ASPEN CASEBOOK SERIES

Teacher's Manual

Property Law

Rules, Policies, and Practices

Eighth Edition

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For Max (ל"ז) *& Lila Singer*

My first teachers

JWS

For my father Martin Berger

Who would point out to me the properties he had "lawyered"

BRB

For Zoe and Sam

Endless sources of property wisdom

NMD

For my grandmother, Yolanda Grave de Peralta Peñalver

Whose loss of property sparked my interest in the subject

EMP

Contents

Introduction 1
Teaching Tips, Especially for New Teachers 2
Transition Guide 6

Part One: Property in a Free and Democratic Society

1. Trespass: The Right to Exclude and Rights of Access 9
2. Competing Justifications for Property Rights 38
3. What Can Be Owned? 71

Part Two: Relations Among Neighbors

4. Adverse Possession 89
5. Nuisance: Resolving Conflicts Between Free Use and Quiet Enjoyment 102
6. Land Use and Natural Resources Regulation 123
7. Servitudes: Rules Governing Contractual Restrictions on Land Use 139

Part Three: Ownership in Common

8. Concurrent, Family, and Entity Property 185
9. Present Estates and Future Interests 205
10. Leaseholds 225

Part Four: The Legal Framework of the Market for Real Estate

11. Real Estate Transactions 263
12. Fair Housing Law 285

Part Five: Constitutional Protection for Property

13. Takings Law 312

Introduction

After an introductory *Teaching Tips, Especially for New Teachers,* this *Teacher's Manual* contains information to help teachers in a variety of ways to understand and teach the material in the casebook. Each chapter begins with a description of major themes in that chapter. The notes then give summaries of, and background information on, the cases. Finally, the *Teacher's Manual* provides answers to the questions and problems found in the casebook. Often the "answer" is a recitation of arguments on both sides. We have found that these sections are particularly useful for new teachers who would like some idea of what the authors were thinking when they wrote the questions and problems in the book. Our answers are, of course, not the only ones that could be given, but they do give some ideas about the issues raised by the questions and problems.

We have not provided answers for questions that are rhetorical, extremely general, or intended to elicit relatively unstructured, broad-ranging class discussion. Examples of such questions are invitations to consider whether students agree or disagree with the results reached in the cases and ruminations about the legitimacy of different ways of understanding the social function of property rights. We have, however, analyzed every question that requires students to present arguments for and against particular propositions, to predict the result that is most likely to be reached in court, or to analyze the holdings of cases. Except for a few instances, we have not explained which result we might favor; you and your students are fully capable of deciding how the issues should be resolved. Rather, the analyses presented here either explain why the question is hard or present arguments on both sides; the goal is to canvass the factors that must be taken into account to reach a considered judgment.

Note that we use the symbol π to represent the plaintiff and the symbol Δ to represent the defendant.

For the Eighth Edition of the casebook, we are continuing the use of a shared Dropbox folder that began with the Sixth Edition. On the Dropbox, we have posted syllabi and supplemental teaching material, among other items, and we will periodically update this *Teacher's Manual*. The Dropbox, however, also vitally serves as a common resource for adopters of the casebook, and we encourage our community of fellow adopters to post their own materials to build this shared resource, as we did with the Sixth and Seventh Editions. If you would like access to the Dropbox folder, please email Nestor Davidson at ndavidson@law.fordham.edu and he can add you.

We would very much welcome suggestions on new cases and issues that could be incorporated into supplements or future editions of the casebook, suggestions about issues or analyses that this *Teacher's Manual* has not adequately covered, as well as corrections of errors contained in this edition of the casebook. We also would like to call your attention to Joseph Singer's treatise on property law, *Property* (6th ed. 2022), updated with Nestor Davidson, also published by Aspen Publishing, which contains further explanations of the issues raised in the casebook.

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We have four brief suggestions.

First, it is perfectly all right not to know the answer to a question asked by a student. Real lawyers *don't* know the answer to many questions they are asked; their response is often, "let me do some research and look it up" and this is the appropriate response in many instances. By admitting you do not know something, you teach your students that real lawyers have not memorized the United States Code and read and memorized every case; rather, they have an idea of how to go about finding out the answer to the question.

You can deal with these kinds of questions in several ways. You can say, "That's a good question; let me get back to you tomorrow." Students feel well taken care of when the teacher cares enough to find out an answer and report back on it. Or you might say, "I don't know the answer, but here is my best guess about how the courts would be likely to handle that problem." Or you might say "That is an interesting question. Do the materials we read for class give us any help in answering it?" Real lawyers often face questions that are not directly answered by the existing case law, and they must extrapolate from decided cases to make a reasonable prediction about what the courts will do. You can use the occasion of the question to give the students practice in this problem they are likely to face again and again as practicing lawyers. Finally, you could ask for the students' views about how the situation *should* be handled, given the uncertainty about what the relevant law is.

In general, you should not be embarrassed about not knowing the answer to a question about what the law is; as long as you do not *feel* embarrassed, you will not *look* embarrassed. Moreover, there is no reason for you *to be* embarrassed. Admitting you do not know will demonstrate to your students how a real lawyer reacts to such questions—with interest, speculation about the likely or possible result, ideas about how to argue both ways, and knowledge of how to find the answer, if there is one. Over time, you are likely to run into this situation less often, but students seem never to exhaust the store of curiosity.

Second, it may be helpful to focus on skills with which you feel confident and engage in role playing that allows you to act in the roles to which you have become most accustomed. If you have been a law clerk for a judge, you might pretend that you are the judge and that the students are your law clerks and you want their advice about how to decide a particular hypothetical cas e, given the precedents they have read. Or you could pretend you are the judge at oral argument and elicit arguments on both sides of a difficult question of law. If you have been a litigator and written briefs and feel comfortable discussing the best ways to argue a particular case, you can play the role of a partner or senior lawyer and ask the students to act as junior lawyers, advising you at a meeting at the office on how to draft a complaint or how to argue a particular case for a client. If you have been a transactional lawyer, you might similarly help students puzzle through a problem-solving approach to the conflict at issue in a given class. Or you might pretend you are a client and ask your students to conduct an initial interview to solicit relevant information from you about a legal problem. These role-playing exercises may increase your comfort level by placing you in a role with which you are comfortable and familiar; they will also be attractive to students both because they will be practicing the roles they will actually undertake as practicing lawyers and may make theoretical issues less abstract.

Third, we have deliberately written this casebook so that it explains basic "black-letter law" either in the principal cases or the notes. Although students should feel free to read commercial outlines of property law if they wish to do so, the book is written so that they should not have to do

so to learn the rules. Because the book is written with this goal in mind, it allows you, as a teacher, to focus class discussion on interesting issues, hard cases, or particular problems a lawyer might face in the real world. One good approach is to focus the class discussion on one or two (and rarely three) issues for discussion. Rather than suggesting multiple hypothetical situations, you can focus on one particular problem and explain to students at the beginning of the course that you will not go over in class everything contained in the reading. You can reasonably expect them to have done the assignment and to know what is in the reading; if they have any questions about material not addressed in class, they are free to come ask you about it after class or to raise it, where relevant, in class. This approach allows you to focus in depth on a particular legal question or questions, without feeling a need to rush to cover every topic in class. It also represents a compromise between covering too few issues (and therefore failing to give students an overview of the subject as a whole) and dealing with issues in a cursory and superficial manner in class.

Fourth, in shaping class discussion, it can be helpful to separate four different kinds of lawyers' tasks, including (1) advocacy, (2) prediction, (3) counseling, and (4) decisionmaking. By advocacy, we mean presenting a question about what the law should be, such as interpretation of an ambiguous statute or precedent, deciding whether to create an exception to an existing rule of law or to overrule an established precedent, or choosing between alternative possible legal rules, and then asking the students to present the strongest arguments on both sides of the question. By prediction, we mean assessing which result is most likely to occur in court. By counseling, we mean practicing the art of interviewing a client to ask appropriate questions and develop the facts, and helping the client think through alternative courses of action, such as doing nothing, negotiating with another party, suing, contracting, or petitioning a government agency for redress. By decisionmaking we mean deciding what the law should be, either as a judge through adjudication or as a legislator.

It is helpful to distinguish these tasks because it may be possible to argue both sides of a contested legal question while having no doubt how the courts will rule and also having no doubt that the predicted result violates one's own sense of justice. Differentiating among these tasks allows students to learn to argue both sides and to understand the rationale for existing legal rules without losing their sense of right and wrong.

Differentiating among these tasks is also extremely helpful in teaching emotional issues relating to such topics as antidiscrimination law about which substantial disagreement may exist among members of the class and about which strong views may be held. Asking students to predict the outcome the courts are likely to reach may be preferable to beginning the discussion by asking students how they personally believe an issue should be resolved. Alternatively, asking students to argue both sides of a contested question may be a necessary prelude to asking them how they would decide the issue. Prediction does not remove the need to argue both sides and to generate the legitimate competing interests and policies underlying the choice; it is not possible to make a reasonable prediction of the likely result without considering the strongest possible arguments that might be raised on both sides.

Similarly, focusing attention on oral argument and brief writing encourages exploration of the strongest arguments on both sides. Students may be reluctant to voice arguments with which they disagree or which they fear will cause others in the class to view them negatively. Focusing on the predictive or advocacy roles of the lawyer and the task of providing legal services to a particular client may give a context for the discussion that will enable students to generate arguments which *must be part of the discussion*, but with which they personally disagree or with which some number of their classmates may disagree. In each of these cases, the issues are explored without directly pitting students against each other. At the same time, it is often crucial to end such discussions by asking students what they themselves think is the proper outcome. Many students feel frustrated unless they are able to express their own views at some point in the discussion.

Moreover, not giving students an opportunity to state their views may wrongly convey the message that there is no answer or that considered judgments are not possible about such questions.

Some students feel uncomfortable dealing with the uncertainties presented by rules of law that are indeterminate. They would prefer to learn clear rules, and how to apply them. One way to approach this problem is to explain that if the law were that clear, we would not need lawyers and they would all be out of a job. On a more serious note, uncertainty about how the law applies to new situations is simply a fact about how the legal system operates. Many cases will not be unclear at all and predictive judgments can be made easily. Other cases require thought and judgment about how courts will characterize the holdings of prior cases and the meaning of statutory language and policy. Although there is uncertainty here, what lawyers do is exercise their judgment to make the best possible guess about how courts will address a particular question. This is not something students should find to be particularly scary. It is, in fact, no different from predicting the result of an election—something they all have done. Some cases are clear, and others very uncertain and in such cases, they may very well turn out to be wrong. In hard cases, being wrong does not necessarily mean they did a bad job in guessing the outcome. Rather than fearing the uncertainty and being made uncomfortable about it, they should recognize that making considered judgments about such matters is simply *what lawyers do.* They may think that someone else must know the correct answer while they are groping around. It is true that lawyers with more experience are better able to predict the probable reactions of judges and the probable results of cases. At the same time, young lawyers begin to obtain these skills very early; they may also have insights that older lawyers lack because they grew up in a different time and social context and may have insights into the ways in which social mores are changing. Noting the advantages that both experience and youth bring can help students see that there is no one else who can do a better job than they at judging how the law will be applied to new situations. After their legal training, *they will be the experts at this.* No one expects the impossible from them; all we expect is their best judgment and they are fully up to the task.

It may help to diffuse discomfort about uncertainties associated with the law by pretending you are holding a meeting in a law office to discuss the existing case law or relevant statutes in order to explain to the client what possibilities exist and how likely each one is. It helps some students to put these judgments in quantitative terms; for example, one might state that one believes that there is a 75 percent chance the client will win a possible lawsuit. Stating the legal conclusion (or prediction) in this way helps alleviate the tension some students feel in making a judgment about the likely outcome. In addition, this type of conclusion is likely to be more accurate as a statement on one's assessment of the client's situation than an outright prediction of victory or loss.

Some students are especially worried about uncertainties in the application of the law because they do not know what they will say on the examination. What if they get it wrong? The answer is that most law professors intentionally write law school examinations to make them hard—meaning that some issues in the question might be resolved by the courts in more than one way. The correct answer is to demonstrate that you know which issues are clear and which are hard, and then to show why the hard issues are hard by explaining the strongest arguments on both sides. After doing this, you can make a judgment (a guess!) about what the courts will do. When the question concerns a hard case, the grade is based on how well the student did in thoroughly exploring the issue—not whether the student makes the same guess as the teacher. In other words, the correct answer is not "the plaintiff will win" but an explanation of why the legal issue is difficult. Thus, if students are confused about the proper way to analyze a question, rather than becoming upset and bewildered about this, they should be happy—it probably means they have correctly understood what the issue is and why the case is a hard one. The thing to do is to explain clearly in the exam answer the nature of their confusion. For example, the student may explain that the conveyance described in the exam question could be a fee simple with a restrictive covenant or

it could be a fee simple determinable, why it could be interpreted either way, what legal consequences follow under each possibility, and only then predict the likely outcome.

Some students feel quite uncomfortable making arguments with which they personally disagree. However, it is possible to explain to them that they will not be able to do a good job of representing a client unless they can anticipate and formulate the strongest arguments on the other side. Litigators engage in role-playing techniques in the office to prepare for trial and oral argument for just this reason—so that they will not be surprised by what the other side says and so that they are prepared with answers to hard questions or objections to the approach they advocate. Thus, even those students with strong beliefs and agendas for legal reform need to be able to construct arguments on both sides of contested questions of law. It is true that some students may change their views when they analyze the arguments on the other side. However, contrary to what some beginning law students fear, this does not mean that they are losing their souls. Rather, they may understand, for the first time, why the issue is more complicated than they had thought. In so doing, they may clarify what they really believe. Moreover, learning counterarguments to what one believes should not force anyone to abandon firmly held moral convictions. On the contrary, retaining one's convictions even after understanding their limits and their relations to competing principles—which one also accepts—can arguably strengthen one's moral character by allowing one to form considered, rather than reflex, judgments. The ability to see both sides of a question may be viewed as a loss of moral principle; it suggests one reason the public may view lawyers with distaste. However, as long as one comes back to moral judgment after full consideration of the issue, there is another way to view the lawyer's practice of arguing both sides—as an essential aspect of mature and principled decision making and a necessary component of reasoned judgment.

The Eighth Edition preserves the order of the chapters from the Seventh Edition but includes two structural changes to note. First, it consolidates what had been Chapters 3 and 4 into a single chapter entitled "What Can Be Owned?" to highlight the commonality of the materials about the types and boundaries of property. Second, the Eighth Edition moves materials on due process and equal protection that had been in the former Chapter 14 to Chapter 6, where the discussions are particularly relevant. The Eighth Edition also contains updates and streamlining of material throughout, all of which is reflected in this *Teacher's Manual*.

This Transition Guide highlights the most significant changes:

Chapter 1: We streamlined the discussions of the *Food Lion* and *Desnick* cases; eliminated the Walter Williams excerpt and replaced it with an excerpt from the 7th Circuit's 1986 decision in *Brooks v. Chicago Downs Association, Inc.*, 791 F.2d 512 as well as a discussion of research on "shopping while Black"; significantly shortened the Hohfeld discussion; updated and expanded note on recent caselaw on intersection of public accommodation law and First Amendment rights as they relate to same-sex marriage. We added a new problem on access to social media platforms, loosely based on decision to ban Donald Trump from Twitter and Facebook; and a new homelessness case, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

Chapter 2: We have added a new section focusing on slavery after *Johnson v. M'Intosh*, anchored by *The Antelope* as a principal case and *Dred Scott v. Sanford* as a notes case. The materials on *Basic Needs Fulfillment* are rewritten to be about *Government Grant Today.* The materials on Relativity of Title are merged with the materials on Possession. A new note discusses the history and gendered impact of rules regarding return of wedding rings.

Chapter 3: As noted, we integrated what were previously chapters 3 and 4 into a single chapter on the limits of ownership; reordered materials so that publicity rights and cultural property (which are closely tied to personhood interests) follow the material on ownership of human beings and body parts; reversed the order of the Cultural Property topics, to put the *Wana the Bear* case before the case on international regulation of cultural property. We added a new case on publicity rights, *Rosa and Raymond Parks Institute for Self-Development v. Target Corp.*, 812 F.3d 824 (11th Cir. 2016); a new note on data privacy; a new case on international cultural property regulation, *Republic of Turkey v. Christie's, Inc.*, 425 F. Supp.3d 204 (S.D.N.Y. 2019); replaced *Feist* with a more recent case, *Craft Smith LLC v. EC Design LLC*, 969 F.3d 1092 (10th Cir. 2020); replaced the *SunTrust* case with a newer fair-use case, *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020); and added a moral rights problem based on the controversy over murals at the University of Vermont Law School.

Chapter 4: We revised and clarified state of mind discussion in the adverse possession section; replaced the "color of title" case (*Romero*) with a more recent case, *Paine v. Sexton*, 88 Mass. App. Ct. 389 (2015); replaced the prescriptive easement case (*Community Feed Store*) with more recent case, *Frech v. Piontkowski*, 296 Conn. 43 (2010); added a more recent case on relative hardship, *Hoffman v. Bob Law, Inc.*, 888 N.W.2d 569 (SD 2016), replacing an extended note on that topic; replaced the "forced sale" case (*Somerville*) with more recent West Virginia case, *Ward v. Ward*, 236 W. Va. 753 (2016); replaced extended note on adverse possession of chattels with the

case of *O'Keefe v. Snyder*, 83 N.J. 478 (1980); and updated problem on stolen Nazi art to incorporate 2016 HEAR Act.

