Look up "chain of title" in grantee index, starting with current grantor and going backwards
  2. Repeat in grantor index, going forward from original grantor

Recording Acts

- Problem—because of mistake or fraud, one grantor has deeded the same land to more than one person
- Statutory exception to *nemo dat* for **good faith purchasers for value**
- **Race** (earliest, rare today)—first to record wins
  - Statutory language "first record"
- **Notice—**good faith purchaser for value gets ownership unless they had notice of previous transaction; recording counts as notice
  - Statutory language "without notice," "in good faith"
- **Race-Notice**—good faith purchaser for value gets ownership if they (1) didn't have notice, and (2) are the first to record
  - Statutory language "without notice," or "in good faith" + "who shall first record"

Hood v. Webster

- Florence Wood owns farm.
  - **1913—**executes deed to brother-in-law William. Held in escrow until she dies (in exchange for monthly support payments?). Unrecorded.
  - **1928**—executes presently effective deed to brother Almon & nephew Howard Webster, for $1 (they were helping out?). Recorded.
  - **1933**—Florence dies
- Recording Act: every conveyance of real property "is void as against any subsequent purchaser in good faith and for a valuable consideration, for the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."
- Q: Who owns farm?

Hood v. Webster

- Held—brother-in-law William
- Brother & nephew not "good faith purchasers ***for value***"—$1 consideration
  - Second transaction was a gift
- Second deed not protected by recording act

Hood v. Webster—dissent

- ***First*** deed was ineffective
- William breached a contract to receive farm only in exchange for support payments he never made
- If the second deed is the only one in question, doesn't matter whether it was for value—recording act not implicated

Hood v. Webster—Takeaways

- Recording acts generally only protect good faith purchasers ***for value***—something like fair market value
  - "Shelter Rule"—protects people who get property as a gift from good faith purchasers for value

Mugaas v. Smith

- Dona Mugaas adversely possesses a strip of land from her neighbor, effective 1910
  - Never filed to quiet title
  - Had fenced in strip from 1910-1928, but it is gone now
  - No physical or legal evidence of Mugaas's ownership of strip
- Smiths buy neighbor's lot in 1941
  - Deed describes lot as including Mugaas's strip
  - Smith has no idea about Mugaas's adverse possession—and no reasonable way to know
  - Good faith purchaser for value
- Mugaas files to quiet title. Q: Does she own strip?

Mugaas v. Smith

- Held—yes
  - To hold otherwise would be to require adverse possessors to "keep flying their flag for ever, and that the statute ceases to be a statute of limitations"
  - Ownership by adverse possession is real ownership, even if never recognized by the courts
    - Background principle of *nemo dat*—seller didn't own the strip when they purported to sell it
  - Mugaas gets the strip ***even though*** Smith's had ***no*** reasonable way of finding out that the seller did not own the deed

Mugaas v. Smith—Takeaways

- Adverse possession—like ownership in general—does not need to be recorded or declared to be effective
  - ***Remember***—recording is *evidence* of ownership, it is not constitutive of ownership
  - It is possible to own things (by adverse possession or any other means) without recording or other public indication
- Recording acts do not protect good faith purchasers for value from all defects in deed—only duplicative grants

Class 11: Mortgages

Professor James Toomey

Timeline of Real Estate Transaction

1. Pre-contract
   - Negotiation, offer & acceptance
2. Contract
   - Enforceable contract, seller in possession with "legal title," buyer has "beneficial title" (*Wood v. Donohue*)
   - **Buyer acquires financing (mortgage)**
   - Buyer inspects property
   - Buyer conducts title search to ensure "marketable title" (*Mugaas v. Smith*)
3. Closing
   - Seller executes deed to buyer
   - **Buyer/mortgagor pay seller**
   - **Buyer signs mortgage note**
4. Recording (*Hood v. Webster*)
5. Post-transaction
   - **Buyer makes monthly mortgage payments (*Murphy v. Fin. Dev. Corp.*)**

Mortgages

- Mortgage—a ***security interest*** (“lien”) in ***real property*** in exchange for a ***loan***
  - Most common method of financing purchases of residential real property in the United States
- **Mortgagor**—borrower, gives security interest and receives loan (buyer)
- **Mortgagee**—lender, gets security interest and gives loan (bank)
- **Note**—document governing mortgage

Mortgages—Rights & Duties

- Mortgagor makes **monthly payments** until loan repaid
- If mortgagor defaults, mortgagee can **foreclose**—sell property and recoup remaining balance
  - Subject to **equity of redemption**—right of mortgagor to pay remaining balance within set period of time (up to 1 year)
  - Any income from sale above remaining balance goes to mortgagor—mortgagee has duty to obtain fair price (*Murphy*)

Murphy v. Financial Development Corp.

- Murphys—mortgagors. Defaulted on mortgage after 10 years. Negotiate with lenders but still short.
- Financial Development Corp.—mortgagees/lenders. Foreclose on Murphys house.
- Lenders advertise foreclosure auction following steps outlined in NH statutes—post notice at house, City Hall, the Post Office, and in newspaper.
- Auction—no one shows up except for lenders. Lenders place only bid for the exact remaining balance on mortgage. Mortgage cleared, but Murphys get nothing.
- Next day, lenders sell house for $10,000 more than they paid for it.
- Q: did lenders fulfill their duties of obtaining a fair price?

Murphy v. Financial Development Corp.

- Held—no.
- Mortgagees in foreclosure sales owe mortgagors a ***fiduciary duty*** to obtain fair price, beyond statutory requirements:
  - "exert every reasonable effort to obtain a fair and reasonable price under the circumstances, even to the extent, if necessary, or adjourning the sale or of establishing an upset price below which it will not accept any offer."
  - Good faith—don't engage in self-sabotage or knowing misconduct
  - Due diligence—"whether a reasonable man in the lenders' place would have adjourned the sale or taken other measures to obtain a fair price"
- Damages—"fair" price, may be less than "fair market value"

Murphy v. Financial Development Corp.—Dissent

- Mortgagees only violate fiduciary duty to obtain fair price if the price house sold for "shocks the conscience"

Murphy v. Financial Development Corp.—Takeaways

- Mortgagees owe mortgagors ***fiduciary duties*** to obtain fair price at foreclosure sale
- Mortgagors get sale proceeds in excess of remaining mortgage balance
- Fiduciary duties—legal duty to act in the best interests of another

Skendzel v. Marshall

- Marshalls purchase home from Burkowski under ***installment land sale contract***
  - Total purchase price of $36,000, to be paid in annual installments from Marshalls to Burkowski
    - No interest
    - No financial institution involved
  - During payment schedule, Burkowski holds legal title, Marshalls get possession (& equitable ownership)
  - In the event of default—"all moneys and payments previously paid shall . . . be and become forfeited and be taken and retained by the Vendor as liquidated damages"
    - Burkowski also gets house
- Marshalls on/ahead of payment schedule for a while, but eventually default
  - Burkowski's heirs sue to keep the money already paid and regain possession of house
- Question—can Burkowskis enforce damages clause and keep money?

Skendzel v. Marshall

- Held—no; Burkowskis keeping payments already made clearly excessive
- Installment land sale contract is functionally the same as a mortgage, and will be treated as such
  - Including common law/equitable protections for mortgagors
  - "[W]e are holding a conditional land sales contract to be in the nature of a secured transaction, the provisions of which are subject to all property andj ust remedies at law and equity."
- So—
  - Burkowskis don't automatically get house; have to do a foreclosure sale
  - Burkowskis cannot keep more than $15K (outstanding balance of loan); any proceeds in excess of that to Marshalls
  - Marshalls have equity of redemption

Skendzel v. Marshall—Concurrence

- Installment land sale contracts may be enforceable by their terms where the penalty is not inequitable
  - If the purchaser has made few payments
  - Or abandoned the premises or something
- And treating installment land sale contracts as mortgages also imports typical provisions in mortgage notes in the community

Skendzel v. Marshall—Takeaways

- Private contractual alternatives to mortgages generally treated as mortgages
  - Limited ability to customize terms of land-sale financing arrangements
  - Ensures protections for purchasers, but may limit flexibility in devising alternative arrangements for people who cannot get traditional mortgages

Mortgages and Financial Crises of 2008

- Precise causes & remedies complicated/contested
- Bubble in housing prices (irrational, inflated rise in housing prices beyond real value)
  - Excessive growth in high-risk, “sub-prime” mortgages
    - Still might be a winning proposition for financial institutions so long as housing prices are rising so they can recover loan amount if mortgagee defaults
  - These high-risk mortgages were bundled in complicated ways that made investing in them look more reliable than they were, and obscured the extent to which banks were relying on dubious income
- When housing bubble burst and housing prices dropped, large numbers of mortgage loans became unrecoverable at the same time, and all of these purportedly-safe mortgage-based income streams turned out to be worthless

Class 12: Estates & Future Interests

Professor James Toomey

Today's Class

- ***Dividing*** ownership in ***land*** across ***time***
- ***Present possessory interest***—right to possess/use property now
  - Someone who has a present possessory interest is called a ***tenant*** (not just renters)
- ***Future interest***—will (or might) get an ownership interest in the future

Goals for Today

- Know the basics and the language (i.e., “fee simple” = full ownership)
  - I’m not going to test the difference between, say, a “reversion” or a “remainder”
  - You will need to memorize details before bar exam

Making Sense of Estates and Future Interests

- Estates created by *language* in *deeds* (or other conveyances, e.g., wills and trusts)
  - Twist 1: language *must* be read to create a *legally recognized estate* (*numerus clausus*—closed set of property interests)
  - Twist 2: *someone* must *always* own land/have a present possessory interest. If the language doesn't say who, law implies it goes back to the *original grantor*
  - Twist 3: if a person is dead when their interest would become possessory, it goes to their heirs

Estates & Future Interests

Present Possessory Interest	Future Interest
Fee Simple Absolute	
Life Estate	(1) If held by original grantor—Reversion (2) If held by third party—Remainder
Fee Simple Determinable	Possibility of Reverter
Fee Simple Subject to Condition Subsequent	Right of Entry
Fee Simple Subject to Executory Limitation	Executory Interest

Fee Simple Absolute ("Fee Simple")

- "Full ownership"
- Present possessory interest ***unlimited in time***
- Created by, e.g.:
  - Traditionally –"to Marge and her heirs"
  - Today:
    - "to Marge"
    - "to Marge in fee simple"

Life Estate

- Present possessory interest for the life of a named person
- When they die, automatically goes to another ("***reversion***" if back to original owner; "***remainder***" if a third party)
- Created by, e.g.:
  - "To Marge for life"
  - "To Marge for life, then to Lisa"

Reversion

- Interest retained by original grantor who will get property back after life estate:
  - "To Marge for life, then back to me"
- Grantor holds ***reversion***; owns in fee simple after Marge dies

Remainder

- Twist on reversion—interest held by third party during a life estate
  - "To Marge for life, then to Lisa"
- Lisa holds ***remainder***
- Twist: "to Marge for life, then to Lisa if she graduates high school"
  - Lisa holds ***contingent remainder***
  - Subject to ***reversion*** held by original owner (if Lisa doesn't graduate, goes back to original owner)

Fee Simple Determinable

- Present possessory interest that ends ***automatically*** on occurrence of future event
- Goes back to ***original grantor*** who holds a ***possibility of reverter***
- Created by, e.g.:
  - "durational language":
    - "To Springfield Law School *as long as* it is used for instruction in the law, then back to me"
    - "so long as"
    - "while"
    - "during"
    - "until"