Chapter 5: We revised and clarified role of intent in nuisance law, as well as interplay between nuisance and negligence; revised and clarified note on nuisance per se; eliminated the *Page County Appliance Center* case and replaced it with an extended note on unusually sensitive land uses.

Chapter 6: We created a new §3 on "Administrative Zoning Flexibility and Rezoning," combining and streamlining materials on variances, special exceptions, and rezoning. We added a new §4 combining the prior discussions of exclusionary zoning, expression, and religion with former Chapter 14's discussions of equal protection/animus, intimate association. And we consolidated and streamlined materials on environment and natural resources.

Chapter 7: We deleted *Henley v. Continental Cablevision of St. Louis County, Inc. O'Buck* and *Neuman*, the cases about rules and bylaws, have been replaced with two new cases, *Apple Valley Gardens Association v. MacHutta* (Wi. 2008) and *Trustees of Cambridge Point Condominium* (Mass. 2018). *Woodside Village Condominium Association, Inc. v. Jahren* has been deleted as a principal case from the Restraints on Alienation section.

Chapter 8: The materials on family property have been substantially revised. The New York Legislature abrogated *O'Brien v. O'Brien*, and the case has been deleted. The Montana Equitable Distribution statute has been deleted and replaced with the statutes on distribution after divorce from North Carolina (a separate property state) and Washington (a community property state). In the section on Unmarried Partners, *Watts v. Watts* has been deleted because it has been substantially narrowed by the Wisconsin courts and no longer represents the trend in the law. It has been replaced with *Wilbur v. DeLapp* (Or. 1993) and *Tompkins v. Jackson* (N.Y. 2009) (about 50 Cent!). The notes now reflect recent scholarship on the difficulty of obtaining property division after nonmarital relationships and the economic and racial discrepancy in access to marriage.

Chapter 9: A new section discusses the treatment of children conceived after the death of a biological parent using frozen genetic material. We have also added a section on Private Trusts, anchored by *Phillips v. Estate of Holzmann*, a case on a trust to benefit the testator's pets. In the Numerus Clausus section, *Johnson v. Whitton* has been demoted from a principal case to an excerpt.

Chapter 10: We added materials about recent empirical work on illegal leases; on leaseholds during the pandemic, particularly emerging approaches to force majeure, frustration of purpose, and impossibility as defenses to nonpayment of rent claims, as well as eviction moratoria; new materials about emerging trends in rent regulation and just-cause eviction statutes; and a new subsection on landlord liability for tenant-to-tenant discriminatory harassment.

Chapter 11: We replaced *Hickey* with *Hurtubise v. McPherson*, 951 N.E.2d 994 (Mass. App. Ct. 2011), an interesting recent case discussing the standards for reliance in part performance.

Chapter 12: We reorganized this chapter to highlight structural questions in fair housing, notably around segregation and integration, adding discussion of the Fair Housing Act's obligation on the federal government and federal grantees to affirmatively further fair housing. We added detailed notes on intent, animus, and mixed motives as well as on proximate cause and the zone-of-interests test in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). We also updated

materials on sexual orientation and gender identity, following *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and added a discussion of algorithmic discrimination.

Chapter 13: We added a section on state "damagings" clauses as well as primary case treatment of or notes on several important recent Supreme Court cases, including *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), on the relevant parcel question; *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) on the question of exhaustion of state remedies before filing takings claims in federal court; and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), on the standards for physical invasion regulatory takings.

1. Trespass: The Right to Exclude and Rights of Access 3

Themes

1. Structure of the legal system. Chapter 1 has a variety of themes. First, it is organized to introduce students to the structure of the legal system. It begins with a criminal trespass complaint and discussion of the common law of trespass. By presenting a problem about homelessness that is not directly addressed by the principal cases, it provides an opportunity to talk both about the meaning of precedent and policy arguments. Attention then shifts to federal and state public accommodations statutes. These materials emphasize the differences between common law and statutes as sources of law, and between federal and state laws. They also introduce statutory interpretation at the very beginning, giving it equal importance to common law analysis. Attention then shifts to constitutional rights, again presenting both federal and state constitutional arguments. The chapter ends with the public trust doctrine, a rule of law that appears to occupy a vague status as partly constitutional and partly based on common law.

The entire chapter arguably addresses a single issue from the standpoint of alternative sources of law. The issue in every case is whether the owner of the property has the right to exclude the non-owner under the particular circumstances presented by the case. The materials in the chapter are intended to demonstrate that a lawyer in the office, presented with this problem, would need to consult a variety of sources of law to answer a client's question about the scope of the right to exclude.

2. Competing policies and social context. Second, because the materials all revolve around a single general issue, the materials help teach the students that the particular context within which an issue is presented matters in formulating the proper legal rule. The facts and the context of the case matter. The particular social setting, the particular reasons access is demanded, the particular reasons given for exclusion, the relative importance of the competing interests, and the effects on both the parties and society as a whole of alternative ways of resolving the case, all matter. This series of issues therefore is intended to help students begin learning to distinguish cases; to do so, they must be able to identify the policy reasons for particular rules of law and the particular circumstances to which those policies are relevant. It is also intended to make students aware that those policies may be multiple and may conflict with each other.

3. Property rights as limited and relative. Third, the materials focus on a particular issue that dramatizes the fact that all property rights are limited and relative to the rights of others. It is often stated that the right to exclude is the most central strand in the bundle of rights that comprises ownership. Permanent infringement of this right is about the only thing that is classified as a per se taking of property which cannot be accomplished by government policy without paying compensation. Students have the impression that the right is absolute. The materials collected here demonstrate that it is not absolute and that, at least as to public accommodations statutes, there is a widespread social consensus that the right to exclude should *not* be absolute.

4. Antidiscrimination laws and the relation between property and power. Fourth, the policies underlying public accommodations laws dramatize the fact that property rights can be exercised in ways that cause illegitimate harm to others. Widespread exclusion on account of race from businesses open to the public effectively creates a racial caste system and thus is illegitimate. The exercise of property rights must be limited to prevent owners from exerting illegitimate power over others. Identifying what constitutes illegitimate power is often difficult, but the principle is fundamental and arguably underlies, not only public accommodations and fair housing laws, but the rule against unreasonable restraints on alienation, the rule against perpetuities, nuisance doctrine, and antitrust law.

5. Significance and limits of the right to exclude. The right to exclude is often characterized as "one of the essential sticks in the bundle of property rights." *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). It is true that this particular stick in the bundle is arguably the most important. On the other hand, the right to exclude would not be much use unless the property holder also had the right to use the property herself and to convey to others rights of access to the property. But let's not quibble. The right to exclude is of fundamental importance.

This is all the more reason to understand the *limits* to the right to exclude. Even as fundamental a right as the right to exclude has significant limits. One way to understand the cases in this chapter is to identify the different *interests* in access to property possessed by another that are protected by the legal system. It is important to understand these interests and the parameters of the situations that come within them. The first interest is a combination of privacy and freedom of association. When an owner allows others to set up a home on the owner's property, the occupants have a right to receive visitors in their homes. The owner's refusal to let them associate with others in the privacy of their homes is generally not protected by the rules in force. Second, when property is opened to the public, the owner of certain kinds of establishments has no power to exclude people for discriminatory reasons. Thus, we have public accommodations statutes that prohibit specific types of discrimination, including race, religion, and disability, with some states prohibiting discrimination on the basis of sex and sexual orientation. Third, access to places open to the public is allowed in order to protect interests in free speech. Protection under the federal constitution is limited to public property (public forums) and "company towns" while some states protect access, for at least certain purposes, to shopping centers. Fourth, public access to property owned by others is protected, to varying extents in different states, when that property is on a beach or comprises a waterway. The navigational servitude ensures that navigable waters are common property and many states allow access to tidelands for certain purposes. Fifth, access to property owned by another is generally allowed under state common law and criminal trespass statutes when necessary to protect human life.

A second way to understand the cases in this chapter is to array them along a spectrum from property that has not been opened to others by the owner (such as beachfront property), to property that has been opened to particular individuals (such as migrant farm workers or tenants), to property that has been opened to the public generally (such as stores and shopping centers), to property that has developed into a full social system (the company town). Although there are disagreements about when owners have the right to exclude and when they do not, it is true that the more property is opened to the public, the greater the legal obligations may be imposed on the owner to allow access to the property on behalf of others. Thus, one way to distinguish *State v. Shack* and the *Uston* case which follows it is to note that the property in *Shack* was open only to the farm workers while the casino in *Uston* was open to customers from the general public. The owner's privacy interests are stronger in *Shack* than in *Uston.*

§1 Trespass 3
§1.1 Public Policy Limits on the Right to Exclude 4
***State v. Shack* (1971) 4**
***Commonwealth v. Magadini* (2016) 9**

The fact situation in *State v. Shack* is easy to understand and the result generally surprises students. They are likely to assume that the "owner" has the right to exclude "non-owners." The case usefully illustrates limits to property rights, the importance of balancing competing interests in the development of legal rules, and the necessity of developing a more complex analysis of the meaning and social role of property rights than the simple device of identifying who the owner is. We know who the "owner" is, but it does not decide the case. When the owner allows others to

have access to his property, his right to exert absolute control over access to his property disappears; his right to exclude may be limited in certain ways to protect the legitimate interests of those he has invited onto his property or of the public at large.

After developing the facts of the case and answering the questions in notes 1 and 2, you might go on to do one or more of the problems that follow. Working on the problems introduces from the very beginning the task of interpreting precedent, developing broad and narrow holdings, and arguing for alternative interpretations of the policies that underlie the rule of law in question.

Commonwealth v. Magadini focuses on the doctrine of "necessity" in trespass law. Doctrinally, the case focuses on the question whether the defendant should have been permitted to have the jury instructed that he was not guilty of criminal trespass if he entered the private property of another to avoid a clear and imminent danger that he could not avoid by available lawful alternatives? The holding in the case (and the reasoning by which Supreme Judicial Court reaches it) is consistent with the New Jersey court's approach in *Shack*. The Massachusetts court states in a footnote that "[t]he doctrine of necessity has its roots in the notion that the law deems the lives of all persons far more valuable than any property." The case is sure to spark a lively class discussion about how to balance the values of property and necessity and about who should decide how to strike that balance.

Note 1. *How did the charge of criminal trespass in* Shack *differ from the common law definition of trespass?*

The statute defined criminal trespass as refusing to leave *after being asked to do so.* In contrast, a common law trespass occurs the moment someone enters property possessed by another, assuming that entry is non-permissive.

It may also be interesting to ask students how the new version of the New Jersey criminal statute differs from the version in effect at the time of the *Shack* decision. The new version is contained in the footnote attached to this note. The new law appears to add an *intent* requirement, releasing the individual from criminal responsibility if she is not "know" she was unprivileged to enter the property. If a journalist believed she had a first amendment right to enter the property (never yet recognized by the Supreme Court) would that person not "know" she had a right to enter the property? Presumably, ignorance of the law is no excuse but a good faith belief that one was privileged to enter might well protect the trespasser from criminal liability.

Note 2. *Did the court in* Shack *rest its ruling on the U.S. Constitution, a federal statute, a state statute, or the state common law? If the court rested its opinion on only one of these sources of law, what role did the others play in determining the outcome of the case?*

If this case is taught toward the beginning of the first semester, many students answer this question incorrectly. You can use this as an occasion to teach that what matters is not only the result but the particular source of the legal rule upon which the court relies. There may be no constitutional right of access but there may be a common law right of access.

The court did not rest its ruling on the constitutional cases concerning free speech rights of access to shopping centers. (Note that these cases were later overruled, as the text indicates.)

The court did not rest its ruling directly on federal law. In other words, it did not find that federal statutes required the farm owner to grant a right of access and preempted any state law to the contrary. Rather, the court merely found federal statutes to embody a strong public policy that would justify access under state common law. It is useful to point out the difference between an argument that federal law directly requires the result and the argument accepted by the court that the existence of the federal law gives the state court a reason to interpret the state common law in a way that narrows the farm owner's rights and protect the rights of the farm workers to receive visitors in their homes.

It may also be useful to ask how the defendants could have argued that the federal statutes at issue in the case required the farm owner to allow access by implication. They could have argued that the federal laws were passed to benefit migrant farm workers by ensuring that they had access to certain services. If state law gave the farm owner the right to exclude these service providers, the goal of the federal law would be completely frustrated. This cannot be what the Congress would have wanted; such an interpretation would therefore violate legislative intent.

A counterargument is that property owners retain whatever rights are not explicitly taken away by statute. It is true that the statutory purpose would be undermined, but it arguably would not be wholly frustrated. Farm workers could meet with service providers off the farm owner's land. Since statutes generally represent compromises among competing interests, the courts should hesitate to imply obligations not explicitly contained in the statutory language.

The court's ruling rested on an interpretation of the criminal trespass statute. However, in interpreting that statute, the court relied on the common law definition of trespass on the ground that the legislature probably had the common law meaning in mind when it passed the statute.

In *Rivero v. Montgomery County*, a case with facts very similar to those in *Shack*, the district court found that legal aid employees had a first amendment speech right to disseminate information to farm workers residing on a private farm. *See* 259 F. Supp. 3d 334, 345-348 (D. Md. 2017).

Note 3. *Why do you think the trial court in* Magadini *kept the defendant's necessity defense away from the jury?*

Obviously, there is no way to know with certainty. Doctrinally, the trial court focused on the availability of legal alternatives to the defendant. The breadth of legal alternatives the trial court was willing to consider may have evinced discomfort with the idea of having a jury decide this question. It is possible that the trial court – like some commentators – was skeptical of the sweeping nature of the doctrine itself or that it doubted the jury's ability to apply it.

Note 4. *Do the examples of airplane overflights and drilling deep underground show that, in the modern world, the* ad coelum *maxim is outmoded? Can we reconcile the results in these cases with continued adherence to the* ad coelum *understanding of the dimensions of an owner's property?*

The questions at the end of the note are meant to bring out the idea that the *ad coelum* maxim defines the geographic boundaries of landownership without committing the law to the position that all entries into the column of space defined by the maxim constitute actionable trespass.

If a court were to conclude that either an overflight or a hydraulic fracturing operation constituted a trespass, what remedy should the court impose? How might such a court measure the harm to the property owner? These questions present an opportunity to talk about non-economic interests in property, such as privacy and quiet enjoyment. Injunctive relief is one way to protect such interests in a prospective way.

Note 5. *Is a landowner who cannot exclude an airplane from flying over her property at 500 feet still an owner of that space in a meaningful sense? Does the rule governing aircraft access prevent an owner from doing anything with her property that she might otherwise be able (or want) to do?*

The law of airplane overflights arguably supports Katz's view, since it seems to treat use rights as definitive of the airplane's right to access the column of space above the owner's land. On that view, the owner's inability to exclude uses that are consistent with her own choices about the best use of the property does not seem to qualify her ownership rights in a significant way.

Note 8. *Can you distinguish the decision in this case from the court's discussion of the scope of consent in* Desnick*, discussed above in note 7?*

One possible distinction is between intrusion on real property versus chattels. But it's not clear why this should make a difference. Another possibility is the harm to the property. *Desnick* involved a trespass that did not itself cause any physical harm to the property, whereas, if the plaintiffs allegations in the Apple case were true, the consent procured through deception led to injury to their property whereas in the *Desnick* case, the deception itself was the only real harm alleged (apart from the damaging information unearthed by the investigation, which is not really a harm to the property itself).

Note 9. *Do you agree with Justice Alito that attaching a GPS device to a car does not harm the owner's interest in use or possession of the vehicle? Or do you think a car owner would be able to obtain an injunction to remove a GPS tracker installed on her car by a private party against her wishes, even if the tracker did not physically damage the car or interfere with its operation?*

Justice Alito's arguments, while correct as a statement of hornbook law on trespass to chattels, seems inapt except with respect to a claim for damages after a trespass to chattels has been completed. His claim seems questionable when considering an ongoing trespass that does not damage the chattel. It is hard to believe that a court would not enjoin an ongoing intrusion on the owner's exclusive right to possess the chattel.

Problem 1. *Was* Desnick *decided correctly?*

a. Consent. Should fraudulently obtained consent be a defense to a trespass claim, as Desnick *held, or should such consent be ineffective as a defense to a trespass claim, as the* Apple *court held? Was the Fourth Circuit in* Desnick *correct to find no trespass, or was the district court in the Apple case correct to find a trespass when the software update exceeded the scope of the users' consent by misrepresenting its purpose? Can both cases be correct?*

Consent is a defense to a trespass claim but there are two different ways a court *might* find the consent to be invalid here. Both are suggested in the question. The first argument is that consent obtained by fraud is not real assent. In contract law, it is sometimes said there must be a "meeting of the minds" whether proven by subjective intent or objective manifestations of mutual assent. If one party commits fraud to get the other to agree than there is no real agreement. From a property perspective, fraud may also be viewed as a species of theft. If one induces another to give up rights with false pretenses, one is taking something the other never intended to give or never would have given had she known the truth and thus the transfer of title or possession is forceful rather than voluntary. The counterargument is that, whether obtained by fraud or not, consent to enter property means that there is no trespass; the owner allowed the non-owner to enter and thus the entry was permissive. It does not matter whether the owner would have not agreed to the entry had he known certain facts; the point is that the owner gave permission for the entry. The owner may have a claim for fraud but not for trespass. As Judge Posner put it in his *Desnick* opinion, the *interest* protected by trespass law is the interest in exclusive possession and once consent is given to the interest, that interest in not implicated.

A different argument for trespass can be based on exceeding the scope of the permission that was granted. Thus, the owner could argue that even if entry procured by fraud is not a trespass, videotaping is just as it would be a trespass for a customer to enter private offices of a store rather than staying in the public areas. Being videotaped secretly is creepy; owners may wish trespass law to protect them from such intrusions; they should not have to fear that allowing others access to their property necessarily includes permission to videotape secretly the activities that go on there,

even if they are in "public view." The counterargument is again that the real interest being asserted by complaint against the videotaping is an interest in privacy or in not having the activities broadcast; the complaint is not really about the videotaping itself. Moreover, someone who has entered property can obviously report to others on what she saw; videotaping is only different in a matter of degree not kind from this possibility. For an argument that both cases can be correct, see the discussion of Note 8, above.

b. Public policy. Should trespasses by investigative journalists be privileged because they further a strong public policy of protecting consumers from harmful products and services?

Judge Posner suggests this by mentioning testers who pretend to seek housing to test whether the landlord or seller is engaged in unlawful discrimination. PrimeTime Live was arguably protecting consumers from unnecessary surgery in *Desnick*, and thus, even if the intrusion is a trespass because consent to enter was invalid, it might nonetheless be privileged to protect the public from harm. Both discrimination and consumer protection might constitute sufficiently strong public policies grounded in statutes to justify limiting the owner's right to be protected by intrusion by those who obtain entry by fraudulently obtained consent. The counterargument is that investigative journalism may protect the public but it can also wrongfully intrude on privacy. The interest in exclusive possession is not just an interest in exerting control over property; it is an instance of the right of privacy and investigative journalism is an intrusion on individual dignity when it takes the form of surreptitious surprise attack. It is not incumbent on all actors to face the possibility of intrusion by journalists; opening property for business purposes does not constitute an implied invitation to television or newspaper journalists to misrepresent themselves as consumers with the express purpose of subjecting the owner to ridicule.

c. Punitive damages. If a trespass can be shown either because entry is obtained by fraud or because secret videotaping exceeds the scope of the permission to enter, should punitive damages be available for trespass to deter investigative journalists from entering property on false pretenses and thus obtaining embarrassing information they can broadcast to the world? … Does intentional trespass rise to that level? Did the conduct in Desnick *rise to that level? If the actual damages are only $1, is a $100,000 punitive award excessive in relation to the harm?*

If punitive damages are not available, damages will be merely nominal. The real harm is from the broadcast of the harmful information and the first amendment protects the right of journalists to public truthful information especially if it is about a public figure. The harm from the entry itself is likely to result in few if any damages. However, if the law is that this is wrongful as an intrusion on the interest in exclusive possession, then nominal damages will mean that there will be no deterrence of this wrongful activity. Punitive damages may be needed to deter this from occurring. The counterargument is that punitive damages should be reserved for truly outrageous conduct and even if one views investigative journalism as unseemly rather than a public service, it simply does not rise to the level of morally outrageous conduct for which punitive damages are appropriate.

Problem 2. *Imagine that you are a juror in a case with facts very similar to* Magadini. *Would you conclude that the defendant's presence on private property was justified by necessity on a very cold night if the property in question were:*

a. the heated vestibule of a shopping mall after closing time? during business hours?

b. an empty, foreclosed home that the defendant had broken into?

c. the detached garage of an occupied, private home?

These hypotheticals are meant to bring out the different impacts that these rights of access might have on different kinds of property and different kinds of owners. Do the survival interests of people experiencing homelessness outweigh mere economic interests (as in (a) and (b)), even if substantial (as in the case of the business during business hours)? The detached garage hypothetical involves non-economic interests, but also a somewhat limited intrusion on safety or privacy. Still, in all of these cases, the burden imposed on private property owners is non-trivial. An interesting question to pose to students during the discussion would be to distinguish between a single episode of intrusion versus repeated episodes or continuous encampments.

§1.2 Limits on the Right to Exclude from Property Open to the Public 23
***Uston v. Resorts International Hotel, Inc.* (1982) 23**

Uston is arguably distinguishable from *Shack* because (1) the owner has opened the property to the general public and therefore arguably has lesser privacy and free association interests at stake and (2) the non-owners who are seeking access are not living on the premises but are merely entering for business purposes and therefore arguably also have lesser privacy interests at stake. It is therefore necessary for the students to articulate what the legitimate interests in both sides are. Although some of the same reasons that were applicable in *Shack* may be relevant here, it is likely that other reasons will come to the forefront.

One way to teach *Uston* therefore is to place the students in the position of being lawyers on both sides, with *Shack* as their only precedent. The casino will argue for a narrow holding of *Shack:* it may argue that it stands for the proposition that owners have no right to exclude providers of government-funded services to poor persons or it may argue that *Shack* holds that all persons have the right to receive visitors in their homes. Those rules protect the government interest in providing the services and the interests of privacy and free association in the home. No such interests were present in *Uston;* thus the ordinary rule that owners have a right to exclude non-owners from their property prevails. The sole exception is statutory public accommodations laws. Uston does not claim to have been excluded because of his race or sex or disability. Since the statutes do not limit the owner's right to exclude him, he has no right of access.

Uston will respond to this argument by suggesting a broad holding for *Shack,* such as "the owner's right to exclude is limited by public policy." The public policies at issue in *Shack* were the right to receive visitors and government-funded social services. The public policy operative in *Uston* is the policy of non-discrimination included both in the public accommodations laws and in the common law. In contrast to the casino, Uston will note that it has long been the rule under the common law that innkeepers and common carriers have a duty to serve the public without discrimination. Uston will further note that there is no good reason to treat retail establishments or places of entertainment any differently. The right not to suffer unjust discrimination is a policy that exists under the common law as well as by statute. Owners of property open to the public cannot arbitrarily exclude particular classes of persons. They can exclude persons who are disruptive, but Uston was not disruptive; rather, he played the game according to the rules.

It is helpful in teaching this case to emphasize to students that *Uston* is an outlier (as stated very clearly in Note 1). Later on in the term (perhaps after teaching adverse possession, prescription and the law of innocent improvement), you might come back to the New Jersey court's sliding-scale approach to trespass to ask whether it does a better job of describing the broad sweep of the law of trespass than the majority.

Note 2. *Impact of the access/exclusion choice. What criteria would a proprietor seeking to exclude "mobsters" employ when deciding whether a potential customer "look[s] like a mobster" (to use the Seventh Circuit's example in Brooks)? If the proprietor relies on stereotypes rooted in national origin (e.g., the customer "looks Italian"), what effect (if any) does recognizing a right to exclude without offering reasons have on the ability of the customer to prove that he was the victim of unlawful discrimination?*

Why did the owner of the clothing store exclude Professor Williams? Can the Seventh Circuit's argument make sense of the observed behavior of retail establishments? Can the law help to change that behavior?

A right to exclude without explanation tilts the playing field in favor of the property owner, putting the onus on the person seeking access to demonstrate the wrongfulness of the owner's motives. This can be extremely difficult for an individual to prove. Only statistical evidence – perhaps provided by an organized testing effort – could unearth the owner's discriminatory behavior.

Problem 1. *A large department store located in downtown Boston has become a hangout for homeless persons during winter months when it is freezing outside. The store begins excluding any person who appears to be homeless. Massachusetts has the majority rule that imposes a duty to serve the public on innkeepers and common carriers but not on retail stores. Should Massachusetts adopt the New Jersey rule? What are the arguments on both sides? If Massachusetts does adopt the New Jersey rule, would exclusion of homeless persons be reasonable? What factors would go into such a determination?*

Problem 2. *Teenagers. Should the mall owner have the right to exclude the teenagers or not? What arguments can you make for the mall owner? For the teenagers? What rule of law should the court promulgate?*

The arguments here on whether to extend the right of reasonable access from innkeepers and common carriers to retail stores or to all businesses open to the public are identical to the arguments rehearsed above. The difference here concerns the reasonableness of excluding teenagers. The dispute may revolve around the question of how to articulate the test for determining when exclusion is reasonable. The mall may argue that it has the right to exclude anyone who is driving away business, for whatever reason, as long as the mall does not violate public accommodations statutes. It will argue that no one has a right simply to "hang out" at the mall, which is open only for shopping purposes. The mall will also argue that it has the right to exclude groups of teenagers who are frightening away legitimate customers by their intimidating conduct and that the mall needs wide discretion to make judgments about when certain members of the public are acting in an intimidating or disruptive fashion. The teenagers will argue that the mall has no right to anyone unless their conduct is "disruptive". The mall may not exclude everyone in a particular group because of the wrongful behavior of a small number of persons in that group. It is discriminatory to generalize about individuals based solely on group membership.

Problem 3. *Racially discriminatory surveillance. Are retail stores places of public accommodation with the duty to serve the public? If they are subject to this duty, is racially discriminatory surveillance a violation of the right of reasonable access under the common law of property?*

This problem draws attention to the fact that the traditional rule imposing a duty to serve the public only on innkeepers and common carriers effectively authorizes retail stores to exclude customers on the basis of race unless a statute limits their ability to do so. As developed in §2.1 below, the federal public accommodations law from 1964 probably does not cover retail stores and

the 1866 civil rights act may not prohibit racially discriminatory surveillance in such stores. Because about ten states do not have state public accommodation laws that prohibit racial discrimination in retail stores, the result is that the law would authorize racially discriminatory conduct in retailing unless the common law is modernized to prohibit that practice. One possibility is to leave it to the legislatures (federal or state) to amend the law to prohibit such discrimination. A second is to modify the common law only as to race discrimination. A third is to adopt some version of the New Jersey rule in *Uston* that allows stores to exclude if they have a good reason but puts the onus on them to justify the exclusion.

§1.3 Trespass Remedies 31
***Glavin v. Eckman* (2008) 31**
***Jacque v. Steenberg Homes, Inc.* (1997) 36**

Both *Glavin* and *Jacque* involve situations where the violation of the owner's right to be free from trespass was intentionally and willfully violated. There is no justification for cutting down trees on the neighbor's land in *Glavin* because there is no property right to a view over the property of another. *Glavin* also raises the interesting issue of when an owner is liable for acts of an agent; on the facts stated, it appears the actions of the agent were within the scope of the agent's authority and may well have been directly mandated by the owners. *Jacque* also demonstrates a case in which there is no established exception to the right to exclude. It may raise possibilities for class discussion because the reasons given for exclusion were weak or silly. Allowing the intrusion could in no way put the owner in danger of losing rights by adverse possession or prescription (but what about estoppel?). And the reasons for wanting access were legitimate; moreover, the direct economic and material costs of access were zero or minimal while the costs of denying access were quite substantial. The owner was arguably being unneighborly to refuse access. At the same time, *Jacque* illustrates the current law, which is that unless access is "necessary" to avoid serious harm to life or property, one has no right to go onto private property owned by another—at least where that property is not otherwise open to the public.

Glavin and *Jacque* present interesting cases to discuss remedies. You might begin the discussion by telling students that one of the first things they need to learn is that lawyers are, in many ways, more interested in remedies than rights. A right without a remedy is meaningless to a client who wants here interested protected or recognized in some way. *Glavin* shows that the ordinary remedy for a trespass is the actual harm to the land which ordinarily is measured by the decrease in fair market value of the real property caused by the intrusion (how much the FMV when down because the trees were cut down) or by the direct harm to the land (here the commercial value of the timber or the decreased value of the trees). The *Glavin* court allows the trial judge to give the jury discretion to consider cost of restoration. With 10 mature oak trees, the cost could be huge. If we are actually talking about restoring mature trees, the cost of moving and planting each tree could be in the hundreds of thousands of dollars making the ultimate award upwards of $4 million. The court does allow cost of restoration in order to make the plaintiff whole but then notes that such costs must be reasonable and sustains a relatively modest award that is probably less than needed to *really* restore the property to its prior condition. So the case usefully shows that courts sometimes interpret property rights expansively in order both to remedy the wrong (a rights argument) and to deter such violations (a social utility/efficiency argument). But then the court worries that the amount not be too harsh, thereby imposing a reasonableness limitation on the cost of restoration measure — a limitation that reduces the penalty for the trespass and makes it more likely owners will commit such trespasses in the future.

Jacque deals with the situation where there is no measurable harm at all to the land, which is why the court allows a $100,000 punitive damages judgment to obtain needed deterrence. The

legal issues with the $100,000 award are several. First, there is a criminal statute that provides for a $30 fine; the court dismisses that as inadequate deterrence. That is true, but why is it not the legislature's job to modernize the criminal law by increasing the amount of the fine? The court then argues that the statute never meant to address trespasses of this kind. But that is plain silly, and again the legislature can change the criminal law prospectively if it wishes to address this situation. Why should the courts use the common law to achieve a penalty that is so far beyond the actual damage to the land and out of whack with the criminal punishment imposed by the legislature? Second, this issue is even more complicated because of the due process cases that limit the amount of allowable punitive damages under the due process clause. The case law (*BMW* and later cases) seem to suggest that anything more than a 10 to 1 ratio of punitive to compensatory damages is fundamentally unfair. But none of those cases involved a situation of nominal damages like the trespass in *Jacque* where it is true that the absence of punitive damages would result in a sense that one is free to trespass upon paying a $30 fee. Third, an alternative way to promote deterrence is to argue that compensatory damages should be allowed, not just for "real" harm to the land but for the sense of intrusion caused by the willful trespass. If we treat the trespass as a kind of civil rights violation then damages could be far higher than $1 even without using punitive damages. After all, if one is refused housing because of one's race, one can get compensatory damages that could be in the thousands of dollars even if one finds an apartment five minutes later across the street. The absence of a remedy for the sense of violation that comes from willful trespass by the rule that allows compensatory damages only for tangible harm to the property is perplexing. At the same time, *Jacque* nicely illustrates the need for a remedy to achieve deterrence in cases like this; nominal damages effectively create a right without a remedy, which is effectively no right at all.

Note 1. *Should their reasons for refusing access matter? Suppose the request was to drive the mobile home over a road on the Jacques' land, causing no damage to it, and the cost to the neighbor of using a different route was $15,000 because a structure on the land had to be removed to bring the mobile home in. Should the Jacques have an obligation to allow access? Or does their status as owners give them the absolute power to exclude others from their land regardless of the reason and regardless of the neighbor's need?* Where an owner has not opened her property up to the public, ownership confers a right to exclude which entitles the owner to refuse access for any reason; indeed, ownership entails a lack of obligation to give a reason or even to have one, much less a good one. Yet at the same time, some have argued that when the owner's reasons are trivial and the harm (cost or aggravation) to the neighbor is very high that owners should have some neighborly obligation to give way in cases like this. *Jacque* nicely illustrates the powers of ownership and the extent of the right to exclude but also shows that this may sometimes result in the law sanctioning conduct that might not be so praiseworthy. In such cases, sometimes we limit rights to protect the legitimate interests of neighbors, as when the law allows courts to order spites fences removed when they serve no purpose other than to block the light and view for neighboring land.

Note 2. *Was the punitive damage award excessive in Jacque? Or was it necessary to deter future trespasses like this?* This is substantially answered above. The award may appear excessive because it is so far out of line with the actual damages. On the other hand, if we consider that the real damage was not any loss to the land's condition but the violation of the right to exclude (with a sense of intrusion on one's private space) then perhaps the compensatory damages should not have been measured at $1 in the first place. Moreover, such a high figure may well be what is needed to deter the conduct. At the same time, it is important for students to know that courts routinely reduce punitive damages awards when they are excessive. Moreover, most states only award such damages if they view the behavior as outrageous and immoral or shocking.

§1.4 The Relational Nature of Property Rights 39

§2 Discrimination and Access to "Places of Public Accommodation" 40
§2.1 The Anti-Discrimination Principle 40
A. Federal Antidiscrimination Law 41
***Civil Rights Act of 1964, Title II* 41**
***Civil Rights Act of 1866* 42**

You might start your class on the federal public accommodations act (the 1964 statute) by asking students to state the elements of a claim that someone has violated the act. This requires careful reading of the statute. The plaintiff must allege that the defendant (1) committed discrimination; (2) on the ground of race (or another protected category, including color, religion, or national origin—notably not including sex); (3) in access to a "place of public accommodation." To constitute a "place of public accommodation," a business must (a) fit into the list of facilities named or implied; (b) must "serve the public" and not constitute a "private establishment…not in fact open to the public" and must (c) either "affect commerce" or be "supported by state action." Most students will miss some detail in this list. It is useful to go through this exercise because it teaches careful reading of the statute and the fact that the precise language of the statute is important rather than the general flavor of it. It is important for students to learn that qualifying clauses, phrases and adjectives in a statute are interpreted to limit the statute's applicability, effectively creating exceptions or loopholes in the regulation.