Possibility of Reverter

- What grantor holds after giving ***fee simple determinable***—right to automatically get back possession after condition
- "to Springfield Law School, so long as it is used for the instruction of law"
  - Springfield Law School has a fee simple determinable
  - Original grantor holds ***possibility of reverter*** and automatically retakes ownership if no longer used for the instruction of law

Fee Simple Subject to Condition Subsequent

- Present possessory interest that ***does not end automatically*** on happening of future event
- ***Original grantor*** gets a ***right of entry***
- Created by, e.g.:
  - "conditional language":
    - "to Springfield Law School, but *if* it is not used for instruction in the law, then I or my heirs have the right to reenter and take the premises"
    - "but if"
    - "on condition that"
    - "provided that"
    - "provided however"

Right of Entry

- What grantor holds after giving ***fee simple subject to condition subsequent***—not automatic transfer back of ownership, right to reclaim ownership
- "to Springfield Law School, but if it is not used for instruction in the law, then I have the right to reenter and take the premises"
  - Springfield Law School has fee simple subject to condition subsequent
  - Original grantor holds ***right of entry*** triggered by condition

Fee Simple Subject to Executory Limitation

- Present possessory interest that ends ***automatically*** on occurrence of future event
- And goes to a ***third party*** (who holds ***executory interest***)
- Created by, e.g.:
  - Durational or conditional language:
    - "to Springfield Law School as long as it is used for instruction in the law, then to the Springfield Animal Hospital"
    - "to Springfield Law School, but if it is not used for instruction in the law, then the Springfield Animal Hospital"

Executory Interest

- Twist on possibility of reverter—held by third party following a fee simple subject to executory interest—automatically get ownership after condition
- "to Springfield Law School, as long as it is used to teach law, then to Marge"
  - Springfield Law School has fee simple subject to executory limitation; Marge has executory interest

Estates & Future Interests

Present Possessory Interest	Language	Future Interest
Fee Simple Absolute	"to Marge"	
Life Estate	"to Marge for life, then to [grantor or third party]"	(1) If held by original grantor—Reversion (2) If held by third party—Remainder
Fee Simple Determinable	"to Marge as long as [durational language], then back to [grantor]"	Possibility of Reverter
Fee Simple Subject to Condition Subsequent	"to Marge, but if [conditional language], then back to [grantor]"	Right of Entry
Fee Simple Subject to Executory Limitation	"to Marge, [durational or conditional language], then to [third party]	Executory Interest

Williams v. Estate of Williams

- Farm owner dies in 1944 with will that reads
  - "At my death I want Ida Williams, Mallie Williams, and Ethel Williams, three of my daughters to have my home farm where I now live . . . to have and hold during their lives, and not to be sold during their lifetime. If any of them marry their interest ceases and the ones that remain single have full control of same. I am making this will because they have stayed at home and taken care of the home and cared for their mother during her sickness, and I do not want them sold out of a home. If any one tries to contest this will I want them debarred from any interest in my estate."
  - Ida, Mallie & Ethel are 3 of Williams's 9 children
- Ethel, 50+ years later, now 92, is the survivor of the three daughters, and has been living on the farm the whole time
- Question—what is the nature of Ethel's ownership?

Williams v. Estate of Williams

- Held—daughters each had a life estate subject to executory limitation, and executory interest (subject to each one's marriage); heirs hold reversion in fee simple
- Lower court thought daughters had fee simple, because will did not discuss remainder and didn't foreclose giving daughters full ownership
  - TN Supreme Court disagrees—language clearly intended to give daughters less than fee simple absolute

Williams v. Estate of Williams—Takeaways

- ***Numerus Clausus***—Grants of property interests must fit within the menu of estates
  - Interpretive question what interest property grants create
  - But peculiar grants of property interests not enforceable on their terms, except through estate system
- ***Conservation of estates***—whenever property is transferred, all of what the grantor had must be accounted for
  - Full temporal duration of fee simple absolute must be provided for

Class 13: *Numerus Clausus*

Professor James Toomey

Charles v. Barzey

- Grantor—Iris Charles, owns lot No. 18 Cork St. Residence + garage & storeroom that she built. Garage & storeroom used by owner of adjacent lot, John Charles (Iris's niece), in pharmacy business.
  - Iris's will—"I hereby bequeath to my niece, Mrs. Yvette Barzey, my house and lot at 18 Cork St, Roseau, Dominica. The addition to the house where the garage and storeroom is located I give to my nephew Mr. John A. Charles to be used by him as long as he wishes."
- Question—what is the legal effect of these words? Who owns what?

Charles v. Barzey

- Held—life estate in garage & storeroom to John
  - Rest of lot to Barzey in fee simple
  - Barzey holds the remainder in the garage & storeroom

Charles v. Barzey—Takeaways

- *Numerus Clausus*—"there are a limited number of property interests which can exist as an interest in property and attempts to create interests unknown to the law are ineffectual"
- In interpreting language as creating estates, courts can be strict or forgiving
- Practice tip—help your clients achieve their goals in the language of the law

Brokaw v. Fairchild

- 1880s—Isaac Brokaw—builds mansion in Manhattan; leaves it to his son, George, with a life estate, remainder to George's children
- 1920s—George wants to tear down mansion and replace with apartment building. Reasons:
  - George hates it
  - Neighborhood has changed—all apartment buildings
  - No market for renting a mansion
  - Currently a loss of $70k, would make $30k profit as an apartment building
- Question—can George, as a life tenant, do this?

Brokaw v. Fairchild

- Held—No, house stays. Tearing it down would constitute ***waste***.
  - ***Waste***—if holders of present possessory interests unreasonably damage the property, holders of future interests have a cause of action for waste
    - "any act of a life tenant which does permanent injury to" property
- Life estate is about *use*, not full ownership—remainder interest entitles holder to property in roughly its current condition
- Distinguish—*Melms v. Pabst Brewing Company*. Court held destruction of a residence by a life tenant was not waste because of changes in the neighborhood (balancing approach).
  - But distinguishable because Pabst thought it owned it in fee simple?

Brokaw v. Fairchild—Takeaways

- Waste—cause of action against present possessory interest holders (not just life tenants), if present possessory interest holder ***unreasonably damages*** property
  - Affirmative waste—take some unreasonable act that causes excess damage to the remainder interest
  - Permissive waste—unreasonably fail to upkeep, causes excess damage (fail to fix leaks, not paying taxes, allowing an adverse possessor)
  - Ameliorative "waste"—improve value of property.
    - Minority view—not permitted (*Brokaw*)
    - Most states—balance interests (*Melms*; NY adopted this after *Brokaw* by statute)

Independent Order of Odd Fellows v. Toscano

- Toscanos gift-deed real property to Odd Fellows:
  - "Said property is restricted for the use and benefit of the second party only; and in the event the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot, the same is to revert parties herein, their successors, heirs or assigns."
- Question—are the restrictions in the deed void as restraints on alienation?

Independent Order of Odd Fellows v. Toscano

- Held—one is valid, one is not
  - "in the event the same fails to be used by the second party"
    - Valid as fee simple subject to condition subsequent
      - Theory that the implication is a restraint on the *kind of use* ("for lodge, fraternal, and other purposes for which the nonprofit corporation was formed"), not the identity of the user as
  - "in the event of sale or transfer by the second party of all or any part of said lot"
    - Void as restraint on alienation
- Dissent—"if we are to have realism in the law, the effect of language must be judged according to what it does."
  - The practical effect of these two clauses is the same

Independent Order of Odd Fellows v. Toscano—Takeaways

- ***Direct*** restraints on alienation typically held void
- Conditions that have the effect of restraining alienation ***may*** be void
  - Courts often allow restraints taken to be reasonable
  - Or which can be framed as more about the particular use rather than the identity of the user

Class 7: Co-Ownership & Marital Interests

Professor James Toomey

Basic Forms of Joint Ownership

- Tenancy in Common
- Joint Tenancy
- Tenancy by the entirety/marital property/community property

Tenancy in Common

- Most common form of co-ownership today
- Each tenant has a *separate, undivided* interest
  - Separate: each tenant can alienate or choose who gets it at their death without permission of others. Can choose what they want to do with their share of the property (alienate, dispose of, etc.)
    - But to sell the *whole property*, all tenants in common must agree
  - Undivided: equal right to possess the *whole* property
- Odd feature—tenants in common can hold different shares (e.g., 60%-40%)
  - Each co-tenant still has right to possess whole property
  - But share of rent income/income from sale of property will be divided by percentage

Joint Tenancy

- Key feature—*right of survivorship*
  - Surviving tenant automatically acquires the interest of another joint tenant when other tenant dies
  - Joint tenants cannot control disposition of interest after death—automatically goes to other joint tenants
- Creating joint tenancy—the "four unities"
  1. Time—each interest acquired at the same time
  2. Title—each joint tenant acquires interest by same instrument
  3. Interest—each joint tenant must have same legal interest in property
  4. Possession—each tenant must have equal right to possess the whole
  5. [Today, you also generally need intent to create a joint tenancy. Traditionally, the law presumed joint tenancy if the four unities are met]
- Ending joint tenancy—"severance"
  - If any of the four unities no longer holds, converts to tenancy in common
  - Most commonly, one joint tenant conveys their interest

Tenancy by the Entirety

- Only available to married couples
- "Joint tenancy plus"
  - Operates like joint tenancy, with right of survivorship
  - Created like joint tenancy—the four unities plus the "fifth unity" of marriage
  - ***But*** tenants by entirety can't sell their interest without consent of the other; no right to partition
- Abolished in about half the states

Situating Today's Cases

- Exiting co-ownership relations (*Delfino v. Vealencis*)
  - ***Partition***
- Rights and duties of co-ownership (*Gillmor v. Gillmor*)
  - ***Accounting***
  - ***Ouster***
  - ***Contribution***
- Transitioning joint tenancy to tenancy in common (*Harms v. Sprague*)
  - ***Severance***
- Introduction to dividing property acquired during marriage at divorce (*Postema v. Postema*)
  - ***Equitable division*** of ***marital property***

Delfino v. Vealencis

- Delfino brothers (Angelo & William) own 20.5 acre lot as ***tenants in common*** with Helen Vealencis
- Helen lives on two-acre part of lot, operating trash removal business
- Brothers want to sell land to developers; Helen does not
- Brothers file for ***partition***
- Question—partition "in kind," or "by sale"?

Delfino v. Vealencis

- Held—partition in kind
- "Official" background rule:
  - "It has long been the policy of this court, as well as other courts, to favor a partition in kind over a partition by sale." Partition by sale only where "the physical attributes of the land are such that a partition in kind if impracticable" and "the interests of the owners would be better promoted by a partition by sale"
  - In practice—most partitions take place by sale
- Not hard to physically partition here; in Helen's best interest to continue living in house and operating business

Delfino v. Vealencis—Takeaways

- ***Partition***—action available to tenants in common and joint tenants to judicially divide ownership interests in land. Can be filed anytime; no reason required.
  - Partition ***in kind***—physical division of land
  - Partition ***by sale***—order land sold and proceeds divided by ownership interest
- Law ostensibly prefers partition in kind. Partition by sale is more common and seems preferred in practice.