Three serious problems arise in interpreting the statutes in this section. The first problem is the relationship between state and federal law. It is important to explain that the Supremacy Clause of the United States Constitution ensures that any state statute which is inconsistent with federal law is unenforceable. This point is often confusing to students because federal and state statutes are not inconsistent merely because they are different. The first question is whether the federal statute "preempts the field" by expressly or impliedly taking regulatory power away from the states and providing that only federal regulation will operate in this particular area. In general, if the federal statute does not preempt the field, states are free to pass legislation on the same subject which imposes *greater* restrictions on the conduct of either state officials or private citizens than does the federal statute. Thus, for example, the federal public accommodations law does not prohibit discrimination on the basis of sex; state public accommodations laws generally do prohibit such discrimination, in addition to prohibiting race discrimination. Further, the 1964 *Civil Rights Act* appears to impose obligations not to discriminate *only* on innkeepers, restaurants, places of entertainment, and gas stations; state laws often impose duties not to discriminate on a wider range of establishments, including retail stores. You can explain the notion of inconsistency by suggesting that federal law creates a minimum amount of protection for individual rights; states are free to increase that amount of protection by further regulating the conduct of state officials or private citizens, unless federal law precludes this result, often to protect competing rights in freedom of action.

It is true that protection of the rights of individuals ordinarily involves limiting the rights or infringing on the interests of others; for this reason, the notion of what constitutes "greater protection for individual rights" is sometimes difficult to define. For example, public accommodations laws regulate the conduct of owners of businesses by limiting their power to exclude non-owners; at the same time, these laws grant privileges to members of the public to enter property possessed by others. A state statute that changes the federal balance between free access rights of customers and the rights of businesses to control their premises might be consistent or

inconsistent with federal law, depending on the policies underlying the federal statute and the changes that federal statute made in the preexisting legal regime. Public accommodations laws were intended to change the common law rule that allowed owners of places open to the public to exclude individuals in a discriminatory fashion; they did so by limiting the right to exclude. They did not expressly protect (although they could have protected) property owners' rights to exclude in situations not covered by the statute. State laws that *further* restrict the right to exclude are therefore consistent with the federal policy. On the other hand, if the federal law were intended to effectuate a careful balance between rights to exclude and rights of access, it might be the case that state laws which altered this balanced by further limiting the right to exclude were inconsistent with the federal compromise; in such a case, the federal law preempts the field entirely, taking away from the states the power to further regulate the relevant conduct.

A second extremely difficult and recurrent statutory interpretation question in this area is the relationship between the civil rights acts of the Civil War Era, including the *Civil Rights Act of 1866,* 42 U.S.C. §§1981 & 1982, and the civil rights statutes of the 1960s to the present, including the public accommodations provisions of the *Civil Rights Act of 1964,* 42 U.S.C. §2000a *et seq.* Here is the problem: If the *Civil Rights Act of 1866* prohibits discrimination in both the housing market and public accommodations, then why was it necessary to pass new civil rights statutes in the 1960s?

Some scholars argue that the Civil War era statutes were intended to regulate state action only. Under this interpretation, they made unenforceable any state statutes which imposed disabilities to contract on Black Americans; thus, Black Americans were free to purchase and enter real property *if they could find anyone willing to sell to them.* Under this interpretation, the federal statutes of the 1960s were necessary because, rather than merely providing that contracts made by Black Americans were enforceable in court, they prohibited others from refusing to contract with Black Americans because of race. If this interpretation is correct, and if it is the case that the federal public accommodations statute applies only to restaurants, hotels, gas stations, and places of entertainment, then plaintiffs cannot appeal to §1982 to sue retail stores for racial discrimination.

One problem with this interpretation is that it arguably goes against the plain language and the legislative history of the Civil War era statutes. One does not have the same right to contract or purchase property if others are entitled to refuse to deal on a discriminatory basis. In addition, the legislative history of these Reconstruction statutes strongly suggests that they were intended to respond to private actions by the Ku Klux Klan and others that interfered with the ability of the freed slaves to participate in the marketplace.

Other scholars argue that the Civil War era statutes were intended to prohibit discriminatory refusals to deal, as well as rendering inoperable state laws that imposed disabilities on Black Americans. Under this interpretation, the 1960 statutes were arguably redundant and duplicative. Why then were they necessary? The answer is that the courts arguably *misinterpreted* the Civil War statutes, depriving them of much of their power by unnecessarily narrow interpretations. The Congress therefore needed to pass new statutes to reaffirm the basic policy contained in the Civil War acts.

The problem with this interpretation is that is fails to explain how to interpret the *exceptions* contained in the 1964 public accommodations law and the 1968 *Fair Housing Act.* Were these statutes intended to *narrow* the applicability of the Reconstruction statutes by allowing discriminatory practices that were previously forbidden? (Note that the 1866 act has no exceptions for private clubs or for owner-occupied housing as do the acts of the 1960s.) There is a good argument that the answer to this question should be no. The Congresses which passed the statutes of the 1960s expressly stated that they did not intend to supersede the Civil Rights Act of 1866; the remedies provided by the legislation of the 1960s were intended to be cumulative. Thus, even if there are limitations in the acts of the 1960s, the Congress expressly refused to repeal the arguably

wider laws of 1866. Compromises are essential to pass legislation, and legislatures often adopt statutes which have internal tensions; this is because, when hard issues are present, it is difficult to answer questions definitively. In such cases, the legislature equivocates, leaving it to the courts to pick up the pieces. It may be argued that, given an ambiguity in the civil rights area, courts should err on the side of more expansive rights for traditionally disempowered groups. Under this view, it is appropriate to interpret the 1866 acts as widely as possible, even if this effectively makes the 1960 laws duplicative in some respects. In the last analysis, under this view, the 1960 acts served a useful function even if they are duplicative; they finally got the courts to enforce the 1866 statutes which had been misinterpreted and ignored for a hundred years. At the same time, the court like to render statutes intelligible, and an expansive reading of the 1866 statutes arguably makes the exceptions in the 1964 public accommodations law meaningless. Compromise or not, this interpretation is hard to accept under traditional notions of statutory interpretation. Nevertheless, because of the clear statements in the legislative history that the 1964 act was not intended to supersede prior legislation, this is the result reached by the few courts which have addressed the issue.

A third problem that should be mentioned here is the question of whether the Civil Rights Act of 1866 prohibits wrongful discrimination other than racial discrimination; for example, does it prohibit sex discrimination? This issue has not been decided by the Supreme Court. This is a complicated question which will be explained in more detail in the Teachers' Notes accompanying chapter 12.

Note 3. *Is the list of covered establishments in the 1964 public accommodations law exclusive or merely illustrative?*

This question is meant to get students thinking. It is also relevant to the question raised in Problem 1 below and is answered there.

If the Civil Rights Act of 1866 regulates the conduct of public accommodations, wouldn't this have made the 1875 statute superfluous and unnecessary? If §1981 or §1982 regulate public accommodations, why did Congress pass the 1875 statute?

This question is answered above in the exposition of the relation between the *Civil Rights Act of 1866* and the *Civil Rights Act of 1964*. If the *Civil Rights Act of 1866* was a general public accommodations law, it arguably would have made the 1875 statute superfluous. On the other hand, it can be argued that the 1875 statute was necessary to ensure that the right to contract and the right to purchase property embodied in the 1866 statute were not rendered meaningless by business owners who flatly refused to make contracts with the newly freed slaves. Duplicative statutes may be necessary to ensure that both citizens and judges understand what exactly Congress is trying to accomplish and to ensure that conservative judges do not undermine legislative policy by narrowly interpreting it. The 1875 Act could have been passed to ensure that it would be understood that part of the right to contract is the right to enter public accommodations for the purpose of entering a contract.

The counterargument, of course, is that the Congress that passed the *Civil Rights Act of 1866* arguably meant only to strike down state laws that make contracts with Black persons unenforceable and which deprived Black persons of the power to give testimony in court. Under this interpretation, the *Civil Rights Act of 1866* should not have been interpreted to prohibit racially motivated refusals to deal but should only have been interpreted to force judges to enforce contracts actually entered into between black and white persons.

But what *private conduct is regulated by §§1981 and 1982? Can you think of a reason §§1981 and 1982 should be interpreted to regulate public accommodations when Congress passed*

a more specific statute regulating them in 1964—a statute which clearly omits any provision for damages?

Congress passed the 1964 Act because the 1866 Act had been narrowly interpreted by the courts in a way that no longer found favor in the Congress. It is important that Congress refused to repeal §1981 or §1982 when it passed the 1964 Act. By leaving the *Civil Rights Act of 1866* on the books, Congress made clear its intentions to give equal force to both statutes and if some duplication resulted, that was all to the good. In addition, while the 1964 statute regulated race, it also regulated national origin and religion as prohibited bases for discrimination. Congress may have wanted to keep broader regulation of racial discrimination which is the sole subject of the 1866 Act; this might be an additional reason for leaving that historic statute intact.

Note 4. *Can you think of a way to interpret the language or purpose of § 1981 in a way that would not view it as an creating an obligation to allow individuals to enter retail stores to purchase goods or services?*

First, one can logically distinguish the right to make a contract from the right to enter real property against the wishes of the owner. Section 1981 might impose an obligation on a business to deal with anyone who comes in the door without regard to race but leave the store owner the power to post a sign reserving the right to determine which customers to allow into the store. Second, before the Supreme Court's decision in *Jones v. Alfred A. Mayer* in 1968 and *Runyon v. McCrary* in 1976, one could have argued that the "right to make a contract" means that one is *free* to make a contract if one can find anyone willing to contract with her but that one has no *power to force* a business to contract with one against the business owner's will. This interpretation, of course is foreclosed by *Runyon v. McCrary* and *Jones v. Alfred A. Mayer Co.*, as well as the amendments to § 1981 created by the *Civil Rights Act of 1991*.

Assuming § 1981 does require stores to allow individuals to enter without regard to race, does § 1981 prohibit stores from discriminatorily following Black, Latino, or American Indian patrons around the store, searching them, and subjecting them to insults? Are these decisions consistent with the intent of the Civil Rights Act of 1991? Which interpretation of §1981 is correct?

A number of courts have interpreted very strictly the language of §1981 and often ignored the language of §1982. They have suggested that the "right to make a contract" is implicated only if π can prove that she attempted to, but was deterred from, making a contract. This interpretation makes §1981 distinguishable from either the *Civil Rights Act of 1875* or the *Civil Rights Act of 1964* because it reads those public accommodations laws capaciously as including the right to "full and equal enjoyment" of the services of a public accommodation while denying that a right to nondiscriminatory treatment in shopping is part of the *Civil Rights Act of 1866*. The counterargument is that one can hardly be said to have the "same" right to make a contract as white citizens if one is deterred from shopping by discriminatory surveillance or mistreatment. The right to make a contract is not only the right to sign on the dotted line but the right to participate in the pre-contractual activities needed to create a contractual relationship in the first place. Contracts do not take place in a magic moment but involve the shopping and negotiating process as well. In addition, the *Civil Rights Act of 1991* expressly overruled *Patterson v. McLean Credit Union,* which had narrowly interpreted the *Civil Rights Act of 1866* as requiring an employer to hire without regard to race but as not requiring employers to offer employees equal terms and conditions while the job. Section 1981 was amended expressly to include a reference to "terms and conditions" of contracts. This Congressional policy suggests that Congress wants "the right to make contracts" to be interpreted to include everything about the contractual process, not just the magic moment of signing the agreement. A court ruling that allowed stores to follow Black customers around the

store while not following white customers around the store might well result in another amendment of §1981 and/or §1982 to correct this mistaken narrow reading of the law.

Note 5. *Does it matter whether the organization is engaged in the sale of goods or services?* Recent discussions of LGBTQ access rights have leaned heavily on this distinction between goods and services, with commentators (and some courts) treating obligations to provide personal services as significantly more intrusive than obligations to sell goods.

Problem 1. *If a store installs a lock-and-buzzer system and allows entry only to patrons that the management or employees consider "safe," does the store come within the definition of a "place of public accommodation" under §2000a(b), or is it a "private establishment not in fact open to the public" under §2000a(e)? Are retail stores "places of public accommodation" as defined in §2000a(b)?*

In addressing this question, you can emphasize four separate issues. The first issue is the *language* of the act. What specific words will each side point to in their quest for a favorable ruling? What words will each side argue are clear? What words will each side argue are ambiguous? Second, what canons of statutory interpretation will help each side? Given the fact that the canons are contradictory and may point in conflicting directions, how will each side attempt to persuade the decision maker that the particular canon in question in the one that should be operative here? Third, what policies and purposes underlying the statute will each side identify? In identifying these purposes, it is crucial to note *limits* to those policies. If the statute represents a compromise between competing interests, what are the competing interests and where did the legislature draw the line between them? If one side is arguing that the statute distinguishes between certain types of acts or situations to which it applies and others to which it does not apply, what makes those distinctions reasonable? Why would a reasonable legislature regulate one situation and not the other? Fourth, how should the court understand its institutional role vis-à-vis the legislature? Should it interpret the statute narrowly on the assumption that the legislature intended to leave unregulated any conduct not specifically covered by the statute, or should it broadly interpret the policies underlying the statute so as to apply the statutory regulations in as broad a manner as possible? Should the court ask how the legislature that adopted the statute would want the court to act or should it ask whether a particular interpretation of the statute is likely to be repealed by the current or a future legislature in amendatory legislation?

The store's strongest argument will focus on the statutory language. It will argue that retail stores are simply not covered by the statutory language since the definition of "places of public of accommodation" in §2000a(b) identifies specific types of establishments, including hotels, restaurants, gas stations, and places of entertainment, and does not include retail stores or other types of businesses open to the public. If Congress had intended the statute to apply to all businesses open to the public, it could and would have said so, rather than defining so carefully the few businesses subject to the statute. Congress knows how to write a statute that applies to retail stores if it wants to do so. The fact that it specifically listed a small number of establishments strongly suggests that it did not intend to regulate the conduct of other businesses. This result is proper because it is the court's job in a democracy to defer to the intent of the legislature and not to expand upon the terms of the statute. To apply the statute in situations excluded by the statutory language would constitute a tyrannical exercise of power because the court would be acting in a manner contrary to the law passed by the democratically elected legislature.

Why would a rational legislature distinguish hotels, restaurants, gas stations, and places of entertainment from other businesses open to the public? A preliminary answer is that almost all legislation effectuates a compromise between competing interests. In this case, the competing interests are interests in not being discriminatorily excluded from access to the marketplace on the

basis of race, religion, or national origin and interests of property owners in controlling access to their property. There was opposition to the 1964 Civil Rights Act and limiting its applicability to only certain kinds of businesses might have been necessary to get it passed. If this is so, the court should not interfere with the careful balance of interests worked out by elected officials simply because the judges disagree with the balance reached. More specifically, legislatures are not obligated to solve all problems at once; they often address *particular* problems which are brought to their attention and for which they are convinced that reasonable answers exist. It may be the case that the social problem which the 1964 act was intended to address was the existence of widespread discrimination in the South that existed in particular types of establishments. Three of the four covered establishments (innkeepers, restaurants, and gas stations) concern the travel industry; discriminatory practices by these facilities had the effect of preventing Black Americans from freely traveling around the country. The fourth covered establishment, places of entertainment, also widely discriminated on the basis of race. The Congress may have believed that discrimination was a serious problem in the establishments listed in the statute, and that discrimination was far less widespread in other types of business. In addition, the Congress may have believed that local monopolies might exist in the areas of services for travel and in places of entertainment, while competition was more operative in other types of business; if this was the case, regulation may have been less necessary in other types of business since competition and the desire to maximize profits might have induced those businesses to provide services without discrimination. If this interpretation is correct, Congress addressed the types of conduct most in need of regulation. There is no obligation on a legislature to address a problem fully or not at all; it is empowered to address specific aspects of a problem which are brought to its attention and for which a reasonable compromise or consensus can be reached among the legislators.

The excluded patron will focus, in contrast, on the broad remedial purposes of the statute and will attempt to demonstrate that the statute is ambiguous on this question, and therefore should be interpreted broadly. She will argue that the statute is ambiguous because it does not expressly limit its applicability; the list of covered establishments in §2000a(b) is intended to be *illustrative* rather than *exhaustive.* This interpretation can be backed up by the wording of the statute, which states that "Each of the following establishments which serves the public is a place of public accommodation." This wording does not say that "only" the following types of establishments are places of public accommodation; it merely states that each of the listed establishments clearly satisfies the test and is intended to be covered. Further, the operative section of the statute is §2000a(a) which states that all persons shall be entitled to the full and equal enjoyment of the services of *"any* place of public accommodation." The wording "any" may indicate an intent to establish a broad definition including any establishment that "serves the public."

The purpose of the statute is to afford equal access to businesses that serve the general public. The statute should be interpreted broadly to effectuate that purpose. If the court interprets the statute in a narrow fashion, it will defeat the purposes underlying the legislation and therefore contravene the legislative intent; such an interpretation will therefore constitute an illegitimate interference with the system of democratic governance by contravening democratically enacted public policies. It is true that the statute explicitly mentions only certain types of establishments; this may be because those were the areas that posed the greatest problem at the time the statute was passed and where discrimination was the greatest. The Congress wanted to make crystal clear that discrimination was not to be tolerated in those businesses. This does not mean, however, that Congress intended to encourage or allow discrimination in other businesses that serve the public; such a result would violate the policy underlying the entire regulatory scheme. There is no reasonable way to distinguish between the listed facilities and retail stores that would justify allowing discrimination in one but not the other. If the statute is ambiguous, it should be interpreted to effectuate its purposes and not to establish an irrational distinction that could not have been

intended by Congress. Support for this interpretation can be found in the *Little League* case in New Jersey in which the New Jersey Supreme Court found a list of covered establishments to be illustrative rather than exhaustive. Similarly, the California Supreme Court has interpreted the *Unruh Civil Rights Act* to prohibit all forms of invidious discrimination, whether or not they are listed in the statute; the categories of race, sex, etc. are deemed illustrative rather than exhaustive. Finally, if the court is mistaken in its interpretation, Congress can always correct the mistake by amendatory legislation. It is therefore appropriate to ask whether it is likely that Congress would pass legislation specifically authorizing owners of retail stores to discriminate on the basis of race. When the question is posed in this manner, it becomes clear that the likelihood is close to zero. The legislature is unlikely to believe that retail stores have free association or privacy interests, or any other conceivable legitimate interests, in racial discrimination. Interpreting the statute broadly to effectuate the anti-discrimination policy therefore is likely to accord with current legislative policy and therefore be congruent with principles of democratic governance.

If retail stores are covered by §2000a(b), do they "serve the public" if they install a buzzer and serve selected customers who show up on their doorsteps or are they "not in fact open to the public" and thus exempt from the statute under §2000a(e)?

The excluded patron will argue that the general question here is what the *test* is for determining when a covered establishment is a place of public accommodation and when it is either "not open to the public" or is a "private club." A difficult statutory interpretation question is how to interpret the private club exception in §2000a(e). After all, §2000a(b) provides that establishments are not public accommodations if they do not "serve the public." What does §2000a(e) add to this requirement? If it adds nothing, then it is surplusage, and duplicative language in statutes is disfavored; the courts presume that each word must be given some meaning. Under this interpretation, the definition of a "private establishment" in §2000a(e) must add something by further narrowing the range of application of the statute. One interpretation is that, by mentioning private "clubs" first, and then referring to "other establishments not open to the public", the language intends to set up "private clubs" as the operative category. This interpretation helps the excluded patron because she might argue that the only establishments excluded from the statute are those that are, or that closely resemble, private clubs. A store open to the general public, even with a buzzer, does not resemble a private club, which has a membership list, a process for applying for membership, and generally has the purpose of providing for certain types of association among members.

This close reading of the statutory language strongly suggests that the store is a place of public accommodation. It does "serve the public" and is "open to the public" because it is open to anyone who comes by. No appointment is needed; no membership application is required; and no selection criteria are applied other than coming in off the street to browse or buy something. The patron might argue that the test for distinguishing private establishments from places of public accommodation is well-stated in the *Jaycees* case. Here, the store has no set limit on membership and is relatively unselective in whom it lets in. Nor does it promote associational interests among its members. The store has no articulated selection criteria. It is true that it does exclude some members of the public. However, an establishment may be a public accommodation even though some amount of selectivity may be present; for example, the Jaycees were held to be a place of public accommodation even though they exclude everyone under 18 and over 35 years of age from full membership. In this sense, the Jaycees were highly selective; however, among this group, they were totally unselective.

The purpose of the public accommodations act is to provide access to the market without invidious discrimination; this interest is clearly implicated in a retail store, despite the presence of the lock and the buzzer. The store should not be allowed to evade the statutory requirements by

simply installing a lock and buzzer. The purpose of the exception for private clubs is to protect interests in privacy and free association; neither of those interests is present here. This interpretation is further supported by the canon of interpretation that remedial statutes should be broadly construed to effectuate their purposes; this means that *exceptions* to remedial statutes should be narrowly interpreted, especially where the purpose for which the exception was included does not appear to be implicated.

The store will argue, in contrast, that the plain language of the statute exempts stores which are not open to the public and that, under the test articulated in *Jaycees,* it is not a place of public accommodation. The store will argue that §2000a(e) does add something to the statute by clarifying that exemptions from the statute include both *membership* organizations which pursue associational interests (private clubs like the Jaycees) and establishments that provide goods or services to *non-members* but which are not open to the general public, which may not pursue associational interests. The fact that the store is not a private club does not mean that it is a place of public accommodation; rather, the statute provides that places which do not "serve the public" are exempt from the statute *whether or not they are private clubs.* The plain language of the statute suggests that a store which is selective in whom it lets in is not "open to the public"; the word "public" suggests everyone, and selectivity is incompatible with this. The fact that the store is locked, rather than open to the public, and that the store manager exercises selectivity in admitting potential patrons, clearly demonstrate that it is not open to the general public.

The purpose of the statute is to allow equal access to places open to the public without regard to race or religion or national origin, but not to require establishments which are not open to the public to change their essential nature. The purpose of the law is to combat racial discrimination in businesses that serve the general public; it is not to require businesses with select clientele (select on a basis other than racial discrimination) to serve everyone and therefore change the nature of the business. The importance of giving effect to every word in the statute suggests that the phrase "which serves the public" is intended to exclude a broader range of establishments than the "private club" exception in §2000a(e); any other interpretation would make the entire paragraph in §2000a(e) unnecessary.

Students often make a crucial mistake in formulating the store's argument. They sometimes argue that any business that discriminates on the basis of race, by excluding all persons of color, is for that reason selective and is therefore not a place of public accommodation. This interpretation would deprive the public accommodation laws of any significance. The selectivity test adopted in *Jaycees* means that the business is selective on a non-racial basis, i.e., that its membership or services are limited on a basis *other than race*. This means that the store must explain its selection criteria in a non-racial way. It must explain what criteria it uses for admittance and must identify *legitimate* criteria. The strongest analogy may be to argue that the store establishes a dress code. This is likely to be understood by the courts as legitimate and non-racial, even though a particular dress code may have a disparate impact on particular racial groups if styles of dress vary by race. An alternative is to exclude all young people. This is harder to explain, but the store may argue that it intends to create an environment for shopping that some adults prefer by excluding teenagers; discrimination in public accommodations on the basis of age is not prohibited by the federal law.

(A useful exercise is to ask the students to act as the lawyer for the store and formulate a policy that is likely to protect the client from a lawsuit under the federal public accommodations act. To do so requires articulating legitimate selection criteria which are both non-discriminatory and which are sufficiently selective to classify the store as not "serving the public." Is it possible to do this without hurting the store's potential customer base significantly? The answer may be "no" if it is not possible to tell, from appearance, who is likely to be a criminal, or if excluding all people likely to be criminals requires excluding large numbers of potential customers the store wants and needs to attract to maximize its profits or to stay in business.)

Problem 2. *A night club in Boston that serves liquor requires all patrons to show a driver's license to prove they are over twenty-one. The club refuses to allow a law student in when he shows his Puerto Rican driver's license on the (incorrect) ground that it is not an American license. Has the club engaged in national origin discrimination in violation of the 1964 Civil Rights Act? What about a restaurant that refuses to serve patrons who cannot order in English?*

The answer is not clear. On one hand, it could be argued that the exclusion was based on the view that someone from Puerto Rico is not an American citizen and thus in some sense discriminates on the basis of national origin. On the other hand, the discrimination does not appear to be racial in nature or motivated by a desire to exclude people of a particular national origin; those of any national origin would be admitted if they have an "American" driver's license. At the same time, a Puerto Rican driver's license *is* an American driver's license so the exclusion is based both on a misapprehension of fact and on the place the law student comes from which may be a form of national origin discrimination.

B. State and Local Laws..... 47
***New York Executive Law, Art. 15* 47**
***McClure Management, LLC v. Taylor* (2020) 48**

The New York statute is included so that students can see the differences between the federal law and many state laws. Many state laws prohibit discrimination based on sex, marital status, and age and a fair number prohibit discrimination based on sexual orientation.

***McClure Management, LLC v. Taylor* (2020).** This case involves a rare situation where an individual customer was able to marshal evidence to demonstrate intentional discrimination. The case provides a nice opportunity to talk with students about how one might go about proving intentional discrimination – the kind of questions to ask and the kinds of evidence that litigants might need to gather.

Note 2. *Do you agree that businesses like photographers should not be treated as "public accommodations" for the purposes of civil rights statutes because they are expressive in nature? If so, how much expression is necessary to remove an occupation from the "public accommodation" category? Would a florist qualify as sufficiently expressive?*

Returning to the questions above about the scope and definition of public accommodations, these prompts add the complication of a version of constitutional avoidance—should the purported expressive nature of a business change the application of the law, especially from the perspective of the customer?

Note 3. *In cases where proprietors of places of public accommodation have religious objections to serving particular customers, which right should give way? Does the expressive nature of the business have any bearing on the strength of the claim for a* religious *exemption?*

This is an opportunity to challenge students over competing rights on both sides of this question.

Problem 1. *A 300-person country club has a "balanced" membership policy with no criteria for admission except that the club seeks to maintain an even balance of Christians and non-Christians (primarily Jews, but also a few Muslims). A club member must sponsor a prospective member. Anyone wanting to become a member of the club must find one person in the club willing*

to invite him or her to join. Applications are marked according to whether the applicant is a Jew, a Christian, a Muslim, or the member of another faith. Nonmembers are allowed to dine at the club only if accompanied by members. Members pay for the drinks and meals consumed by themselves or their guests on a quarterly basis. A Jewish man seeks to become a member but cannot because there is a two-year waiting list for Jews seeking membership. The only spots currently open are earmarked for Christians. Does he have a legal claim under Title II? Under Article 15 of the New York Executive Law? See Mill River Club, Inc. v. New York State Division of Human Rights*, 59 A.D.3d 549 (2d Dept. 2009) (finding a claim under New York law).*

Under federal law, public accommodations are generally distinguished from private clubs by asking whether the organization is selective in its membership and/or has limits on its size. It may also matter whether the organization has underlying purposes of organizing for political reasons, disseminating a message, engaging in religious practices, or other interests protected by the constitutional right of free association. When an organization sells things to the public (either goods or services), it is very likely to be held to be a public accommodation because it has entered the world of the market where equal access without regard to invidious discrimination in the norm. A restaurant could not immunize itself from the federal public accommodations law by calling itself the Segregation Society and posting a notice of its political views in favor of segregation. The fact that it is unselective, in addition to its sale of goods and services, is almost certain to place it within the scope of the statute and to deny it any claim to constitutional rights of free association.

New York law creates a specific exception from its "distinctly private" exception by excluding from the "distinctly private" category groups that have more than 100 members, provide regular meal service, and receive payment (directly or indirectly) from nonmembers. Under the hypothetical, each of these elements would seem to be present, although the indirect payment from nonmembers is the closest call. The applicability of the law probably turns on how regularly nonmembers dine in the club's facilities. The important point to bring out is that the scope of the New York club exemption may be significantly narrower (because of the carve-out) than the exemption under federal law.

If the entity does not fall within the "club" or (in the case of the New York law, the "distinctly private") exception, the question becomes whether the eligibility criterion chosen by the club has the intent or effect of "discriminating" on the basis of religion. The question is whether the goal of maintaining a religiously balanced membership permits the club to take religion into account in its membership decisions. In a way, the case raises some of the same issues as debates over affirmative action. The club will argue that the purpose of maintaining a balanced membership means that placing an applicant in a different pool because of his religion does not amount to an act of discrimination as envisioned by the antidiscrimination laws. The Jewish applicant will point to the literal language of the statute to argue that the club's policy has both the intent and effect of denying him (as an individual) access to membership because of his religion. Although the club's reasons for discriminating, he will argue, may be less blameworthy than those of someone who discriminates out of sheer animus, the statute does not inquire into the motives behind the discriminatory conduct.

Problem 2. *A restaurant has two, multiple occupancy bathrooms, one designated for men and one for women. A transgender woman attempts to enter the women's bathroom, but the restaurant's manager stops her, telling her that she must use the bathroom corresponding to her gender at birth. When she resists using the men's room, the manager offers to let her use a single-occupancy bathroom normally reserved for restaurant staff. The restaurant is located in a town and state that (like federal law) do not treat sexual orientation or gender identity as protected categories under their antidiscrimination laws, but that requires "equal service" on the basis of "sex" in all "places of public accommodation," a category that includes "restaurants." The*

transgender patron files a complaint with the state's human rights commission, alleging that the restaurant's manager has violated the state's human rights law. Has the restaurant violated the law? Could she have filed a federal claim as well? Cf. Bostock v. Clayton Cnty., *140 S. Ct. 1731 (2020) (interpreting federal employment discrimination statute — which prohibits discrimination "because of sex" — to prohibit discrimination on the basis of sexual orientation or gender identity or expression).*

This problem revisits the scope question and adds the emerging vein of federal civil rights that, under *Bostock*, interprets "sex" to include gender identity.

§2.2 Discrimination Against Persons with Disabilities 61
Americans with Disabilities Act of 1990, Title III 61

The Americans with Disabilities Act gives students an excellent opportunity to experience the task of interpreting a statute cold, as lawyers in the field will have to do before there are definitive interpretations of the ADA by the courts. It is important to note that regulations have been passed to implement the Americans with Disabilities Act and those regulations may answer some of the questions.

Problem 1. *A man whose legs and arms are substantially paralyzed but who has some movement in his hands and lower arms and in his head and neck and part of his upper torso, is admitted to law school. His wheelchair is motor-operated and he can use his hands to move himself around in the wheelchair. He applies for, and obtains a room in the law school dormitory which he can share with his trained full-time attendant. He needs to be constantly attended since he is on a respirator to enable him to breathe and may require immediate attention if something goes wrong with the breathing mechanism. The law school notifies him that he will have to pay rent (the dormitory fee) both for himself and his attendant, effectively doubling the rent he must pay, because the attendant takes a space that would otherwise go to another paying law student. Has the law school violated the public accommodations provisions of the ADA?*

Defendant's argument that the school has not violated the statute. The ADA, at §12182(a), grants π the right to *"full and equal enjoyment"* and he has not been excluded or otherwise denied enjoyment of the school's facilities; he simply must pay for two dormitory contracts since he is using more resources than others. It is not "discriminatory" to treat him differently if he is not *similarly situated*; he demands greater services and thus should pay more. The attendant's presence displaces another student from living in the dormitory and justifies the extra fee. Nor does the school's conduct violate any of the specific prohibitions in §12182(b)(2). The requirement of double rent is not an "eligibility criterion" regulated by §12182(b)(2)(A)(i); he is free to attend the school and live in the dormitory and no extra requirements are being placed on him for admission to the school or the dormitory. Nor has the school violated the requirement under §12182(b)(2)(A)(ii) that the school make "*reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . services."* The modification in school policy requested by the student is unreasonable since it imposes significant financial cost on the school and the statute clearly intends to avoid this result. Cost considerations and the fact that the attendant reduces the number of other students who can live in the dorm are relevant since these facts are relevant to determining whether Δ's conduct is reasonable.

Plaintiff's argument that the school has violated the statute. Under §12182(a), π is entitled to *"full and equal enjoyment"* and he cannot get this without his attendant present. It is necessary to allow attendant to live with him or he would be excluded from the dormitory. He cannot be forced to pay twice what other people pay for the same services; that is discriminatory. He is not

utilizing more services. While it is true that his attendant takes a spot that otherwise would go to another law student, the failure to allow the attendant to live in the dormitory effectively excludes π from the dormitory and this is discriminatory. In addition, the policy may constitute an invalid *"eligibility criterion"* under §12182(b)(2)(A)(i) that *"screens out ... any class of individuals with disabilities from fully and equally enjoying any . . . services."* The school's policy constitutes an eligibility criterion that screens out people who need full time attendants. Moreover, the only exception to such an invalid eligibility criterion is that it is lawful only if it "can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." This exception excludes cost considerations. The presence of the attendant in no way is necessary to provide the school's services; on the contrary, failure to allow the attendant to live in the dormitory would prevent the school from offering its dormitory services to π. Similarly, under §12182(b)(2)(A)(ii), the school has failed "*to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, etc."* This modification is reasonable and any cost to the school is not relevant since the "readily achievable" exception to paragraphs §12182(b)(2)(A)(iii) and (iv) is not present in (ii). The modification must be allowed *"unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."*

It seems almost certain the courts would find the school's policy to constitute a violation of the act.