Gillmor v. Gillmor

- Cousins Edward Leslie Gillmor and Florence Gillmor own 33,000 acre ranch as tenants in common
- Edward is using entirety of property by himself for ranching
- Florence asks him to reduce his ranching activities so she can also ranch and he says no. But Edward has not physically prevented Florence from entering.
- Florence sues for *accounting* (Edward pay her for her share) based on *ouster* (being deprived access to right to entire possession as co-tenant). Edward counterclaims for *contribution* (Florence pay Edward for maintenance work)
- Question:
  1. For accounting, did Edward oust Florence?
  2. For contribution, does Florence owe Edward for maintenance?

Gillmor v. Gillmor

- Held:
  1. Edward ousted Florence; owes her accounting
     - Each co-tenant has a right to use of entire property. But if a tenant excludes another by either an "act of exclusion" *or* "use of such a nature that it necessarily prevents another co-tenant from exercising his rights in the property," that is *ouster*, and *accounting* is appropriate
     - "When a tenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other tenant's right to use the land, the tenant out of possession has established a claim for relief
  2. Florence owes Edward contribution for fence repair
     - Co-tenants don't generally owe contribution for maintenance or improvements (except for expenses necessary to avoid forfeiture, e.g., taxes)
     - But can counterclaim for contribution in an accounting action

Gillmor v. Gillmor—Takeaways

- Three co-ownership concepts:
  1. Accounting—cause of action against co-tenant in possession after *ousting* other co-tenants; co-tenant in possession pays other co-tenants according to their share
  2. Ouster—prerequisite to *accounting*; co-tenant in possession deprives co-tenants of right to possess the whole property, either by physically excluding them or using the property in a way that makes it impossible for them to use it
  3. Contribution—action by co-tenant in possession against co-tenants out of possession for payment for maintenance or improvements on property. Generally not available; available as a counter-claim in an *accounting* action or for expenses necessary to avoid the property being taken—taxes, mortgage payments, etc.

Harms v. Sprague

- Brothers John Harms and William Harms buy and live in house as joint tenants in 1973.
- Charles Sprague (John's friend) wants to buy a house from Simmonses. John grants Simmonses a mortgage on his interest in house he owns with William as collateral for Charles's installment contract with Simmonses.
- John dies in 1981. John's will leaves everything to Charles.
- Q: Who gets John's half-interest in original house?
  - Did granting a mortgage on joint interest *sever* to co-tenancy?

Harms v. Sprague

- Held—house to William.
  - Granting a mortgage on an interest held in joint tenancy is not severance
  - Lien theory of mortgages—mortgages are a *lien*, not a *title* to property. Therefore, mortgages don't sever the unity of title.

Harms v. Sprague—Takeaways

- *Severance* of one of the "four unities" converts joint tenancy to tenancy in common. At stake is what happens at death of one tenant.
- Classic cases of severance—one tenant sells or gives away interest to a third-party.
- Edge cases of severance—mortgages and leases
  - Courts are all over the place, no clear majority/minority
  - *Harms v. Sprague* is one approach, varies *a lot* from jurisdiction to jurisdiction

Division on Divorce

- **“Common law”/“Separate property” states** (most states)
  - ***Marital property*** (all property acquired during the marriage, regardless of whose name it is in) is divided ***equitably***
- **Community Property** (minority of states in West and South; based on civil law)
  - Property acquired during marriage is ***community property*** (a form of joint ownership during marriage, requiring both spouse’s consent to certain uses or transactions)
  - Divided ***equally*** on divorce

Postema v. Postema

- Plaintiff and Defendant married in 1984.
- Plaintiff—working as licensed practical nurse. Postponing education to support Defendant getting law degree. Financial and emotional support.
- Defendant—getting law degree. Also, apparently an asshole.
- Divorced in 1987. Court has to determine *equitable division* of *marital property*.
- Two questions:
  1. Is Defendant's law degree "marital property"?
  2. If so, how can it be "equitably divided"?

Postema v. Postema

- Held:
  1. Basically yes—”where an advanced degree is the end product of concerted family effort, involving mutual sacrifice, effort, and contribution of both spouses, there arises a ‘marital asset’ subject to distribution”
     - Not *literally* holding advanced degrees to be property *in general*; but *treated like* property on divorce in these circumstances. Equitable remedy.
  2. Valuation a question of compensating spouse for sacrifice, not literally valuing and dividing the degree

Postema v. Postema—Takeaways

- Equitable division on divorce—in most states ("separate property states"), when a married couple divorces, the court divides *marital* property *equitably*, not necessarily equally
  - Multi-factorial balancing; specifics vary a lot from state to state
- Controversies about advanced degrees—states have taken different approaches
  - NY used to treat them as actual property; now it is a factor in dividing other property

Class 15: Leases I—Introduction to Landlord-Tenant Law

Professor James Toomey

Types of Leases

- Term of Years
- Periodic Tenancy
- Tenancy at Will
- Tenancy at Sufferance

Term of Years

- Lease for a fixed time—need not be measured in years
  - Lease for a month, or even a day, called “term of years”
- Automatically ends after specified time

Periodic Tenancy

- Automatically rolls over in specified intervals (annually, monthly)
- Unless the parties give notice
- At common law, notice to terminate a year-to-year periodic tenancy was 6 months
  - Most states by statute provide for 1 month's notice

Tenancy at Will

- Can be terminated by tenant or landlord at any time
- Common law—no notice required to terminate
  - Many jurisdictions today require notice in frequency rent payments are made

Tenancy at Sufferance

- Not really a tenancy—what we say that holdover tenants (after expiration of lease, who do not leave) have
- Landlord can evict, but if chooses not to, might create a different kind of lease

Landlord Tenant Law Since the 1970s

- Basic trend: towards more tenant-friendly doctrine
  - Traditional story: from “property” to “contract”
  - But much of it was accomplished by statute
- Trend has perhaps stalled—less clear, rapid development in recent decades
- Trend largely (but not entirely) limited to residential leases
- Great deal of contemporary variation in landlord-tenant law across jurisdictions

Paradine v. Jane

- Lawsuit by landlord against tenant for unpaid rent
- Tenant argues he doesn't have to pay rent because land is occupied by a "certain German Prince, by name of Prince Rupert, an alien born, enemy to the King and Kingdom"
  - Tenant has not been able to possess land
- Question—does the fact that tenant cannot possess land relieve him of duty to pay rent?

Paradine v. Jane

- Held—no
- Traditional conception of leases as ***independent covenants***
  - Promise to pay rent is not dependent on landlord's promise to provide quiet enjoyment
  - (And landlord's promise to provide quiet enjoyment not dependent on tenant's promise to pay rent)

Paradine v. Jane—Takeaways

- Traditional lease law conceived of landlord's and tenant's duties to one another as "independent"
  - And both parties were required to fulfill as promised, regardless of the other party's breach

Blackett v. Olanoff

- Same landlord rents two properties in same area—residences and a “bar or cocktail lounge”
- Music from bar made living in residences unbearable
- Residential tenants move out. Landlord sues for unpaid rent. Tenants raise ***constructive eviction*** as affirmative defense
- Question—were tenants constructively evicted?

Blackett v. Olanoff

- Held—yes.
  - Music breached tenants' *covenant of quiet enjoyment*—implied term in every lease that tenant shall have peaceful possessor of premises *as against landlord*
    - Problem here was *in the control of* the landlord
  - Breach justifies tenants in moving out; they were *constructively evicted*

Blackett v. Olanoff—Takeaways

- **Covenant of Quiet Enjoyment—**implied term in every lease that tenant will have quiet and peaceful possession of premises as against landlord
  - Only breached by ***action of landlord***—if another tenant is causing problems, generally not breach
- **Constructive eviction**—if landlord breaches covenant of quiet enjoyment, forcing tenants to leave, and they in fact leave, they have been "constructively evicted," and relieved of requirement to pay rent
- These are *early* tenant-friendly developments. Limited because:
  - Requires *action* by the landlord
  - Requires tenant to *actually* move out

Medico-Dental Building Co. of Los Angeles v. Horton and Converse

- Medico-Dental Building Co. leases first floor to Horton and Converse pharmacy
  - Lease—"Lessor agrees not to lease or sublease any part or portion of the Medico-Dental Building to any other person, firm or corporation for the purpose of maintaining a drug store or selling drugs or ampoules, or for the purpose of maintaining a café, restaurant, or lunch counter therein during the term of this lease."
- Dr. Boonshaft, another tenant in the building, starts selling drugs, bought wholesale, directly to his patients
- Horton and Converse stops paying rent; Medico-Dental Building Co. sues for unpaid rent
- Question—does Medico-Dental's breach of lease relieve Horton and Converse from duty to pay rent?

Medico-Dental Building Co. of Los Angeles v. Horton and Converse

- Held—yes
- Court acknowledges doctrine of independent covenants, but points to trend towards thinking of leases contractually
  - "Covenants and stipulations on the part of the lessor and lessee are to be construed to be dependent upon each other or independent of each other, according to the intention of the parties and the good sense of the case."
- Lease was for *exclusive* pharmacy space in building—exclusivity was an essential part of the consideration

Medico-Dental Building Co. of Los Angeles v. Horton and Converse—Takeaways

- Against background of leases as independent covenants, courts often find promises in leases to be dependent
  - Even in commercial leases, where the doctrine of independent covenants largely still applies
  - Look to intent of the parties, materiality of the promise to the lease

Javins v. First National Realty Corp.

- Plaintiffs—landlord
- Defendants—group of residential tenants in building called Clifton Terrace, Washington, DC
- Plaintiffs sue defendants for month of unpaid rent. Defendants raise as a defense 1500 violations of DC Housing Code that arose after they moved in.
- Question—are housing code violations a defense to non-payment of rent?

Javins v. First National Realty Corp.

- Held—yes
  - ***Implied Warranty of Habitability***—residential leases include an implied duty on landlord to maintain premises in habitable conditions on ongoing basis
    - Breach relieves tenants of duty to pay rent, in whole or in part
  - Additional holdings about implied warranty of habitability in DC:
    - Tied to housing code
    - Non-waivable
    - Limited to residential leases
  - Three reasons for change in law:
    - Primary lease relationship today involves urban renters, not farmers
    - Analogy to consumer protection cases in tort and contract
    - Inequality of bargaining power

Javins v. First National Realty Corp.—Takeaways

- ***Implied Warranty of Habitability***—nearly all jurisdictions, landlord has ongoing duty to repair, breach of which justifies non-payment of rent. Variation across jurisdictions on:
  - Whether tied to housing code (what "habitable" means)
  - Waivable for consideration vs. non-waivable
  - Residential leases vs. all leases
  - How to calculate amount of rent withheld
- Implied warranty of habitability is the central feature of the "revolution" towards tenant protections in lease law

Class 16: Leases II—Alienation

Professor James Toomey

Sommer v. Kridel

- James Kridel enters into two year lease for apartment in Hackensack. Plan to move in with new wife, to be paid by parents as he pursues education.
- Engagement broken off.
- Kridel writes landlord, explaining he can't move in and abandoning all interest in apartment. Other people express interest in letting the apartment, but landlord refuses.
- Landlord sues Kridel for all rent due for two years under the lease.
- Question—did the landlord have a duty to "mitigate damages" by reletting the apartment?