Problem 2. *A law school library is being renovated. Right now the only access to the library is through an underground tunnel through the elevator with the entrance to the library on the fourth floor. The library stacks are not accessible by wheelchair. The twenty million dollar renovation project will move the library entrance to the first floor and create two wheelchair accessible entrances on the south side of the building. Although these south entrances visually appear to be the "back doors" to the library, in fact ninety percent of the students enter the library through these south entrances. The north entrance has a grand staircase and is architecturally the main entrance to the building from a design standpoint although only about ten percent of the users enter the building this way. Installing a lift or a ramp at this northern entrance would cost $80,000 to $150,000. Is the school required by §12183 to make the north entrance accessible by wheelchair?*

Section 12183(a)(2) requires facilities that are being "altered . . . in a manner that affects or could affect the usability of the facility or part thereof . . . to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." The school may argue that the building is "readily accessible" since persons in wheelchairs can easily access the building from the south entrances and that these constitute the main entrances to the building in any case. "Accessible" means that one can get in easily and that is true without adding a lift or ramp to the grand front stairs. The student may argue that the front lift or ramp is required by the language "to the maximum extent feasible" and that the building is not "readily" accessible if the user cannot enter through what is obviously the "main" entrance to the building. The fact that most people use the back entrance does not alter this. It would violate the law for a new building to be constructed in a manner that required persons with disabilities to enter the building from the back door even if most users parked near the back door and entered from there most of the time.

Problem 3. *A new movie theatre has stadium-style seating at a sharp incline and provides spaces for wheelchairs only down on the lowest level in the front row just in front of the screen. These seats are always the last to fill up because individuals must crane their necks back to see the*

film and the picture is somewhat distorted at that angle. However, those seats are used by the general public when the theater is full. A Justice Department regulation under the ADA requires movie theaters and stadiums to provide "lines of sight comparable to those for members of the general public." ADA Accessibility Guidelines, 28 C.F.R. pt. 36, App. A, §4.33.3.

(a) Has the theater violated the ADA?

The seats do provide comparable lines of sight because others sit in those seats. On the other hand, they are the worst seats in the house and if wheelchair users are permanently relegated to the worst seats in the house, they have arguably not be afforded "comparable" lines of sight.

(b) Must the theatre reserve seats next to spots reserved for wheelchair users for companions who accompany them so that they can sit together, thereby requiring individuals who have taken those seats to move to other available seats in the theatre? Would the case come out the same way if the plaintiff were not a quadriplegic? If you were the attorney for the theatre, what policy would you advise them to adopt to ensure compliance with the ADA?

The affirmative answer is based on the fact that the statute defines segregated services to be discriminatory (*see* § 12182(b)(1)(A)(iii) & (B)). Because wheelchair users can only sit in certain parts of the auditorium, they will be treated differently than other patrons if they are allowed to sit with the people they come with to the theater. Moreover, some wheelchair users need to have an attendant with them at all times; denying the right to have the attendant sit next to the patron would be equivalent to denying the service altogether. On the other hand, many people get separated when they come to theater if there are no seats left that are contiguous and sufficient to seat the entire party. In this sense, wheelchair users are not being treated differently from others. If the service is merely "the right to view the movie" then there is arguably no problem, and it is not clear that the service being provided is "the right to view the movie in a seating location near your companions." As an attorney for the theater, one would probably advise attendants to try to work it out by asking others politely to move if possible. Of course, this would create its own problems; giving the wheelchair user the right to sit with her companions while denying that right to another who is forced to move away from her companions seems problematic. If the companion is an attendant that needs to be near the wheelchair user then requiring access to a nearby seat would seem to be required to make the facility open to that person at all.

Problem 4. *How should a court reconcile the requirements of the ADA with the historic preservation laws that prohibit alterations of historic buildings that would impair their historic significance?*

This is an interesting question because the statute is ambiguous as to how to balance historic preservation against access. The interest in preservation is strong but so is the interest in equal access. It is hard to discuss such questions in the abstract. One focus of discussion could be the question of whether a ramp must be added to a historic house; such ramps obviously change the external appearance of the house but are necessary to provide access. This is a good problem for class discussion because it implicates the issue of whether all individuals should have a right of access to historic monuments or whether preservation of such monuments is more important that access.

Problem 5. *A law school professor gives an eight-hour take home exam to be picked up at 8:30 am and returned at 4:30 pm. A student with dyslexia asks to be allowed to add twenty-four hours to the exam picking it up 8:30 am one day and returning it at 4:30 pm the next day. Is the school obligated to comply?*

Again, it is hard to answer this question in the abstract. At issue are the basic requirements of being a lawyer. Access claims are that individuals with dyslexia can be functioning professionals; we have much evidence to that effect. On the other hand, some professions require

the ability to move quickly and those with disabilities may not be able to perform those functions. For example, no one would argue that a blind person should be a surgeon but a blind person might perform other medical functions. Lawyers take on many different tasks, some of which require relatively rapid response to questions and others of which do not require such rapid responses. When accommodation is provided, it is also a difficult question how much accommodation is appropriate and how this should be determined. Does the school have a duty to give as much time as is needed by the student or is there some limit to the amount of extra time it need provide, even if this means the student is at a disadvantage compared to others?

A woman suffers from limb girdle muscular dystrophy, which makes it difficult for her to walk or stand from a seated position. She seeks permission to use a Segway in Walt Disney World, despite a policy against two-wheeled vehicles in the park. Disney refuses to make an exception to its policy. Does its refusal violate the ADA? See Baughman v. Walt Disney World Co.*, 685 F.3d 1131 (9th Cir. 2012) (finding the requested exception to constitute a reasonable accommodation). What sorts of arguments would you make if you represented Disney in defense of the existing policy?*

Problem. 6. *Do the ADA public accommodations provisions apply to the web sites of businesses that do not operate at specific physical locations? If virtual places are covered by the ADA in their own right, must they be made accessible to the blind through computer protocols that vocally describe screen images and allow navigation by use of the keyboard rather than a mouse?*

These questions raise the issue of whether a "place of public accommodation" refers to a physical location or it is merely a convenient term for a services provider? Here, it is important to point out to students that the ADA does not use the phrase "place of public accommodation." If you look at §12181, the definition section merely uses the words "public accommodation" – arguably excising any requiring of a physical place. At the same time, many of the definitions *do* use the word place, including "other place of exhibition or entertainment," "place of public gathering," "place of public display o collection," "place of recreation." In addition, one still must get the entity covered by the language of the act. A website, for example, may be a "place of entertainment" but it is not clear it is intended to be included with theaters or sports stadiums as a "public accommodation." On the other hand, a website may provide an important mechanism for enjoying access to a physical place of public accommodation. Consider, for example, a restaurant that only allowed reservations to be made through its website. In those situations, the non-accessible website may impair the ability of certain people to enjoy what is undoubtedly a place of public accommodation.

§3 Free Speech Rights of Access to Public and Private Property 69
***Lloyd Corporation v. Tanner* (1972) 69**

The materials in this section illustrate (1) the difference between common law or legislative regulations of property use on the one hand and constitutional rights on the other; (2) the relationship between state and federal constitutions; and (3) the relationship among different constitutional rights (e.g., speech rights and rights of private ownership, both of which are protected in the federal Constitution). As the notes explain, constitutional provisions protecting individual rights establish entitlements that cannot be changed by legislation or common law; they can only be changed by courts reinterpreting the constitution or by constitutional amendment. In addition, state constitutions may go further in limiting state power than does the federal constitution, as *Robins* and *Lloyd* demonstrate. Some states accept the reasoning of *Lloyd* and interpret their state constitutions accordingly. Others distinguish *Lloyd* on various grounds, including (1) the idea that

the First Amendment applies only to state action while state constitutional free speech provisions are not so limited; (2) the wording of many state constitutions is different, protecting the "right to speak freely" which is arguably broader than the First Amendment because it is not limited to state action and appears to prohibit private individuals from unduly interfering with the rights of others to "speak freely" and (3) state courts may simply agree with the dissenters in *Lloyd* and so interpret their state constitutional free speech provisions.

Students are often confused by the relationship between constitutional protections for free speech and constitutional protections for property rights. As the notes explain, the constitution's bill of rights merely describes minimum amounts of protection for certain interests. States are free to provide greater protection for these interests, as long as they do not infringe on some other constitutional right. The Supreme Court could have interpreted the First Amendment to allow a right of access to shopping centers for free speech purposes; under this interpretation, free speech rights would overcome property rights. Any state law that purported to protect the rights of shopping center owners to exclude those who were handing out leaflets would therefore be unconstitutional under the First Amendment. Alternatively, the court could have held that the fourteenth amendment protects property owners' rights to exclude; under this interpretation, any state law that purported to protect the rights of individuals to engage in free speech activities in shopping centers would be unconstitutional. The court did neither of these things. Rather, it held that states are free to choose between free speech rights and property rights; either result will not violate the constitution. Protection of free speech rights will not violate the constitutional provisions protecting property from being taking without just compensation; protection of property rights to exclude will not violate the First Amendment. The court therefore allowed each state to draw its own balance between the rights of free speech and the rights of property owners. (It also allowed Congress the freedom to accommodate these conflicting interests as it sees fit, as Congress has done in the federal labor laws.) The discussion of gun rights in note 3 provides a nice opportunity to discuss this question in connection with a different underlying constitutional right (the right to bear arms). Would a state law requiring private owners to permit people to carry guns on their property violate constitutional property rights?

Problem 1. *A large shopping mall in New Jersey is owned by a survivor of the Nazi concentration camps. The Ku Klux Klan begins peaceably handing out literature in the shopping center, praising the Nazi Party and urging shoppers to vote for a member of the KKK who is running for public office and who has stated that the United States should adopt Nazi methods to deal with Black persons, Latinos, Asian Americans, and American Jews. The owner ejects the KKK members from the mall. They subsequently sue and claim that the owner is violating their free speech rights under the state constitution, as defined in New Jersey Coalition. The owner defends by arguing that she has the right to prevent her property from being used as a base from which to hand out literature that preaches hatred against particular ethnic groups. What should the court do?*

This question is designed to make uncomfortable those who argue for free speech rights. Does the Holocaust survivor have to sit by and listen to hate speech on her own property? This question may lead some students to doubt the wisdom of requiring free speech rights. On the other hand, some may be willing to distinguish hate speech and argue that it should be granted less constitutional protection than other types of political speech. Some recent legal scholarship has taken this position.

Problem 2. *A major Internet search engine refuses to list among its search results web pages that criticize the third-world labor practices of the conglomerate that owns the search engine. The group that maintains the blocked pages complains that this violates their rights to free speech; they argue that since nearly all Internet users locate web pages using a few major search*

engines, these engines are the equivalent of a public square or a modern shopping mall: the central way to get a message to the public. The search engine company responds that a search engine is private property: the company can choose to make accessible whatever information it wants, and it must have this right if it is to exclude pages containing pornography from its database. The company also argues that storing information is expensive, and it must be able to exclude at will to prevent its database from growing too large. The Electronic Frontier Foundation, a nonprofit organization that promotes free speech on the Internet, proposes legislation prohibiting search engines from refusing to include any web page in their database if the page's owner requests inclusion. If you were a member of the legislature, how would you vote and why?

The question is whether to treat the Internet as similar to the public square or as similar to a magazine or publication that is able to determine what it wants to publish. There is no right answer to this question and students may have very different views about whether the Internet is a social space that should be more open to the speech participants want to make and to find out about or whether it is more like an area where private clubs or magazines operate that can filter out offensive speech. Obviously, it is a combination of these things and discussion of this issue can bring home the idea that the courts are going to have to determine how to treat the Internet and that their decisions will help construct the nature of Internet itself.

Problem 3. *Several weeks before a presidential election, several of the largest social media platforms, including Facebook and Twitter, ban one of the major party candidates from posting on their services. The companies justify their decision by pointing to policy positions the candidate has endorsed that are contrary to the companies' financial interests. Are these platforms "places of public accommodation"? Should the law protect the private companies' right to exclude, or should courts recognize a right of access based either in the common law or state constitutions?*

The questions provide a good opportunity to explore questions of public and private power, and the dramatic impact that private owners can have on the ability of speakers to reach audiences.

§ 4 Beach Access and the Public Trust 76
***Matthews v. Bay Head Improvement Association* (1984) 76**

The question of public rights of access to tidelands (the area over which the tide flows between the low and high-tide lines) and to dry beaches (the area between the high-tide line and the vegetation line) implicates the public trust doctrine under which certain resources cannot be the subject of private ownership but, rather, vest in the state acting for the public as a whole. This doctrine is related to, but different from, the doctrine that there can be no private ownership in navigable waters; those waters are owned by the federal government in trust for the people.

It may be useful to ask students not only to formulate justifications for the public trust doctrine, and to argue about its proper scope (as the questions below explain), but to ask whether other types of resources in the environment should be subject to the public trust doctrine. Arguments for the doctrine include (1) the fundamental need to preserve certain resources for particular public uses (such as navigation) in conjunction with the belief that (2) private ownership would result either in undue exploitation of the resource, rather than its careful preservation, or (3) that private ownership would result in unfair and unequal access to the resource by allowing segments of the populace to be totally excluded from it. A final justification rests simply on tradition and precedent; private ownership of beachfront property simply never included the right to prevent others from using tidelands for fishing and navigational purposes. These rights were implicitly or explicitly reserved by the state when the property was first alienated. Arguments against the doctrine are all the traditional reasons given for private property generally: (1) public

rights of access may mean that the resource is not preserved but rather that it is trampled over; (2) private ownership will ensure that it is devoted to its most highly valued use, rather than reserved for particular uses that may have been important 200 years ago but are not so important today; (3) that public rights of access for recreational and fishing purposes can be satisfied by public ownership of particular stretches of beach rather than reserving the entire coastline for this purpose; and (4) that public rights of access interfere with the owners' interests in control of their property and privacy.

Note 2. *Should it make a difference whether or not the public has customarily used the beachfront adjoining private property for recreational purposes? Does longstanding customary use justify recognizing rights of access in the public?*

This question highlights two very different theories for justifying public access to beaches and tidelands. The first is based on the theory of prescription or custom: longstanding use by the public suggests that the owner has waived her right to exclude and that the reliance by the public on continued access should be protected. (At the same time, it is important to note that prescription differs from custom since prescription traditionally requires individual proof that each property owner has allowed access while custom is based on overall social practice and may result in access to all beachfront property even though some owners have excluded members of the public from their beaches.) The second theory is the public trust doctrine, which is not based on custom but on a rule of law that tidelands (and perhaps beaches) simply cannot be privately owned; they are either common property (open to anyone in the public) or they are public property (belonging to the state or a subdivision such as a municipality or county government).

If there is no longstanding public use, should the courts interpret the scope of the public trust doctrine to be rigidly limited to those uses customarily enjoyed in colonial times or should the doctrine be interpreted to authorize uses needed by the public and considered legitimate under evolving community standards?

As *Matthews* shows, the New Jersey courts have allowed the uses encompassed by the public trust doctrine to expand to include recreation as well as fishing and navigation. In contrast, the Massachusetts and Maine Supreme Judicial Courts have held that public access is limited to the traditional purposes and does not include recreational uses. This issue brings to the forefront the extent to which property rights can be redefined over time by the courts, as occurred in *Shack* and *Uston* and in *Robins,* and the extent to which they can be redefined by legislatures, as in the state and federal public accommodations statutes, versus the extent to which property rights should be frozen in time and protected against legislative or court interference or change in the absence of payment of just compensation. The Maine Supreme Judicial Court has held, for example, that a state law that protected public rights of access to tidelands for recreational purposes constituted a taking of property without just compensation on the ground that the public trust doctrine traditionally only allowed access for navigation and fishing purposes. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

Problem 1. *Matthews involved beachfront property owned by a nonprofit charitable organization. In* Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (N.J. 2005), the Supreme Court of New Jersey extended the Matthews ruling to require the owner of a beach club to allow anyone to become a member and prohibited the club from charging exorbitant fees designed to limit membership. The private owner had previously allowed the public to use the beach and had only recently converted it to a private beach club accessible only by members upon payment of fees higher than necessary to pay for costs of operation. The court applied the Matthews factors and found that the public interests in access outweighed the private interests in exclusion*

when there were no publicly owned beaches in the township and demand for beach access was very high. Two judges dissented on the ground that a nearby hotel allowed the public to use its beach. Did the court reach the correct result?

Raleigh Avenue Beach Ass'n. v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005), extends the *Matthews* decision to a private beach club that does not have any association with the municipality and is not a quasi-public or not-for-profit entity. It is thus a significant extension of the right of access; this fact accounts for the dissents. In addition, the availability of other access nearby may make the required access to this private property seem less urgent. On the other hand, although not a nonprofit entity, the owner had made the property available to the general public and it was arguably the case that allowing it to become exclusionary, limiting access to members and charging high fees, would significantly limit access to the beach areas encompassed within the public trust doctrine which are reserved for public use. It is important to recall, however, that most states limit public rights to the tidelands, not the dry sand area between the high water mark and the vegetation line. The states that have allowed public access in those areas, such as Oregon, tend to do so either under a theory of custom or prescriptive public easement.