Sommer v. Kridel

- Held—yes; landlords have a ***duty to mitigate damages***
  - Landlord must "mak[e] reasonable efforts to re-let the apartment[]"
  - Satisfied by "treating the apartment in question as if it was one of [the landlord's] vacant stock"
- Kridel only liable for amount landlord wouldn't have been able to re-coup if he had re-rented

Sommer v. Kridel—Takeaways

- ***Landlord's duty to mitigate***—most jurisdictions; landlord must make commercially reasonable efforts to re-let apartments after tenant's breach
  - Tenant only liable for amount landlord can't make up by re-renting
  - "Reasonable efforts" generally involve (1) treating apartment as vacant; (2) not turning down commercially reasonable replacements (esp. if offered by tenant)

Transfers of Interest in Leases

- Landlord's transfer
- Tenant's transfer
  - Sublease
  - Assignment

Making Sense of Obligations

- **Privity of Contract—**parties have this if they are in a contractual relationship with one another
- **Privity of Estate**—parties have this with respect to land if (1) one party's interest is carved directly out of another's, and (2) one is in possession or holds reversion

Sublets vs. Assignment in Terms of Privity

- **Sublet**—
  - Landlord in privity of contract and estate with original tenant
  - Original tenant in privity of contract and privity of estate with subtenant
  - Landlord not in privity of estate or contract with subtenant
- **Assignment**—
  - Landlord in privity of contract, but not estate, with original tenant
  - Original tenant in privity of contract, but not estate, with assignee/new tenant
  - Landlord in privity of estate, but not contract, with assignee/new tenant

Assumption & Novation

- **Assumption—**
  - Assignee agrees to be bound by original lease terms. Binds assignee to landlord in privity of contract. No necessary effect on original tenant's relationships.
- **Novation—**
  - Parties agree to erase privity of contract liability on part of original tenant. If landlord agrees to novation after assignment, original tenant is entirely off the hook, no relationship with the property. No necessary effect on the assignee's relationship with landlord.

Mullendore Theatres, Inc. v. Growth Realty Investors Co.

- ***Lease***—provides that security deposit will be returned absent lessee's default. Says that covenants run with the land.
- ***Lessor/Landlord***—original landlord → North Pacific → Growth Realty → City of Tacoma (w/ promise to indemnify for any liability for the security deposit)
- ***Lessee/Tenant***—Conner Theaters → Mullendore
- Mullendore renegotiates lease with city, agrees to release any claim for return of security deposit against city.
- Mullendore sues Growth for return of security deposit.
- Question—does Growth owe Mullendore amount of security deposit?

Mullendore Theatres, Inc. v. Growth Realty Investors Co.

- Held—no; promise to return security deposit was personal to original landlord, did not run with land
  - Theory: promise to return security deposit not one that "touches and concerns the land"—security deposit could be used for anything if forfeited, did not need to be used for the land

Mullendore Theatres, Inc. v. Growth Realty Investors Co.—Takeaways

- Most jurisdictions hold that obligation to return security deposit does not follow transfer of ownership interest; personal to original promisor
  - Tenants—bargain for limitations on use of security deposit in the event of forfeiture (generally makes future landlords liable for return of security deposit)
- Persistence of "property" ideas in some areas of lease law

Jaber v. Miller

- Jaber leases building for rug shop from 1946-1951. Original lease provides that obligation to pay rent ceases if building destroyed by fire.
- 1949—Jaber sells lease to Norber & Son. $700 upfront, five additional $700 payments at four-month intervals.
- Contract provisions:
  - Titled “assignment”
  - Says Jaber “transferred and assigned”
  - Norber & Son responsible for paying rent to original landlord
  - Jaber reserves right to retake possession if Norber & Son fails to pay installment payments to him, or pay rent to landlord
  - Document says nothing about fire
- Norber & Son transfers interest to Miller. Property destroyed by fire. Miller wants to get out of paying installment payments to Jaber.
- Question: was Jaber’s sale to Norber & Son an assignment or a sublease?

Jaber v. Miller

- Held—assignment.
  - **Common law rule:** Assignment if lessee transferred interest for the *whole* remaining term. Sublet if for *any time less* than full remaining time, even an hour or day.
  - **New rule:** Evaluate the *intent* of the parties.
- Intent inquiry leads to assignment—called "assignment," repeated several times that Jaber was "assigning" full interest

Jaber v. Miller—Takeaways

- **Assignment—**transfer of full remaining interest. New tenant owes rent directly to landlord; original tenant remains secondarily liable. Landlord has management responsibilities to new tenant.
- **Sublease**—transfer of some part of remaining interest. New tenant owes rent to original tenant, who owes rent to landlord. Original tenant has management responsibilities to new tenant.
- How to distinguish?
  - Traditional rule: if transfer is for full remaining interest in property, it's an assignment; if *any* less, it's a sublease
  - Some jurisdictions: inquire into the intent of the parties

Kendell v. Ernest Pestana, Inc.

- **Lessor/Landlord**—Pestana (technically lessee from City of San Jose; received interest from Perlitch)
- **Lessee/Tenant**—Bixler (technically sub-lessee)
- **Lease—**says Bixler may not further sublease or assign interest in the property without the consent of the landlord
- Bixler wants to assign remaining term to Kendalls for consideration
- Pestana refuses permission for assignment; no "commercially reasonable" explanation
- Question: can Pestana refuse assignment without a business-related reason?

Kendell v. Ernest Pestana, Inc.

- Held—no; landlords cannot refuse proposed sublets or assignments without "commercially reasonable" reason
  - Presumption in favor of alienability
  - Contract implication of good faith
- Factors:
  - Financial responsibility of proposed assignee
  - Suitability of proposed use
  - Need for alteration of premises
  - Nature of occupancy

Kendell v. Ernest Pestana, Inc.—Dissent

- Would have permitted landlords to deny permission for any or no reason
  - Avoid litigating reasonableness of reasons

Kendell v. Ernest Pestana, Inc.—Takeaways

- **Traditional rule**—if lease requires landlord consent to proposed subleases or assignments, consent is required and can be withheld unreasonably
- **Many jurisdictions**—regardless of what lease says, consent cannot be withheld unreasonably
  - Variation state-to-state
  - **E.g.**—NY provides by statute permission to sublet in residential leases cannot be withheld unreasonably (even if lease *prohibits* sublets—tenants have a "right to sublet")
    - Permission to assign *can* be withheld unreasonably, but tenant then has a right to be released from lease after 30 days.

Class 17: Roommates, Condos & Co-ops

Professor James Toomey

Additional Living Arrangements

- "Common interest communities"—how and to what extent will judiciary be involved in governance?
  - Condominiums
    - Owners own their unit "inside the walls" in fee simple, everything else all owners own as tenants in common
    - Created by "Declaration" or "Master Deed" laying out rules
    - Governed by Homeowner's Association
  - Cooperatives
    - Corporation owns building; tenants/owners collectively own all stock in corporation. Corporation leases tenants/owners their units
    - Created by corporate registration documents
    - Governed by Co-op Board
- Roommates—co-lessees jointly living together

Nahrstedt v. Lakeside Village Condominium Association

- Condominium community in California, “covenants, conditions, and restrictions (CC&Rs)” in Declaration prohibit pets. Declaration also creates Condo Association to enforce CC&Rs.
- Plaintiff—Nahrstedt, resident of Lakeside Village with three indoor cats.
- Defendant—condo association. Issues fine against Nahrstedt for violating Declaration.
- Question—can the restriction against having pets be enforced as applied to Nahrstedt?
  - How will courts review decisions by common-interest communities’ governing bodies?

Nahrstedt v. Lakeside Village Condominium Association

- Held—yes.
  - CA statute—CC&Rs "shall be enforceable . . . *unless unreasonable*"
  - "unreasonable"
    - "presumption of validity" measured with "deferential standards"
    - Reasonableness to be measured "by reference to the common interest development as a whole, not "facts that are specific to the objecting homeowner"

Nahrstedt v. Lakeside Village Condominium Association—Dissent

- Huge fan of cats—weighs loss to Nahrstedt much more than majority
- Thinks it is unreasonable for community to prohibit indoor pet ownership that has no effect on other residents

Nahrstedt v. Lakeside Village Condominium Association—Takeaways

- **Condominiums**—owners own within their walls in fee simple, common areas as tenants in common. Governed by master deed or declaration that lays out restrictions and establishes homeowners' association.
  - Most common form of common interest community
- Decisions of homeowners' association (and restrictions in master deed) reviewed under deferential judicial standard

40 West 67th St. v. Pullman

- 40 West 67th St. owned as a *cooperative*, corporation owns building, owners buy shares in corporation and corporation leases them a unit
- Pullman "engaged in a course of behavior that . . . began as demanding, grew increasingly disruptive and ultimately became intolerable"
  - Accused upstairs neighbors of various crimes and indignities that did not take place
- Coop board votes to eject Pullman.
- Can the board eject Pullman?
  - What standard will the court apply to review decisions of coop boards?

40 West 67th St. v. Pullman

- Held—Pullman out; coop board wins.
  - Two potential standards:
    - Business judgment rule (*Levandusky*)—highly deferential standard for reviewing decisions of corporate boards in general
    - Tenant eviction rule (RPAPL 711(1))—more challenging standard to evict tenants in general, requires landlord show "competent proof"
  - Court reads business judgment rule into RPAPL 711(1) in coop context—deferential standard unless the board acted:
    - Outside the scope of its authority
    - In a way that did not legitimately further corporate purpose
    - Bad faith

40 West 67th St. v. Pullman—Takeaways

- ***Cooperatives***—corporation owns building, governed by corporate board. Owners/tenants are sole shareholders in corporation, and corporation leases apartments to owners/tenants.
  - Older form of common interest community. Today only exists in NYC.
- Decisions by coop board reviewed under deferential business judgment rule from corporate law

Kiekel v. Four Colonies Homes Association

- Four Colonies Condominium community—declaration (need 75% vote to amend) does not ban renting, and appears to contemplate it. Bylaws (need 50% vote to amend) originally silent on rentals.
- Many residents frustrated with neighbors renting—evidence that renters were more disruptive.
  - Kiekels rent 8 lots; there are complaints about their renters, but no evidence it's more than anyone else
- Bare majority (51.34%) lot owners vote to amend bylaws to effectively ban renting.
- Question: is this ban effective?
  - In the alternative: condo association argues that the Kiekels' renting violates provisions in the Declaration prohibiting commercial use and noxious activities. Can the Kiekels be enjoined from renting on these grounds?

Kiekel v. Four Colonies Homes Association

- Held—no and no.
  - Renting ban:
    - "[T]he Declaration intended any property use restrictions . . . to be achieved through an amendment to the Declaration" because "the Declaration set forth owners' fundamental ownership rights and the Bylaws would set forth enforcement and govern its procedures."
    - Rental ban could not be achieved by amendment to bylaws.
  - Kiekels' rentals:
    - Don't qualify as "commercial use"—Declaration prohibits commercial use but contemplates renting
    - Not "noxious use" because no evidence Kiekels' renters are worse than any others, and renting itself is not "noxious use"

Kiekel v. Four Colonies Homes Association—Takeaways

- Renting/prohibitions on renting one of the most controversial contemporary areas of common-interest community law
  - Split of authority on how renting can be prohibited after creation of community
- Restrictions on certain "core powers" of ownership likely subject to greater judicial scrutiny

Fair Housing Act (1968)—Review

- Prohibits discrimination based on ***race, color, religion, sex, familial status, disability or national origin*** in ***selling or renting*** residential "dwellings"
- Doesn't apply to:
  - Single-family home sold or rented by owner (three or fewer properties; no broker)
  - Dwellings with less than four or fewer units in which the owner lives
- *Does* (generally) apply to common interest communities

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC

- Roommates.com allows people seeking roommates to screen by gender, sexual orientation, and family status
  - FHA prohibits discrimination by these criteria in the sale or rental of any "dwelling"—"any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as a residence by one or more families"
- Question: are roommate relationships "dwellings" for purposes of the FHA?