Problem 2. *Now suppose members of the public begin using the dry sand area between the mean high water mark and the vegetation line in an area next to a private home. The owner puts up a fence and signs warning against trespassing on the beach. A member of the public sues the beachfront owner and asks for declaratory and injunctive relief preventing the owner from interfering with the public's right of access to the dry sand area along the beach, arguing that the state should adopt the standards used in Hawai`i.*

a. *What arguments could you make for the plaintiff that the principle underlying the rule of* Matthews *applies to this case? What arguments could you make for the defendant that this case is distinguishable from* Matthews *and* Raleigh Avenue Beach Association *and that the plaintiff has no right of access to the beach adjoining a private home?*

b. *If you were the judge deciding this case, what rule of law would you promulgate and how would you justify it?*

The result in *Matthews* appears to rest partly on the fact that the property is owned by a "quasi-public" body and thus comes within the rationale of *Marsh v. Alabama,* i.e., that private owners who take on the functions of a municipality may be subject to certain constitutional obligations ordinarily applicable only to government entities. What makes the Bay Head Improvement Association a "quasi-public body"? It is a "private" charitable entity but (1) its purpose is charitable and (2) that purpose encompasses the general public in a municipality.

The first question is whether the holding in *Matthews* rests on the "quasi-public" nature of the entity. If it does not, then the public trust doctrine perhaps should extend to all beachfront property. If the operative fact is that the public trust doctrine preserves as public, or common, property, all tidal lands (and perhaps the dry sand area as well), then the result in *Matthews* would apply to all beach-front property, whether publicly or privately owned, for-profit or not-for-profit, open to the public or reserved for single family or multi-family use.

An argument for this result would rest on the claim that beaches are a particularly scarce and valuable form of property and that the public interest in equal access to this resource is so important that ownership must be vested in the public as a whole. A further argument is that case by case analysis of each parcel of property would make property rights uncertain and require needless and costly litigation. In addition, market regulation of access to beaches is likely to discriminate against poor persons, depriving them of access to recreation.

A counterargument is that this result cuts too far into private property rights without adequate justification. If sufficient access is otherwise provided by public or quasi-public entities, then there is no need to allow members of the public to have a right to use beaches located adjacent

to private property. Further, property owned in common is likely to be mismanaged (the so-called tragedy of the commons). Even if the state were to act as owner, and therefore to establish reasonable management policies, the use of the resource is better determined by the market than by government fiat.

If, on the other hand, the result in *Matthews* does rest on the quasi-public nature of the Association, the second question is exactly what that "public" element is. If the important fact is that the Association in *Matthews* made the beach open to the general public, a reading arguably supported by the decision to apply *Matthews* in the *Raleigh Avenue Beach Association* case, this would mean that any private beach club open for membership to the general public would serve the same functions, but perhaps owners of private homes along the beach would not have similar obligations. If the important fact is that the Association is non-selective in allowing members of the public to enter (it does not have a membership list, but allows anyone in the municipality to enter), then private beach clubs may be distinguishable if they have size limits and membership rolls. These possibilities would treat beachfront property owners like public accommodations and require rights of access without unjust discrimination by analogy to the situation in *Uston.*

If the important fact is that the Association in *Matthews* was a charitable (non-profit) organization, then for-profit beach clubs would not have the same obligation. This interpretation would narrow the obligation to serve the public to charitable entities and thus treat as public accommodations only owners that were established for the purpose of serving the public, rather than for the purpose of making money.

§5 The Right to Be Somewhere and the Problem of Homelessness 82
***Martin v. City of Boise* (2019) 82**

***Martin v. City of Boise* (2019)**. The question of homelessness has risen in importance, particularly in cities on the west coast that saw a dramatic increase in visible homelessness during the COVID pandemic. The impact of persistent (and growing) encampments on public property (or on sidewalks in front of private businesses) has challenged some people's patience and compassion. The case provides an opportunity to discuss the conflicts between a number of values that students may consider to be important.

Note 2. *Do you agree with the dissent's argument in* Martin *that the court's decision prevents local governments from effectively regulating the behavior of homeless people unless they undertake heroic efforts to count the actual number of homeless people in their jurisdiction on a daily basis? Would it be possible for the City of Boise to draft an ordinance that both addressed the dissent's concerns and did not run afoul of the constitutional limits as defined by the Ninth Circuit?*

One possibility to consider would be an ordinance that allowed city officials to remove a homeless person from private or public property (or arrest them for noncompliance), but only after offering them shelter. Such an ordinance would seem to comply with the 9th Circuit's decision in *Martin*.

2. Competing Justifications for Property Rights 95

Themes

The Property course covers many separate bodies of legal rules—some concern contract law, for example, some tort law, and some constitutional law. They are joined together, however, by the distinctive role of property in human society, and the common justifications for recognizing or limiting it. Justifications focusing on substantive goals include (among others) positivism or sovereign allocation, efficiency or maximization of social welfare, distributive justice, justified expectations, labor and investment, possession, and personhood interests. Justifications focusing on procedural or administrative goals include certainty, alienability, and judicial economy and legitimacy. All of these arguments may also be categorized as either serving fairness/rights concerns or efficiency/social welfare concerns, or both. Ability to manipulate these arguments is an important skill for lawyers, policymakers, and even students trying to understand, use, and critique the law. This chapter seeks to help students spot and evaluate these arguments, and perhaps use them as one way to bring coherence to the multiple doctrines involved in the typical property course.

The materials also all concern allocation of property rights, rather than limitations on use, exclusion, or transfer. Some casebooks present these as cases about "original acquisition," acquisition of formerly unowned things, but few of them actually fit that description—the land in *Johnson v. M'Intosh* was owned by the Indians, the baseball in *Popov v. Hayashi* was owned until deliberately abandoned by Major League Baseball, and even the fox in *Pierson v. Post* or the news in *INS v. AP* were only unowned because the law had decided that they were.

The chapter is divided into five sections based on the dominant justification the materials concern: sovereignty; labor and investment; families; possession; and property without law.

Different professors will choose to teach different selections of the materials in the chapter, and may assign them in different orders: Joe, for example, starts with the Trespass materials in Chapter 1 and teaches *Johnson v. M'Intosh* at the end of the course along with *U.S. v. Sioux Nation* from Chapter 13; Bethany starts the course with the excerpt from Erving Goffman's *Asylums* then moves to *Johnson v. M'Intosh* and *The Antelope*; Eduardo and Nestor start with *Johnson v. M'Intosh* and *The Antelope*. Other professors use *Pierson v. Post* as their initial case—the facts are fun and the opinion, while easy to understand, is very rich. None of the cases in this chapter are crucial for understanding later chapters. These are, however, some of the most engaging fact patterns and theoretically rich cases in the book, and students usually enjoy them. Many of these cases—*Pierson v. Post*, *Johnson v. M'Intosh*, finders—were placed at the beginning of the classic property casebook, and many professors teach them first in the course. Other professors will choose to begin with the materials on trespass in Chapter 1, which employs much simpler legal concepts but also raises core property ideas of exclusion and access.

§ 1 Sovereignty 95

One of the key arguments for allocation of property rights, and one of the key theoretical arguments about property generally is that it is a creature of sovereignty or law—property doesn't emerge without community enforcement of one's claims, and that is usually accomplished by a sovereign. (There are interesting counterarguments, *e.g.* James Krier, *An Evolutionary Theory of Property Rights*, 95 Cornell L. Rev. 139 (2009)). The government in charge sets the rules for allocating property rights. These materials provide examples of governmental allocation of rights, as well as when the government will recognize claims originally formed in violation of governmental rules. This theme—the tension between formal and informal sources of rights—will

repeat throughout the course. Similarly, the materials also present the relationship between sovereign authority and justice, which will be another recurring theme in the course. In particular, by bringing together cases about claims to property in Indigenous lands and enslaved Africans, the two top sources of wealth in the early United States, this section may help students question the justice of "original" distributions of property. It may be challenging cover this entire section in one class session. Depending on the number and length of your sessions and what you want to concentrate on in the course, you may want to either cover solely *Johnson* and *The Antelope* (pp.96-117), or cover the entire section (pp.96-126) over two sessions, perhaps covering *Johnson* in the first and *The Antelope*, the note on *Dred Scott,* and the materials on Government Distribution in the second.

§ 1.1 Sovereignty and Indigenous Lands 96
A. Acquisition from Native Nations
***Johnson v. M'Intosh* (1823) 96**

Johnson v. M'Intosh starkly raises questions of the authority of governments to allocate property rights even when those rights may violate ideas of justice founded in other sources. It also raises questions of the source of both governmental authority and property rights in the United States—if the transfer of land and sovereignty from Indian tribes to the United States was questionable as a matter of justice, what does that mean for the way we understand the current allocation of property?

The case, however, does not involve claims by tribes or Indians, but instead was a property dispute between non-Indian claimants. Johnson and Graham's claims originated in private purchases by land speculators from the Illinois and Piankeshaw tribes, while M'Intosh's claim originated in the government, which acquired the land in an 1803 treaty from the Piankeshaw and many other tribes. The text box notes that the claims didn't in fact overlap; assuming they knew this (which they probably did—M'Intosh was actually a surveyor for the government), why did the plaintiffs sue, and why did M'Intosh not seek to have the suit dismissed, rather than (as he did) stipulating to the plaintiffs' statement of the facts? Possibly because for both sides it was important to resolve the question of how Indian land could be acquired. Until that was clear, uncertainty would negatively impact the market for all Indian land.

One could ask the students about the arguments the parties are making as an example of use of different property justifications, and as a contrast with Justice Marshall's opinion. The plaintiffs use arguments about rights coming from occupancy and lack of governmental authority to assert the Indians' right to sell and the non-Indians right to buy, while the defendants make arguments that the Indians have no idea of property rights, insufficiently labored in the land to acquire it, and anyway are unfairly claiming more than they need.

Justice Marshall doesn't adopt either of these extremes. It is helpful to ask students to state the question in the case. Marshall states it right in the second paragraph—whether Indians can convey title to land that will be recognized in federal courts—but students often look for something broader, and so miss the limited holding. Then ask why Indians can't give such title. The answer is that the doctrine of discovery gives the discovering government (or its successor, as the U.S. succeeded to the U.K.'s rights) the exclusive right to acquire Indian lands.

After this, the questions are a good way to take students through the case. As **Question 1** asks, the doctrine applies to European governments, was adopted by the United States, and was created to resolve conflicts in land settlement between nations.

For **Question 2**, Indians under the doctrine retain a "right of occupancy," or a "legal as well as just claim to possession." You might ask students which of the famous sticks in the basic bundle of property rights — the right to use, exclude, transfer, and prevent harm — is missing from

this right of occupancy. The answer is just one, the right to transfer. As the Supreme Court held in *Fellows v. Blacksmith*, an Indian has the legal right to exclude a non-Indian who moves on to the land without federal consent. But in the American system, in which property rights were core to ideas of liberty and citizenship, and alienability was considered key to property, losing the right to sell diminished perceptions of tribes and their rights. As Marshall says, and many later courts would say more starkly, this loss signifies the diminishment of tribal "rights to complete sovereignty, as independent nations," and is a symbol of the "ultimate dominion" of another government.

For **Question 3**, the government gains the sole right to extinguish the Indian right of occupancy. The US can grant another individual the right to the land, but must extinguish the Indian right of occupancy before that individual can possess the land. The opinion states that this title is to be extinguished "by purchase or by conquest." Does this mean that the US can simply acquire the land by force if the Indians refuse to sell it by purchase? The opinion is not clear. If Indians have a "just as well as a legal right to retain possession" of the land, it seems hardly just or legal to just conquer the land if they refuse to sell it. But then why would the opinion say "conquest"? One possibility, supported somewhat by other writings at the time, is that "conquest" meant victory in a just war—if the Indians gave a justification for the US to wage war against them, say by attacking settlements, any land won in the process was theirs. Another possibility, one adopted in 1955 by the Court in *Tee Hit Ton*, is that the federal government can simply acquire Indian land at the "whim of the conqueror."

Even if the US must purchase, what will be the effect on prices of making the US the sole potential purchaser (creating a monopsony for Indian land)? It's going to bring prices down a lot. (I like to illustrate this by picking up a student's property book and creating various scenarios, one in which I can simply claim it by "conquest" as supreme governmental authority in the room, one in which the student is willing to sell and I am simply one potential buyer, one in which I am the only potential buyer, and one in which I am the only potential buyer, but tell the student that I won't protect her if someone else tries to use the book, and will take the book forcibly if she uses force against a trespasser. This last scenario is probably the most like what actually happened in the Indian context.) Of course, giving private individuals the right to claim Indian land by purchase would leave tribes vulnerable to fraudulent purchases; while the US committed fraud in its purchases as well, at least it was worried about having to defend against Indian wars as a result, which private land speculators did not care about.

Question 4. *"Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." What does this mean? Can you tell what Chief Justice Marshall's "private and speculative opinion" is of the original justice of the loss of Indian property rights through the doctrine of discovery?* In many places Marshall suggests unease with the doctrine. He is sarcastic about the "potentates of the old world," with their "pompous claims" to the country, and "extravagant . . . pretension of converting the discovery of an inhabited country into conquest." He also states that the general rule of humanity is that property rights after conquest should remain unimpaired. So why does he adopt the doctrine? Because he's writing for the "courts of the conqueror." The whole country has been settled based on title acquired via the doctrine of discovery. Marshall makes the positivist and pragmatic point that the title to land depends on the law of the country, and "however opposed this restriction may be to natural right," it is more important to respect established governmental allocations.

But Marshall also adds the infamous "character and habits" excuse. Indians are "fierce savages," resisting peaceable incorporation, and threatening non-Indian settlements with "perpetual hazard of being massacred." This section shows the impact of popular stereotypes regarding Indians, and perhaps also the personal animosity developed from Marshall's experiences as a boy

growing up in Virginia in an area that experienced Indian violence. He claims that leaving Indians in possession will also be inefficient: the Indians are not farmers, "their subsistence is drawn chiefly from the forests," and to leave the country with them is to leave it a wilderness. As several scholars have noted, this was a misrepresentation: Indians did farm (and indeed part of the Thanksgiving story involves the Wampanoag helping the Pilgrims survive by teaching them how to grow corn and squash in their new land) but the farmers tended to be women rather than men, and their work was overlooked by commentators.

Why didn't Marshall simply decide the case by holding that the purchases were illegal under the Royal Proclamation of 1763, which forbade private purchases of Indian land west of the Appalachians? Marshall, as in so many of his cases, is deciding more than the just the case before him. Although claiming powerlessness as the court of the conqueror, he is in fact settling the entire question of individual purchases from Indians, and implying much more about Indian relations at the same time.

Question 5. *Why does public opinion limit governmental actions? What are the costs to a government of ignoring public opinion? Why did the general rule not apply to Indian lands?* Public opinion constrains governmental allocation of property—an allocation widely perceived to be fundamentally unjust will not be respected, leading to rule violation and perhaps even violent revolt. But Americans did not widely believe that transfer of property rights away from Indians was unjust, or if they did, they, like Marshall, may have believed that the injustice was justified by the greater good of settlement of the country by non-Indians.

Question 6. Are [Justice Marshall's statements about Indian land in *Worcester v. Georgia* and *Mtichel v. US*] consistent with *Johnson v. M'Intosh*? . . . Is *Tee-Hit-Ton* consistent with *Johnson*? Justice Marshall's later statements about Indian property rights are not legally inconsistent with *Johnson*, but certainly have a different tone, suggesting far greater respect for property rights. *Tee Hit Ton* in contrast reads *Johnson* to mean that Indians have no property rights at all against the federal government, and even any ostensible purchase was really a "gratuity" rather than a sale. This interpretation is not ruled out by *Johnson* either, but seems even further from the spirit of the opinion.

One question that the facts of the case may raise is why would the Indians first sell their land to the private purchasers, then twenty-five years later cede it to the United States by treaty? Justice Marshall suggests that any nation after losing the war might understandably cede part of its former land by treaty to the victor. Another answer appears to be that in both cases the purchasers obtained agreements from groups with weak authority over the land, in part to defeat the claims of tribes with stronger claims. At the time of the private purchases, the formerly powerful Piankeshaw and Illinois had been devastated by disease and war; although other stronger tribes claimed the lands, Murray and Viviat did not try to negotiate with those tribes. The Piankeshaws that Viviat dealt with also apparently did not have the consent of their tribe to sell the land. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. Penn. L. Rev. 1065 (2000). Governor William Henry Harrison negotiated the 1803 and 1809 treaties under which M'Intosh claimed by deliberately first obtaining consent of tribes without strong claims to the lands, and then using the earlier consent to pressure other tribes to sign. See *Robert M. Owens, Mr. Jefferson's Hammer: William Henry Harrison and the Origins of American Indian Policy* (U. Okla. Press 2007). In those treaties, the United States got the signatures of the Piankeshaw without paying the tribe a cent.

B. Competing Justifications for Property Rights 106

This section lays out some of the important justifications for property rights, and how they are employed in Johnson. These materials show that none of these arguments is decisive, and that all can be challenged—for example, first occupancy by the Indians seems not to count because law often determines what is the "right" kind of occupancy, and although efficiency arguments often favor alienability of property, the rule in *Johnson* prevents alienation except to the federal government, perhaps because a free-for-all in which Indian land was distributed to whoever could claim to have purchased it first might create a monopoly in those there first (note in the Kades map that Viviat and Murray were able to buy huge chunks of Illinois in their purchases) and prevent orderly settlement of land in a way that could be defended against Indians and European claimants. The examples of prohibiting large groups—Black slaves, married women, and Asian immigrants—from owning property at all for substantial portions of U.S. history also suggest that property allocation significantly reflects the preferences of the group making the rules.