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC

- Held—no, "dwelling" means "independent housing unit"
  - Court finds the "dwelling" language ambiguous—could apply to roommates, could not
  - But applying the FHA to roommate relationships would raise "substantial constitutional concerns"
    - Right to free, intimate associations implicated by roommate relationships

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC— Takeaways

- Roommates—co-tenants who have jointly signed a lease
- Not subject to federal Fair Housing Act

Covered by FHA	Not Covered by FHA
Sales of residences by brokers	Single-family homes sold or rented by owners with less than three properties and no broker
Rentals by broker or landlord with four or more units	Rentals of dwellings with less than four units in which owner lives
Condos	Roommate selection
Co-ops	Additional exceptions—"housing for older persons"

Class 18: Nuisance I

Professor James Toomey

What Is Nuisance?

- Acts of a defendant that cause a ***substantial*** and ***unreasonable*** interference with a landowner's right to ***use and enjoy*** real property
  - Suit can be for money ***damages*** for loss of right to enjoy property, or ***injunction*** ordering defendant to stop the nuisance, or both
- Two general approaches to **balancing** interests of property owners in nuisance suits
  - "Modern view": balancing of interests to see whether there is a nuisance at all (*Hendricks*)
  - "Traditional approach": balancing in determining remedy, damages vs. injunction (*Jost*, *Campbell*)
- Nuisance is a notoriously vague and indeterminate area of law with a lot of variation from jurisdiction to jurisdiction

Hendricks v. Stalnaker

- Neighbors Walter Stalnaker and Harry & Mary Hendricks have adjacent rural lots
- West Virginia law—wells must be at least 100 feet away from septic tanks. Stalnaker needs a well, Hendricks needs a septic tank.
- Because of rough terrain and damage from mining, the only places to put their well and septic tank would be within 100 feet of the other
- Upon learning this, Stalnaker moves quickly to drill well before Hendricks can put in septic tank—it is now illegal for the Hendrickses to put in their septic tank.
- Hendrickses sue Stalnaker for nuisance
- Question—was drilling the well nuisance?

Hendricks v. Stalnaker

- Held—no
- Nuisance requires balancing of interests of landowners (“modern” rule)
- Drilling well not unreasonable—uses are mutually exclusive and either would have been reasonable
  - Because not unreasonable, no nuisance

Hendricks v. Stalnaker—Takeaways

- Great summary of nuisance law
- Modern approach—balance the interests of landowners to determine "reasonableness"
  - Most courts today engage in some threshold balancing as to whether conduct qualifies as nuisance
  - Endorsed by the Restatement

Campbell v. Seaman

- Plaintiffs—own a 40-acre lot in Castleton-on-Hudson developed with expensive dwelling house and landscaping
- Defendants—operate a brick-smelting plant immediately to the south of plaintiffs
- Brick-smelting produces sulfuric acid that damages plaintiff's ornamental plants
- Plaintiffs sue for nuisance, asking for both damages and injunction
- Two questions:
  - Is brick burning a nuisance?
  - Are plaintiffs entitled to an injunction?

Jost v. Dairyland Power Cooperative

- Coal burning power plant drops sulfur dioxide on farms—harms alfalfa yield
- Farmers sue for damages (not injunction)
- Jury finds that the power plant is a continuing nuisance but that it has not caused "substantial damage" to the plaintiffs' alfalfa crops
  - Actual damages found were a couple hundred dollars all around
- Defendants make three arguments on appeal:
  1. Nuisance can only be found where there has been "substantial damage"
  2. Trial court should have admitted evidence that power plant was exercising due care
  3. Trial court should have admitted evidence showing social value of power plant

Jost v. Dairyland Power Cooperative

- Held (in nuisance suits for damages)—
  1. "Substantial damage" to sustain nuisance verdict is ***any physical injury***
  2. Care is not a defense to nuisance
  3. Social value of defendants' activity not relevant

Jost v. Dairyland Power Cooperative—Takeaways

- Many courts today, balancing the interests of the landowners, would hold that this is not a nuisance at all
- No court would enjoin the power plant from operating—all courts engage in balancing in deciding equitable remedies

Campbell v. Seaman

- Held—yes and yes.
- Is brick-burning a nuisance?
  - Nuisance is a substantial and unreasonable interference with the use and enjoyment of another's land
  - *Sic utere tuo ut alienum non laedas*—"use what is yours so as not to damage what is another's;" theory of nuisance law
  - "Locality" rule—"A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance."
- Are plaintiffs entitled to an injunction?
  - Balancing
  - "It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiffs' damages from its continuance."
  - Defendant can move brick-burning operation; plaintiffs' ornamental trees are irreparably damaged, and damages would multiply suits

Campbell v. Seaman—Takeaways

- Nuisance is substantial and unreasonable interference with the private use and enjoyment of another's land
  - *Sic utere tuo ut alienum non laedas*
- Locality rule—the character of the neighborhood is a factor to consider in determining whether land use constitutes a nuisance
- Classic nuisance damages—if a plaintiff can show nuisance, they are entitled to actual damages
  - Upon balancing the interests of competing landowners, they may also be able to get an injunction ordering the nuisance to cease

Class 19: Nuisance II

Professor James Toomey

Trespass vs. Nuisance

- Some conduct (paradigmatically, pollution) could be thought of as trespass or nuisance—but the legal stakes of conduct being thought of as one or the other are high

	Trespass	Nuisance
Legal stakes of being categorized as one or the other	(1) Strictly applied (2) No actual damages requirement (3) Automatic entitlement to injunction (4) Automatic entitlement to nominal damages, maybe punitive damages	(1) Squishy, unpredictable (2) "Substantial" damages requirement (3) Entitlement to injunction requires balancing (4) Entitlement to damages may turn on balancing, no nominal damages
Traditional factual distinction	Direct physical invasion; violation of right to **exclude**	Something else; violation of the right to **enjoy**

Adams v. Cleveland-Cliffs Iron Company

- Plaintiffs—property owners in Palmer, MI, near Empire Mine
- Defendant—owner of Empire Mine
- Empire Mine releases dust, vibrations, and noise. Plaintiffs allege this has harmed their property:
  - Dust settling on their homes, difficult to clean, can't open their windows
  - Need to repaint and repair their homes more often
  - Vibrations make it difficult to sleep
  - Snow falls grey or black
- Plaintiffs argue that these difficulties have substantially diminished the value of their property, sometimes to the point of being unmarketable
- Plaintiffs sue for both trespass and nuisance
- Question—could facts like these count as trespass?

Adams v. Cleveland-Cliffs Iron Company

- Held—no. Court affirms "traditional distinctions" between trespass and nuisance and rejects (minority) "modern trend"
- Trespass is a ***tangible*** and ***direct*** invasion
  - Tangible—dust is not tangible in the meaningful sense, vibrations and noise not tangible
  - Direct—trespasser knew or reasonably should have known their behavior would result in physical invasion
- Nuisance is any other violation of the right to enjoy, but need to show ***substantial harm*** resulting from ***unreasonable interferences***

Adams v. Cleveland-Cliffs Iron Company—Takeaways

- Traditional distinctions, most jurisdictions:

	Trespass	Nuisance
Legal stakes of being categorized as one or the other	(1) Strictly applied (2) No actual damages requirement (3) Automatic entitlement to injunction (4) Automatic entitlement to nominal damages, maybe punitive damages	(1) Squishy, unpredictable (2) "Substantial" damages requirement (3) Entitlement to injunction requires balancing (4) Entitlement to damages may turn on balancing, no nominal damages
Traditional factual distinction	Direct physical invasion; violation of right to **exclude**	Something else; violation of the right to **enjoy**

- Some jurisdictions—trespass can be indirect or not tangible, but in such cases it also has an actual, substantial harm requirement, unlike traditional trespass

Public Nuisance

- Like private nuisance, can offer tort damages or injunctions for unreasonable behavior causing harms
  - Historically, a statutory crime enforced by states' attorneys general rather than private property owners
  - Vague and obscure historical boundaries, infrequently invoked
- Included in the Second Restatement of Torts as a privately enforceable cause of action that looks more like private nuisance
  - Includes balancing of interest
  - But less tied for violation of private property rights or expectations
  - Prominently and (apparently; settlements mean little case law) successfully deployed against tobacco companies by states' attorneys general
  - Being explored as a remedy against a variety of social harms today—climate change, gun manufacturers, opioid epidemic, etc.
  - Very unsettled area of the law

Spur Industries, Inc. v. Del E. Webb Development Co.

- Spur runs cattle feed lot that is initially far outside Phoenix.
- Del Webb builds a development called "Suntown," catering to older adults, that expands closer and closer to the feedlot
- Feedlot causes smells and insects in Suntown, difficult to sell houses and challenging for people already living there
- Del Webb sues Spur, arguing that it is a public nuisance
- Two questions:
  - Can a business that was originally lawful be enjoined as a nuisance after a residential area builds up around it?
  - If so, does the developer owe the company it's forced to relocate or shut down money for making them move?

Spur Industries, Inc. v. Del E. Webb Development Co.

- Held—yes and yes
- Is it a nuisance?
  - "Coming to the nuisance" not a defense—doesn't matter that Del Webb knew it was building closer and closer to feedlot
- Does Del Webb have to pay Spur for shutting them down?
  - "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 to develop a new town or city in the area, to indemnify those forced to leave as a result."

Spur Industries, Inc. v. Del E. Webb Development Co.—Takeaways

- Public nuisance—regulated by statute; a nuisance not to any individual landowner but the public at large
  - Can be enforced by the state attorney general or any private party "specially impacted" by the nuisance
- Courts can (but rarely do) order a plaintiff to pay for an injunction abating defendant's nuisance

Class 20: Easements

Professor James Toomey

Types of Servitudes

- Consensual regulation of property access and use among neighbors
- Easements—property right to use another's property
  - "in gross"—held by another individual
  - "appurtenant"—held by another piece of property
- Real covenants—contractual restrictions on use of property
  - Enforced at law (damages)—"real covenants"
  - Enforced at equity (injunction)—"equitable servitude"

Easements

- "in gross"—held by another person
- "appurtenant"—held by another piece of property
  - "dominant" tract holds easement
  - "servient" tract has easement held against it
- Created by
  - Deed (generally)
  - Other writing (*Baseball Publishing*)
  - Implication (*Schwab v. Timmons*)
  - Prescription (*Holbrook v. Taylor*)
  - Estoppel (*Holbrook v. Taylor*)
  - Necessity (*Schwab v. Timmons*)

Baseball Publishing Co. v. Bruton

- Plaintiff—billboard company
- Defendant—Bruton, owner of building
- Contract—for $25, Bruton gives Baseball Publishing "exclusive right and privilege to maintain advertising sign one ten feet by twenty-five feet on wall of building 3003 Washington Street" for one year. Renewable by Baseball publishing for additional $25, up to five years total.
- Baseball Publishing sends checks and hangs billboard for 3 years. Bruton takes the billboard down.
- Baseball Publishing sues for specific performance.
- Question—what kind of property right did this contract create?
  - Is Baseball Publishing entitled to specific performance?

Baseball Publishing Co. v. Bruton

- Held—an *easement in gross*. Violation of easement in gross gives rise to remedy of specific performance
- Not a lease:
  - No general possessory interest in wall
- Not a license:
  - "goes beyond" a mere license
- Was this document sufficient to create an easement?
  - Not really, because not in a deed. But sitting in equity, court says close enough.

Baseball Publishing Co. v. Bruton—Takeaways

- Easements—right to use another's property in a particular way
  - "in gross"—held by a particular person
  - "appurtenant"—runs with a particular piece of property
- Generally created by deed (but maybe in another writing in equity)

Schwab v. Timmons

- Schwabs & McCormick own property at the tip of a small peninsula in Green Bay
  - Inherited property including inland of 60ft cliff (where there is access to roads), but sold portion inland of cliff
  - Currently own from Green Bay to the cliff
  - Private road runs along cliff up to two lots south of theirs, never accessed by Schwabs, McCormicks, or predecessors
  - All lots originally owned by United States
- Schwabs & McCormick argue they have an easement ***by implication*** or ***by necessity*** to access private road along cliff
- Question—do Schwabs and McCormick have an easement to private road?

Schwab v. Timmons

- Held—no
- Easement by implication "arises when there has been a separation of title, a use before separation took place which continued so long and was so obvious or manifest as to show that it was meant to be permanent, and it must appear that the easement is necessary to the beneficial enjoyment of the land granted or retained"
  - No evidence of use of road along cliff when lots were under common ownership (US)
- Easement by necessity—"a party must show common ownership of the two parcels prior to severance of the landlocked parcel, and that the owner of the now landlocked parcel cannot access a public roadway . . . ."
  - Schwabs and McCormick caused their own lack of access to road by selling above the cliff
  - The cliff itself does not make access to the road impossible, even if more expensive
  - Court suggests that *grantors* can never get easements by necessity (because should have reserved explicitly)
    - This is no longer the rule in WI, but part of the problem here is they were seeking an easement over a *third-party's* land, not the land over the cliff that they sold, cutting themselves off

Schwab v. Timmons—Takeaways

- ***Easement by implication***—
  - An easement was ***implied*** when the lots were severed, because of continuous use and substantial benefit or necessity of easement
- ***Easement by necessity***—
  - Grantor severs portion of their property and one of the portions now is now landlocked
  - No need to show intent or expectations of parties
- Courts are generally reluctant to imply easements

Holbrook v. Taylor

- Road runs across appellants' land and is used as the only access road to appellees' land
  - First built in 1944, appellants gave permission to adjacent mine to build road to haul coal, used for 5 years and mining company paid royalties
  - 1957-1961—appellant builds rental house on property, both appellant and tenant use road to access house
  - 1964-1970—appellees buy adjacent tract, build a house, and use road to access house
- In 1970, appellants insist on signing a written agreement saying that access to the road is a license at their permission. Appellees refuse to sign and say they have an easement by prescription or estoppel.
- Question—do appellees have an easement to use the road?

Holbrook v. Taylor

- Held—yes, easement by estoppel
- No easement by prescription—use not continuous or adverse
- Easement by estoppel—
  - Where a license is "not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense"

Holbrook v. Taylor—Takeaways

- Additional ways easements can arise—
  - ***Prescription***—variation on adverse possession; hostile, continuous for statutory period of time creates easement
  - ***Estoppel***—promise or reliance of access that is detrimentally relied on can give rise to easement

Holbrook v. Taylor—Takeaways

- Additional ways easements can arise—
  - ***Prescription***—variation on adverse possession; hostile, continuous for statutory period of time creates easement
  - ***Estoppel***—promise or reliance of access that is detrimentally relied on can give rise to easement

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.

- Fontainebleau is building an expansion that will cause a shadow over neighbor Eden Roc's pool from 2pm – sunset in winter
  - Construction is partially out of spite (owners of Fontainebleau and Eden Roc are rivals)
- Eden Roc sues to enjoin construction
  - Nuisance (trial court agrees)
  - Easement by prescription
  - Grab bag of other statutory and common law claims
- Question—are there grounds to enjoy Fontainebleau's construction of expansion?

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.

- Held—no
- Nuisance claim only lies where use of property interferes with a legal right of ownership
  - "There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure severs a useful and beneficial purpose, it does not give rise to a cause of action . . . ."
  - Court thinks motive irrelevant in this context
- "It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied . . . ."
- Other claims unpersuasive

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.—Takeaways

- Controversial question whether rights to sunlight or airflow can be subject of easements under US law
  - Generally not by prescription (contrary to UK law)
  - Some jurisdictions allow grant deeds of easements to light or air rights
  - This goal is more commonly accomplished by restrictive covenants against offending construction
- Under US law, blocking light or airflow does not constitute nuisance

Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.

- Penn Bowling owns land with an easement by deed over Hot Shoppes land
  - A sixteen foot right of way for ingress and egress
- After acquiring the dominant tract, Penn Bowling acquires an adjacent tract with no easement
  - Builds bowling alley and restaurant straddling these two lots
  - And is using the right of way for the benefit of both lots
    - Though the bowling alley is not necessarily bigger for extending onto the non-dominant tract; could have built a bigger one just on the dominant tract
  - Bowling alley built a loading dock up to the property line and so is parking trucks for loading and unloading on right of way
- Question—is Penn Bowling violating the easement, and if so, what remedy?

Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.

- Held—Penn Bowling is violating easement; remand to craft appropriate injunctive relief
- Any use of the easement for the benefit of land other than the dominant tract is a misuse
  - Even though the overall use might be less than it could be if Penn Bowling had built a bigger bowling alley on the dominant tract
- Misuse of easement only terminates it if it isn't possible to constrain use appropriately
  - Here it is, but court remands to figure out how to craft injunctive relief that will prevent misuse
  - Parking is a violation, but loading and unloading may be permitted
  - Penn Bowling's use of the easement cannot prevent Hot Shoppes from reasonably using it as well

Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.—Takeaways

- Any use of easement beyond its terms and intent is a misuse
  - Injunctive relief or money damages may be available
  - Misuse of easement *may* lead to its termination, but not automatically, so long as injunctive relief constraining use to that which is permissible is available

Class 21: Covenants

Professor James Toomey

Covenants

- Promises about the use of land—question is when promises will be enforceable against *subsequent owners of same land* ("run with the land")
  - Can be *affirmative* (require landowner to *do* something) or *negative* (require landowner *not to do* something)—same legal analysis either way
- Promise that runs with the land called "real covenant" if enforced at law for money damages
- Same promise called "equitable servitude" if enforced at equity with injunction

Real Covenant Enforceability

- Written—no real covenants by implication
- Intent for promise to run with the land
- Promise "touches and concerns" the land
- Privity
  - For the *burden* of real covenant to run with the land (for the covenant to be *enforceable against* subsequent owner), both *horizontal* and *vertical* privity required
    - Horizontal privity—"community of interest" between parties agreeing to original covenant (relationship of ownership in same land, or grant by one to the other)
    - Vertical privity—transfer of full durational interest from one owner to the next
  - For the *benefit* of real covenant run (right to enforce covenant *against neighbor*) only vertical privity required

Neposit Property Owners' Assoc. v. Emigrant Indus. Savings Bank

- Plaintiff—homeowners association
- Defendant—financial institution that acquired home at foreclosure
- In deeds to original purchasers in community, there was a covenant requiring landowners to pay fees to homeowners association—deeds say that these covenants run with the land
- Homeowners' Association sues for damages for failure to pay fees
- Question—does the language in the original deed create an enforceable real covenant that runs with the land?

Neposit Property Owners' Assoc. v. Emigrant Indus. Savings Bank

- Held—yes
- In order for a real covenant to run with the land—
  - Grantor and grantee intend the covenant to run
    - Text in the deed saying the deed should run
  - Privity
    - Vertical privity—Emigrant Industry in privity with original grantee
    - Horizontal privity?—court says yes, even though homeowners association has never actually owned property in the community
  - Touches and concerns the land
    - Debatable—court says yes on a "functional approach." Under "traditional test," if the promise "affect[s] the legal relations . . . of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general," many courts held promises to pay money did not touch and concern the land

Neposit Property Owners' Assoc. v. Emigrant Indus. Savings Bank—Takeaways

- Requirements for the burden of a real covenant to run with the land—
  - Intent
  - Privity
    - Horizontal—"community of interest" between people agreeing to create real covenant
    - Vertical—transfer of full interest from one owner to the next
  - Touches and concerns the land—famously vague test; abandoned by Restatement

Eagle Enterprises, Inc. v. Gross

- Covenant in original deed requires one owner to supply water, from May 1 to October 1, to neighbor, for $35/year
  - Transfers on both sides—deeds between subsequent owners do not include restriction
  - New owners use property year-round, build own well, don't need water from neighbor anymore
  - Refuse to accept or pay for water from neighbor; neighbor sues, demanding payment
- Question—does the promise to accept and pay for water from neighbor run with the land?

Eagle Enterprises, Inc. v. Gross

- Held—no
- Intent—yes
  - Deed says all covenants run with the land
- Privity—yes
  - Covenant contained initial deed of sale of subdivision from developer, and vertical privity among subsequent interest holders
- Touch and concern
  - No
  - Water from neighbor, at least where the land can get its own water and its use has changed, does not “substantially affect” ownership interest in land

Eagle Enterprises, Inc. v. Gross—Takeaways

- "Touch and concern" test remains vague
  - Look for *necessity* of restriction to particular kind of use
  - Consider effect of change of circumstances and notice
  - And whether there is any limit on the burden
- Concern about perpetual burdens

Equitable Servitude Enforceability

- Intent
- Touch and concern
- For the *burden* to run, *notice* is required
  - Can be constructive/record notice
  - Writing not necessarily required—common plan doctrine
  - Notice not required for benefit to run

Sanborn v. McLean

- McLeans own lot 86 in the Green Lawn subdivision. Want to build a gas station.
- In the Green Lawn subdivision, many original deeds contain a covenant restricting use to residential purposes. But some, including the McLeans', do not.
- Neighbor sues to prevent construction of gas station
- Questions—
  - Is the McLeans' property burdened by an equitable servitude enforceable by injunction?

Sanborn v. McLean

- Held—yes.
- For the burden of equitable servitude to run with the land:
  - Intent
    - Intent is implied here by the common plan
  - Notice
    - "Common plan doctrine"—where there was a clear common plan to dedicate a particular neighborhood to a particular use, and most of the deeds in the area in fact include covenants, purchasers will be held to *inquiry notice* of servitude
    - Court says this is met here because the neighborhood was clearly dedicated to residential use and most lots in fact had written covenants in chain of title
  - Touch and concern
    - Met here, burdens the use of land

Sanborn v. McLean—Takeaways

- For the burden of an equitable servitude to run:
  - Intent
  - Notice
  - Touch and concern
- "Common plan doctrine"—equity will *imply* an equitable servitude where (1) it is clear that a particular neighborhood is meant to be dedicated to a particular use, and (2) most property in the area is burdened by written covenants in chain of title

Termination of Covenants

- Change in circumstances (*Bolotin v. Rindge*)
- Abandonment (*Peckham v. Milroy*)
- Violation of public policy (*Peckham v. Milroy*)

Bolotin v. Rindge

- Restrictive covenants in neighborhood restrict property to residential uses
- Plaintiffs own corner lots across the street from the border of the neighborhood, where there has been substantial commercial development
  - Plaintiffs want to develop their property for commercial use
  - Claim it is useless to them for residential purposes, valuable for commercial use
  - Neighbors object
- Lower court finds that commercial development of plaintiff's lot would not diminish market value of neighbor's property and holds covenant unenforceable
- Question—is it sufficient to show restrictive covenant no longer valid if breaching it does not harm market value of property in community?

Bolotin v. Rindge

- Held—no
- "A court will declare deed restrictions to be unenforceable when, by reason of changed conditions, enforcement of the restrictions would be inequitable and oppressive, and would harass plaintiff without benefitting the adjoining owners."
  - But enforcement is only "inequitable and oppressive" where the restriction serves no continued function
  - And aesthetic or lifestyle functions count—value of restrictive covenant need not be reflected in market value

Bolotin v. Rindge—Takeaways

- Change of circumstances can invalidate restrictive covenants
- But change has to do more than merely make covenant seem financially pointless or annoying to purchaser
  - Show it serves *no* function, even a plausible aesthetic one

Peckham v. Milroy

- Lots in the Spokane Terrace Development burdened by written restrictive covenant in chain of title prohibiting "business purposes of any kind."
- Milroy family moves into Spokane Terrace and attempts to open day care business
- Neighbor (Peckham) sues for injunction to prevent daycare from operating
- Question: is covenant enforceable in equity?

Peckham v. Milroy

- Held—yes
- Court rejects claim that restrictive covenant has terminated—
  - Abandonment—"prior violations have eroded the general plan such that enforcement is inequitable"
    - There was evidence of a few violations here, but court says not enough
  - Public policy—courts will not enforce restrictive covenants found to violate public policy
    - Zoning laws that preclude municipalities from banning day cares in residentially-zoned areas not sufficient to show public policy against private parties banning daycares
- Other defenses:
  - Laches—Peckham did not delay unduly in bringing claim
  - Estoppel—Peckham objected to daycare from the beginning

Peckham v. Milroy—Takeaways

- Real covenants can be terminated by
  - Abandonment by violation not objected to
    - (Look for sustained, broad violation, not isolated incidents)
  - Violation of public policy
    - (High bar)

Class 22: Zoning

Professor James Toomey

What is Zoning?

- General regime of land use regulation that permits and forbids certain uses of land in certain locations
- States authorize municipalities to engage in zoning
- Local zoning authorities draw up a general plan regulating land use in particular areas in their jurisdiction
- Arose in the early twentieth century
- Always controversial—the theme of the class today are theories of challenge to zoning

General Principles of Zoning

- Zoning must be pursuant to a *comprehensive plan*—government can't be making ad hoc decisions about uses of individual lots
  - In practice, easy to satisfy—implicit in the zoning ordinance, plan generally need not be in writing
  - *Spot zoning*—making individualized determinations about the use of particular lots—is impermissible

Plan for the Day

- Origins and theory of zoning—*City of Euclid*
- Challenges based on impermissible exclusion—*Mount Laurel*
- Novel challenges—*Burns v. Palm Beach*

Village of Euclid v. Ambler Realty Co.

- Early twentieth-century state statute authorizes municipal zoning boards to zone particular uses in particular areas with the force of law
- Ambler Realty owns a tract zoned as residential that they believe would be more valuable with storefronts
- Ambler sues, arguing that the zoning ordinance is unconstitutional:
  - Main theory—zoning "takes" "property, without due process of law" and "just compensation"
  - Additional theories—equal protection clause, state constitutional challenges
- Is this zoning ordinance constitutional?

Village of Euclid v. Ambler Realty Co.

- Held—yes
- Constitutional theory—industrialization and urbanization have made zoning necessary
  - "[T]he 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 in the field of their operation."
- Zoning is rooted in the traditional police-power right to abate nuisances
  - Fact intensive inquiry, sensitive to context and locality
  - Courts must be highly deferential to legislative zoning judgments
  - But Court suggests there is a limit
- Height restrictions, safety, regulation of materials, etc.—easily constitutional
- Regulation of uses more difficult—court ultimately defers to evidence presented by the Village showing that zoning for use is beneficial
  - "If these reasons . . . 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."

Village of Euclid v. Ambler Realty Co.—Takeaways

- Zoning is constitutional but has always been controversial
- Grounded in state police power to abate nuisance and limited by the due process clause
- Since *Euclid*, zoning has spread around the country and to all major cities except Houston

Southern Burlington County NAACP v. Township of Mount Laurel

- Mount Laurel is growing rapidly in the 1960s, from rural/agricultural to suburb of Philadelphia
- Zoning authority approves a development plan designed to keep unit prices up and children out:
  - Limits number of bedrooms in apartments
  - Requires amenities
  - Requires developers to include covenants limiting the number of school children
- Mount Laurel admits it is trying to discriminate by income and family size, the goal is to keep property taxes for funding the school district low
- Is this zoning plan lawful?

Southern Burlington County NAACP v. Township of Mount Laurel

- Held—no.
- New Jersey—”Mount Laurel Doctrine”—”every municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing”
- Preserving the tax base is not a permissible goal of zoning—”[M]unicipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate”
- Court gives Mount Laurel 90 days to come up with a new plan

Southern Burlington County NAACP v. Township of Mount Laurel—Takeaways

- Longstanding criticism of zoning is that it is *exclusionary* by income and race
- As in *State v. Shack*, the NJ courts have adopted a unique approach to mitigating this problem

Burns v. Palm Beach

- Palm Beach has an aesthetic review board ("ARCOM") that must approve all new construction for "harmony," excessive similarity or dissimilarity, etc.
- Burns wants to tear down Bermuda-style house and replace with "International-style" (more Modernist) house
- ARCOM does not approve
- Burns sues for violation of his First Amendment right of free expression
- Does Palm Beach's aesthetic zoning ordinance violate the First Amendment?

Burns v. Palm Beach

- Held—no
- "Expressive Conduct" Test:
  - Did Burns intend to convey a message through the design of his home?
    - Yes
  - Would a reasonable observer understand that some message was being conveyed?
    - No—difficult to see, and even if it could be seen, a reasonable viewer would not understand a message

Burns v. Palm Beach—Dissent

- Art is protected by the First Amendment; architecture is art
  - Dissent acknowledges that there might be some tough line drawing about what kinds of buildings qualify
- "Expressive Conduct" Test:
  - House is on a public beach; the reason there was controversy was because it could be seen
  - Reasonable viewer would understand *some* message being sent
- Government interest in aesthetics alone not sufficient to overcome scrutiny
  - But the government has other interests in most zoning regulations—health, safety, etc.

Burns v. Palm Beach—Takeaways

- Aesthetic zoning—controversial, growing form of zoning
- Novel challenges to zoning include First Amendment

Class 23: Eminent Domain

Professor James Toomey

Fifth Amendment

- ". . . nor shall private property be taken for public use, without just compensation"
  - "Takings Clause"
  - Implies a power of "eminent domain" under which the government *can* take private property for public use *with* just compensation
  - Two big questions in use of eminent domain:
    - What is "public use"?
      - *Kelo v. City of New London*
    - What is "just compensation"?
      - *United States v. Miller*

Kelo v. City of New London

- State of Connecticut is trying to redevelop New London, a depressed area, establishes private entity New London Development Corporation and delegates power of eminent domain
- Pfizer is interested in building a plant along the water in particularly depressed area
- NLDC plans to redevelop space adjacent to Pfizer plant. Plan is to:
  - Buy up (or exercise eminent domain over) all the land in the proposed development area
  - Lease that land to private developer Corcoran Jennison on a 99-year lease at nominal $1/year rent
  - Corcoran Jennison to build proposed new apartments, houses, restaurants, river-walk, marinas, corporate space, and lease and sell them
- NLDC voluntarily buys up most land in proposed area. 9 owners refuse to sell, including sympathetic plaintiffs:
  - Susette Kelo—invested a lot in making the house her own, it's pink, has a water view
  - Wilhelmina Dery—lived in the house since 1918
- NLDC attempts to exercise eminent main to involuntarily take these properties for just compensation
- Is this proposed taking for "public use" such that the Fifth Amendment applies?

Kelo v. City of New London—Key Precedents

- *Berman v.* Parker (1954)—first case authorizing the taking of property from one private party to give to another
  - Congressional redevelopment plan in DC to condemn a "blighted" neighborhood and give it to private developers to redevelop
  - Court holds this is an appropriate use of the eminent domain power, even though plaintiff's department store wasn't blighted and the plan will benefit certain private parties
- *Hawaii Housing Authority v. Midkiff* (1984)—*Berman* reaffirmed
  - 72.5% of fee simple titles held on Oahu by just 22 owners
  - Hawaiian government wants to use eminent domain to redistribute land ownership to correct oligopoly problems
  - Court says this is an appropriate use of eminent domain—public use because public interest in correcting the market failure

Kelo v. City of New London

- Held—yes.
- Two principles:
  - Bare taking of property from A to give it to B is unconstitutional
  - Taking of property from one private party to give to another can be constitutional if use is for a "public purpose" or for "use by the public"
- So long as taking is part of a carefully deliberated, reasonable plan for economic development, it is constitutional

Kelo v. City of New London—Concurrence

- Justice Kennedy—
  - Majority's holding does not permit the use of eminent domain *for the purpose of* benefitting some particular private party
  - Courts should look for evidence of favoritism, but there wasn't any here

Kelo v. City of New London—Dissent (O'Connor)

- (joined by Rehnquist, Scalia & Thomas)
  - Beyond *Berman* and *Midkiff* because there was no problem with the current use of property the government was trying to solve
    - The only times government can take property from A and give to B is something like an emergency, grounded in traditional state police power to abate nuisance or respond to exigencies
  - Because there is always a more economically valuable use of property, if that counts as "public use" any private property can be taken and given to another private party who will make it more valuable
  - This power won't be used randomly—people with less political power are the ones at risk

Kelo v. City of New London—Dissent (Thomas)

- "For public use" means (1) owned by the public, or (2) held privately but open to the public to use (e.g., railroads, grist mills)
  - Thinks the Court should revisit *Berman* and *Midkiff*
- History shows that letting majorities decide the "best use" of property will particularly harm poor and minority communities:
  - Neighborhood condemned in *Berman* was 97% black
  - Poletown (1981)—poor, close-knit, elderly community outside Detroit torn down for GM plant

Kelo v. City of New London—Takeaways

- Governments can use eminent domain to take private property and give it to other private owners, but only so long as it is part of a carefully deliberated, reasonable plan for economic development, not a bare transfer
- This holding is legally and politically extremely controversial—states have gone different ways

United States v. Miller

- Government is building a new dam and reservoir that requires diversion of railway through now-private land. Timeline—
  - Before 1935, land is "uncleared brush land"
  - 1936—government exploring project
    - Area starts developing
  - 1937—commits to project and path of train
    - Area developing into "Boomtown"
  - Dec. 1938—government files for eminent domain of respondents' land
- Question—what is "just compensation" for respondents?
  - Do we look at the "fair market value" at the moment the condemnation is filed, or before the government committed to condemnation?

United States v. Miller

- Held—before condemnation; value from when it became clear that the lands will "probably" be condemned
  - "The project, from the date of its final and definite authorization in August 1937, included relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property."
- On the one hand, "[r]espondents correctly say the value is to be ascertained as of the date of taking"
  - On the other, it is an arbitrary, artificial windfall to respondents to let them accrue increase in value *because of* the government's plan to condemn it

United States v. Miller—Takeaways

- "[Just] compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."
- But courts do not want to encourage arbitrary speculation and windfalls in land values attributable to government's project
  - Look to fair market value of the land at the time it becomes probable the land will be condemned

Class 24: Regulatory Takings I

Professor James Toomey

“Regulatory Takings”

- Government action *other than* explicit eminent domain
  - Typically regulations, but could be something else
- That restricts use of pre-existing property rights
- Such that owner argues that the government has, *in effect* taken their property
  - And, therefore, *must* proceed by eminent domain
  - And pay them just compensation

Pennsylvania Coal Co. v. Mahon

- Coal Company owns right to extract coal under Mahon's land
  - And deed *explicitly* grants them rights to extract coal even if it causes the surface to collapse
- Mahons own surface of land, and their predecessor explicitly waived any claim for damage caused by coal mining under land
- PA Statute—prohibits mining coal in such a way as to cause subsidence of any structure used as human habitation
- Question—has this statute "taken" Coal Company's property rights in coal?

Pennsylvania Coal Co. v. Mahon

- Held—yes
- "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."
  - Extent of diminution—statute "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate"
  - Public interest—this statute protects private landowners, not the public at large
  - "Reciprocity of advantage"—the coal company is not getting any benefit from this regulation

Pennsylvania Coal Co. v. Mahon—Dissent

- Brandeis—
  - Does not seem to disagree that regulations that go "too far" could count as a taking
  - But thinks public interest is stronger (something like a public nuisance)
  - Character of the regulation does not amount to any kind of physical intrusion
  - Diminution of value is low (from the perspective of all the coal the Coal Company owns, even on this lot)
  - Reciprocity is irrelevant, or satisfied by "the advantage of living and doing business in a civilized community"

Pennsylvania Coal Co. v. Mahon—Takeaways

- Regulations or other government exercises of police power that go "too far" are takings for which the government must use eminent domain and pay just compensation
- Whether a regulation goes "too far" has always been a squishy balancing test—
  - Extent of diminution of value (but how to measure?)
  - Strength of public interest (abating a nuisance, or pursuing some other goal?)
  - "Reciprocity of advantage"
  - Extent to which regulation looks like eminent domain

Penn Central Transp. Co. v. City of N.Y.

- Penn Central Company owns Grand Central Station and wants to build an office tower on top
- NYC has a "historic preservation" ordinance that allows a board to designate certain buildings as "historic landmarks" that cannot be modified by their owners without approval
  - Realizing this inhibits the value of designated properties, ordinance allows owners "TDRs"—rights to develop contrary to zoning ordinances elsewhere
- Grand Central is designated as a historical landmark, and the board refuses to approve Penn Central's plan for a tower on top
- Has NYC "taken" Penn Central's "private property" such that it must pay "just compensation" under the Fifth Amendment?

Penn Central Transp. Co. v. City of N.Y.

- Held—no.
- Regulations *can* go "too far" in restricting property rights such that it becomes a taking. (*Pennsylvania Coal v. Mahon*). To determine whether one does, apply "ad hoc" balancing test:
  - "[T]he economic impact of the regulation on the claimant."
  - Its interference with "distinct investment-backed expectations."
  - "[T]he character of the governmental action."
- Question is not whether *any* "stick in the bundle" has been "taken," but the extent of interference with the overall bundle the plaintiff purchased
  - Economic impact significant but nowhere near a total wipeout
  - "Investment backed expectation" was surely to run and own Grand Central Terminal, not necessarily to construct an office building
  - Not a physical invasion, TDRs mean that the airspace rights haven't been rendered totally worthless

Penn Central Transp. Co. v. City of N.Y.—Dissent

- Justice Rehnquist (joined by Burger & Stevens)
  - Government needs to pay Penn Central just compensation for taking their airspace rights
    - Theory that NYC is pinning the costs of historical preservation (a benefit for society at large) on individual landowners—public not paying for public benefit
  - One of the rights in the bundle of property rights is the right to develop *ad coelum*—government has taken that away for public use
  - Regulations that do not count as takings are either:
    - Abating a nuisance, or
    - Reciprocal, or costs and benefits average out across everyone in some way—(e.g., zoning)
  - TDRs go to question of "just compensation," not whether there has been a taking at all

Penn Central Transp. Co. v. City of N.Y.—Takeaways

- Good law/bottom-line—regulations limiting the right to use property may be takings on consideration of:
  - The economic impact on the claimant
  - The interference with distinct investment-backed expectations
  - The character of the government action

Loretto v. Teleprompter Manhattan CATV Corp.

- NY regulation requires landlords to allow cable companies to run cable through their buildings
  - Prohibits landlords from demanding more than $1 in statutory compensation
- Question—is this regulation a taking?

Loretto v. Teleprompter Manhattan CATV Corp.

- Held—yes
- ***Permanent physical occupations*** by government (or government-authorized third party) are a ***per se*** taking
  - *Penn Central* does not apply—taking regardless of public interest or extent of interference

Loretto v. Teleprompter Manhattan CATV Corp.—Dissent

- *Penn Central* should apply to all alleged regulatory takings
  - Distinction between "permanent physical occupations" and other regulations not clean, and doesn't capture what the doctrine cares about
- This regulation is indistinguishable from regulations requiring landlords to add certain amenities or features to their properties (e.g., mailboxes, smoke detectors)

Loretto v. Teleprompter Manhattan CATV Corp.—Takeaways

- Permanent physical occupations by government or third-party are automatically takings
- *Penn Central* applies to other regulations

Class 25: Regulatory Takings II

Professor James Toomey

Dolan v. City of Tigard

- Florence Dolan owns plumbing and electric supply store on lot abutting Fanno Creek in Tigard, Oregon
  - She wants to double the size of the store and pave over the parking lot
  - As a condition for granting a building permit to do so, City would require her to:
    - Dedicate a portion of her property along the river as a public greenway
    - Dedicate a 15-foot strip of land adjacent to floodplain as a bicycle/pedestrian pathway
  - Purposes of city's exactions are to limit flood damage and reduce congestion caused by new development
- Question—is demanding these concessions as a condition of building permit a taking?

Dolan v. City of Tigard

- Held—at least partially, yes
- An exaction is not a taking where—
  - There is an "essential nexus" between the "legitimate state interest" the government is pursuing and the permit condition (*Nollan*)
  - And there is "rough proportionality" between the exaction and the purpose
    - City could demand a greenway in the floodplain, but no clear reason for it to public rather than private
    - And no effort to show that the pedestrian path would really offset increased congestion from development

Dolan v. City of Tigard—Takeaways

- ***Exactions*** count as ***takings***, and require just compensation, where—
  - The condition lacks an "essential nexus" with a "legitimate government purpose"
  - ***or*** where the condition is not "roughly proportional" to the harms of the development

Cedar Point Nursery v. Hassid

- CA statute—union organizers may go onto the land of commercial farmers for up to 3 hours a day, 120 days a year, subject to certain restrictions and regulations
- Plaintiffs—commercial farmers
- Question—is the CA statute a "taking" of private property for which just compensation is due?

Cedar Point Nursery v. Hassid

- Held—yes.
- This is a *physical appropriation of property*—a *per se* taking
  - Violation of the right to exclude
  - CA has effectively appropriated something like an easement, a traditional property right
  - Three exceptions to *per se* rule, where violation of the right to exclude is not a taking:
    - "[I]solated physical invasions, not undertaken pursuant to a right of access"
    - Invasions "consistent with longstanding background restrictions on property rights"—e.g., nuisance
    - Government may "require property owners to cede a right of access as a condition of receiving certain benefits"—but there must be an "essential nexus" and "rough proportionality" between the benefit and the condition (*Nollan* & *Dolan*)
- Regulations on the *use* of land are governed by *Penn Central*

Cedar Point Nursery v. Hassid—Concurrence

- Justice Kavanaugh—
  - Majority's opinion is consistent with labor-law precedent *NLRB v. Babcock*, which held statute authorizing union organizers to enter private property when "necessary" was not a taking
  - Falls into the majority's second exception—background restrictions on property rights

Cedar Point Nursery v. Hassid—Dissent

- Justice Breyer (joined by Sotomayor & Kagan)—
  - *Penn Central*—this is not a "physical appropriation," it's a *regulation* of the right to exclude
    - *Permanent* physical appropriations are governed by *per se* rule—but this is not permanent
  - Government needs to be able to enact these kinds of regulations without compensating landowners
    - The majority's three-exception scheme is at least as confusing and indeterminate as applying *Penn Central* to all cases

Cedar Point Nursery v. Hassid—Takeaways

- Government violation of the *right to exclude* is *always* a taking except:
  - Isolated intrusions (traditional trespass)
  - Background limitations on the right to exclude (necessity exception to trespass; nuisance; searches pursuant to lawful warrants)
  - Access rights exchanged for government benefits (requires "nexus" and "proportionality"—*Nollan*/*Dolan*)
- *Penn Central* for everything else
- Regulatory takings law is in flux

Lucas v. South Carolina Coastal Commission

- Lucas (developer) acquires two undeveloped lots on South Carolina coast
  - For the purpose of developing residences and selling them
- South Carolina Beachfront Management Act prohibits development on the lots
- Question—is the Beachfront Management Act a taking?

Lucas v. South Carolina Coastal Commission

- Held—probably
- ***Per se rule***—where a "regulation denies all economically beneficial or productive use of land" it is ***automatically*** a taking (no *Penn Central*), ***unless***—
  - The proposed use would have been a common law nuisance
  - Because then the owner never had the legal right to engage in the use in the first place

Lucas v. South Carolina Coastal Commission—Concurrence

- Kennedy—
  - Whether a regulation counts as a taking should be based on the reasonable expectations of the property owner
  - Owners do not have reasonable expectations of being able to commit nuisances
  - But might also not have reasonable expectations to do things that aren't common law nuisances
  - Government should be able to regulate beyond nuisance law without compensation

Lucas v. South Carolina Coastal Commission—Dissent 1

- Blackmun—
  - "Today the Court launches a missile to kill a mouse."
  - "If the Court decided that the early common law provides the background principles for interpreting the Takings Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact."

Lucas v. South Carolina Coastal Commission—Dissent 2

- Stevens—
  - The Beachfront Management Act imposes costs on all owners of coastline property
  - Spreading out the costs of the regulation
  - And maybe the owners of undeveloped lots lost more, economically, but that is just a matter of degree
    - The regulations on owners of developed lots are also substantial but are not a taking

Lucas v. South Carolina Coastal Commission—Takeaways

- A regulation that causes a ***total loss of value*** of real property is a per se taking
  - *Lucas* says "all economically beneficial or productive use of land;" later courts read this to mean it is only a per se taking if the regulation causes a *total* wipeout of value
  - Which is rare, and probably not even present in *Lucas*
  - And states can cause a total wipeout of value without compensation if they are abating a common law nuisance

Why Close With Takings

- Essentialist vs. Skeptical Theories of Property
  - Is property a kind of relationship with a thing (that can be regulated without being taken) or a "bundle of rights"?
  - If the government "takes" some stick in the bundle, have they taken private property? Or are they just reconfiguring what "property" means?

Takings and the Big Themes

- Exclusion—how central is the right to exclude under any circumstances?
- Control/dominion—how far can the government tell private owners how to use their property?
- Labor/desert—who put in the work? Who deserves the rewards?
- Use—who decides what a valuable use is?
- Possession—how much does first/earlier possession count?