C. Past Wrongs, Present Remedies: Modern Indian Land Claims 109

Federal law has made it illegal to purchase Indian land without federal consent since 1790. This rule was often violated, however, including quite blatantly by states. Because of procedural and political limitations, however, tribes did not begin to bring their own claims under the federal law until the 1960s. What is the appropriate resolution of these disputes many years after other communities have grown accustomed to their ownership and sovereign rights in the lands?

The materials summarize the complicated legal history: the Supreme Court held that the tribes have a present federal right to sue for their lands in 1974, and that no statute of limitations bars suit on this right in 1985, and a number of tribes entered settlements for limited portions of their ancestral lands under these precedents. A 2005 Supreme Court decision, *City of Sherrill v. Oneida Indian Nation*, however, upended this litigation by suggesting that laches barred suits that would be too "disruptive" for those who had occupied the land. A more recent Supreme Court decision, *McGirt v. Oklahoma* (2020), affirmed the boundaries of the Muscogee (Creek) Nation over a century after Oklahoma began acting as though the reservation no longer existed, noting that tribal peoples, as well, had expectations that their treaties would be observed.

Question 1. *How should these conflicting expectations — between Indian nations deprived of their homelands and those who later built homes and towns on those lands — be resolved? Do you agree with the district court that while states may be held liable today for the illegal acquisition of land, private landowners cannot be? Do you agree with Sherrill that even when tribes purchase land within their treaty boundaries from private sellers, it is too disruptive for tribes to assert immunity from state jurisdiction on those lands?* Barring tribal claims to possession might well be justifiable for individual landowners—so long after the illegal transfers, it seems unfair to require individuals to leave the land or pay damages to the tribes. But when tribes acquire land voluntarily within their treaty area, it is much more questionable whether justice prevents the city and county from having to respect their treaty rights. Similarly, even if individual owners cannot be removed from their land, requiring the governments who engaged in and benefitted from the illegal transfers to pay damages and transfer public lands does not seem unduly disruptive. As Justice Gorsuch wrote of a dispute between the Muscogee (Creek) Nation and the state of Oklahoma in *McGirt v. Oklahoma*, moreover, there are expectations on both sides: although non-Indians expect things to stay as they are now, the tribes expected that the United States would keep its the treaty promises to them.

Note 2. Similar but even more pressing conflicts occur in South Africa and other countries where Apartheid and racist colonialism has resulted in tremendous land concentration in the hands of a small minority group. Here, not only the past injustice but also the present unequal distribution creates great conflict, leading to illegal occupation by the formerly dispossessed group. Involuntarily redistributing land from the minority in possession may create other problems, by undermining security and discouraging investment by land owners. As in South Africa, however, redistributing land through voluntary purchases may be beyond the means of an economically pressed country; in addition, redistribution to those without the capital or experience to work it productively may not be the best way to improve welfare. So long as massive distributive inequality exists, however, the system is unstable and requires significant investment in policing to protect the unequal distribution.

§ 1.2 Sovereignty and Human Property 112
***The Antelope* (1825) 112**

The materials in this section draw attention to the role of slavery in the theory and practice of property law in the United States. On the eve of the Civil War, enslaved people comprised a huge portion of all the wealth in the United States, and core property doctrines developed in disputes over slave ownership. Although southern states held the vast majority of enslaved people, the economies of northern states were dependent on processing and exporting the products of slavery, like cotton, and proving the financing that allowed plantation farming to expand. Conflicts over slavery occupied a key role in U.S. politics and constitutional law, and ultimately divided the country in the Civil War. Many other materials could be used to teach the role of slavery in U.S. property law. Frances Lee Ansley collects a number of state cases on the conundrums involved in defining persons as property in *Race and the Core Curriculum in Legal Education,* 79 Calif. L. Rev. 1511, 1524 n.31 (1991). K-Sue Park discusses others in *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale Law Journal ___ (forthcoming 2022); Justin Simard in *Citing Slavery*, 72 Stan. L. Rev. 79 (2020) discusses the ways state law cases on slavery shaped doctrine in many different subjects. Alfred L. Brophy, Alberto Lopez, Kali N. Murray, Integrating Spaces: Property Law and Race (2010) collects materials on slavery as well as other intersections between race and the property course.

The Antelope, the principal case in these materials, concerns the fate of the Africans confined on board a ship captured by U.S. Customs officials after the U.S. had banned the international slave trade. The case raises questions of slavery, justice, and property in several ways. First, it strikingly contrasts "the sacred rights of liberty and of property" and holds that property wins. Second, Justice Marshall declares, even more starkly than in Johnson that the property rule involved (ownership of human beings) is unjust, and "contrary to the law of nature," but upholds it in the name of the "law of nations." Third, in applying the law of nations, Justice Marshall effectively refuses to apply the law of the United States, which bans the international slave trade in U.S. territory. Fourth, the facts of the case show how sovereignty can be manipulated. *The Arraganta*, whose crew took over *The Antelope*, was outfitted and crewed by Americans, but sought to shield itself from American law by claiming a commission from the Oriental Republic, a revolutionary government that would only later gain independence. Marshall also privately speculated that no one came forward to claim ownership of the captives from the "Portuguese" ships because they were in fact owned by Americans seeking to evade the federal ban. Historians also report that Santiago de la Cuesta, the Spanish-Cuban owner of *The Antelope*, often allowed Americans to sail slave ships in his name. Like ships today that fly "flags of convenience" from nations with lax regulations, it appears that many of the ships involved were manipulating sovereignty in order to bolster their property claims.

The initial facts of the case are complicated, and it may be best to lay them out for students yourself rather than establish them through questioning. There are also lots of great facts not included in the materials you can use to add richness to the case. Many of these can be found in Jonathan Bryant's great book on The Antelope, Dark Places of the Earth. You can also peruse the materials linked to before the text on the decision, from Jonathan Bryant's website, for primary documents related to *The Antelope*. These include the reward for the capture of one of the Africans, a runaway girl only 4'3" tall, with a chest "swollen with dropsy," or edema, and the indictment for piracy of Captain John Smith. It's always fun to talk about privateers (legal pirates), but did you know their role in the revolutionary movements then sweeping across Latin America? You could also mention the high-profile attorneys involved in the case: representing the Africans were Francis Scott Key, who wrote the *Star Spangled Banner*, and Attorney General William Wirt on behalf of the United States; representing the Spanish and Portuguese claimants was John Berrien, who had just been elected U.S. Senator from Georgia, and later became President Andrew Jackson's attorney general. The materials in Note 3, of course, provide lots of fuel for discussing the horrors of slavery in general and the slave trade in particular.

After introducing the facts, you could use the questions in Note 2 to take the students through the case.

Note 1. Judicial similarities. *The Antelope was decided two years after Johnson v. M'Intosh. What similarities or differences do you notice between the cases?* This question may be best tackled after you go through the discussion suggested by the questions in Note 2, but here are perhaps the two central similarities. Both opinions sanction a legal rule that the Court suggests is immoral in the name of adherence to positive law, and the result of both is to protect a state of affairs that undermines the rights of people of color. There are also at least two major differences. First, while the result in Johnson accords with federal statutory law, the Nonintercourse Act's prohibition on private purchases from Indians, the result in Antelope undermines the statutory prohibition on the international slave trade. Second, although Johnson states that the doctrine of discovery is inconsistent with the law of humanity, it also excuses it with the supposed "character and habits" of the Indians; The Antelope more straightforwardly condemns the morality of the slave trade.

Note 2. Liberty, property, and natural law. *Does Chief Justice Marshall think that slavery is just or right?* No—he calls it "contrary to the law of nature," stating "[t]hat every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission."

If not, then why does he uphold it? As in *Johnson*, Marshall rests his opinion on the argument that the Court is bound to uphold existing law. "Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made."

You might discuss with students the role of jurists faced with laws that they personally abhor. What about a judge who is against abortion but required to honor the right to obtain an abortion under current constitutional law, or a judge who abhors torture but finds herself in the position of being asked to enforce a national policy that has been judicially upheld as constitutional in wartime? One of the hallmarks of the rule of law is that judges uphold laws even if they personally don't like them. Is what the Court did in *The Antelope* any different? Note also that the opinion uses property law itself to find for freedom for some of the captives. Although the Court holds that the U.S. must return captives to foreign nationals whose nations had not abolished the

international trade in human beings, they must adequately prove their ownership. Because this had not been done for the people taken from the Portuguese ships, they, like those captured from American ships, had to be set free.

Of course, as in *Johnson*, there's a lot more going on than a simple conflict between positive law and morality. First, you could ask students, what would be a positivist way to hold that all the captives should be freed? The Court could have just held that U.S. law should apply in U.S. territory. The captives were being held in the international slave trade, which Congress had declared to be not only illegal in U.S. waters but to be piracy punishable by death. Why should the U.S. recognize Spanish and Portuguese property rights that violated that law? (The answer touches on international law, and you should decide how far you want to get into it. One response is that the Spanish and Portuguese claimants hadn't chosen to bring the captives into U.S. waters, so shouldn't be penalized for having fallen victim to privateering. But U.S. policy at the time was studiously neutral between the Latin American revolutionary and colonial governments; this included refusal to punish privateering against Spain and Portugal.) In addition, although the Court holds that the "law of nations" did not forbid the international slave trade, that was not the only possible resolution of the issue. In 1822, Justice Joseph Story, Marshall's protege, had reached the opposite conclusion in a Circuit Court decision: "[N]o practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice." *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (1822).

Students will be able to think of many reasons beyond positive law for the Court's decision not to recognize the freedom of all of the captives. As a matter of foreign policy, the Court might be eager to extend comity to the laws of Spain and Portugal to encourage those countries to extend the same courtesy to Americans whose ships were in foreign waters, and to encourage their cooperation with the United States, which was still establishing its footing on the international stage. Likely more important, the Court was keenly aware of the national conflict over slavery, and would have been reluctant to issue a decision that would disrupt the fragile peace between North and South. Individually, moreover, although Marshall opposed slavery in theory, and even represented some individuals in freedom suits pro bono when he was in practice, he also was a son of Virginia, a slave state. He was a slave owner all his life, received an enslaved man as a wedding gift from his father, and did not emancipate all his slaves upon his death.

What, according to [the Court] is the source of one person's ownership of another person? You need not discuss this question to get the gist of the case, but it is a fascinating example of condemning slavery while praising the white Christian nations that practice it. The Court says that war gives the victors the right to enslave captives. Although "[t]hroughout Christendom, this harsh rule has been exploded . . . this triumph of humanity has not been universal . . . . The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them." In other words, the Court uses the immorality of its interpretation of African law to justify sales of Africans in the immoral slave trade by European and American nations.

Note 4. *Scott v. Sanford*: property, citizenship, and the path to the Civil War. We chose not to make *Scott v. Sanford* the principal case in these materials because it is less directly about allocation of property in human beings than about what the assertion of property means for the individual rights of enslaved Black Americans and the constitutional power of the United States. Students are also more likely to read it in other classes. In addition, because it is so thoroughly condemned and overruled today, it perhaps presents fewer challenges to modern readers. But it remains vastly important, and professors may choose to present a longer excerpt to their students. For more factual background on the case (and particularly Mr. Scott's wife and daughters), *Mrs. Dred Scott*, 106 Yale L.J. 1033 (1997), by Lea S. VanderVelde and Sandhya Subramanian provides

an unusually rich history. (By the way, the materials refer to the case as *Scott v. Sanford*, rather than, as is more common, *Dred Scott*, because it feels odd to refer to a case involving an enslaved man differently than we would anyone else's case. In addition, *Scott v. Sanford* also gives equal emphasis on the defendant trying to keep him enslaved, and better includes the role of Harriet Scott and their two daughters.)

Scott v. Sanford highlights the fundamental contradictions in the Constitution as it was originally adopted, and property plays a crucial role in rationalizing that contradiction. Justice Taney's opinion acknowledges that equality acknowledged in the Declaration of Independence is "utterly and flagrantly inconsistent" with slavery, and resolves that consistency by holding that because most Black people were slaves at the Founding, all Black people were excluded from the "We the People" included in the Declaration. In addition, because Black people were enslaved in most states and denied equal rights in all states, they must be "regarded as beings of an inferior order" and therefore "had no rights which the white man was bound to respect." The result was that regardless of his slave or free status, Dred Scott could not be a citizen, and therefore could not assert diversity jurisdiction. Second, because property in slaves was recognized in constitutional provisions like the Fugitive Slave Clause and the Apportionment Clause, which counts non-free persons as three-fifths of a person for apportionment of direct taxes and representatives, Congress could not constitutionally change the slave status of individuals if brought to free territories and states.

There are of course flaws in both arguments; these are recounted by the dissents and many, many works of scholarship. First, a number of Founders believed slavery was inconsistent with the Declaration of Independence and Constitution. Jefferson's original draft of the Declaration included a condemnation of the British King George for having "waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither," but the phrase was replaced upon protests of Southern slaveholders and Northern slave merchants. And even if most Black Americans were enslaved, that did not mean that free Blacks could not be citizens, and many states recognized them as such.

In addition, although the Constitution does not prohibit slavery, and requires states to return enslaved people escaping into other states, it does not permanently shield property in slaves from congressional regulation or abolition. In fact, the Northwest Ordinance of 1787 (enacted the same year as the constitutional convention) prohibited slavery in the Northwest Territory. Further, the Slave Trade Clause, preventing federal prohibition until 1808 on the "migration or importation of such persons as the several states now existing shall think proper to admit" (a phrase understood to refer to the slave trade) suggests that other prohibitions might be allowed before then, and that the slave trade would be restricted after 1808. Many of the Founders believed that slavery was a temporary evil, which would gradually disappear after the international trade was prohibited. Even outside the special nature of property in human beings, simply because something is property does not mean it is not subject to regulation or forfeiture in appropriate circumstances.

Of course, because *Scott v. Sanford* was abrogated by the Reconstruction Amendments, the validity of the opinion is less important than what it reveals about the role of property in the sad history of inequality in U.S. law.

§ 1.3 Sovereign Distribution of Property 120
A. Homestead Acts and Land Grants 120
B. Squatters 120
C. Property After Enslavement 121
D. Government Distribution Today 124

Where §§1.1 & 1.2 concerned sovereign authority to declare rules for acquisition and ownership of property, §1.3 involves the government distributing its own property to others. The materials highlight the active governmental role in granting property and which illegal claims to property the government ultimately graces with legal recognition. They also show the tendency of property distribution to favor those who already have more political and economic power: although the announced goal of property was to favor individual settlers, in practice most land went to railroads; although policy and law immediately after the Civil War policy promised to distribute land to landless freed people, legal and illegal actions quickly broke that promise; and while the state and federal laws promise support of people in need, in practice equal amounts of government support go to the wealthy, and those funds are far less restricted.

Although the government sought to regulate how and when individuals acquired land, individuals frequently violated those rules. You might ask students how Hurst's squatters or the freed people claiming plantation land employed the kinds of arguments they saw in *Johnson*, and why the federal government does or does not recognize their claims. The Hurst excerpt discusses individuals who illegally squat on federal land in advance of surveys. Relevant to the theme of sovereignty and property, the squatters form a claimants' union—a quasi-government—to resolve conflicts between themselves regarding property rights, defend land against other claimants, and advocate with the federal government. In justifying their illegal claims, they make arguments based on their labor in the land and the utility of their settlement to society. They further use violence and threats of violence to prevent others from bidding on the land once it is available for settlement. The government ultimately accedes to these settlements made in violation of formal rules.

For formerly enslaved Black Americans, the result was different. Like the squatters (and with more justification) they make labor and investment arguments that they are entitled to the land they have worked on because of their long unpaid labor, as well as distributive justice arguments that the land should go to those who can work it themselves rather than those who sit in the house and make others work. The excerpt also highlights the relationship between land and freedom—the decree ordering Confederate property returned coincided with a rumor that the Emancipation Proclamation had been repealed, and the denial of land to freed Black Americans condemned them to return to work for their former enslavers, often under coercive conditions.

Ask students why the federal government acknowledged the claims of Hurst's illegal squatters, but not of the Black people occupying land they had worked on from those who had illegally sought to secede. Racism is clearly part of the answer, but the need to restore stability and legitimacy for the US government is part as well. This returns to the question of redistribution in the face of past injustice—emancipation can be looked at as a vast redistribution of property (or a declaration that people should never have been "property" in the first place) but redistributing property creates enough turmoil that it is done sparingly. At the same time, the failure to provide a measure of property to newly freed Black people, and the later violence and unjust rules applied to those who sought to acquire property, may be one cause of the racial and economic inequality that has plagued this nation for the last 150 years.

The federal government continues to play an active role in the distribution of property, albeit more in the form of funds and licenses rather than land. Although this governmental property goes both to the relatively wealthy and to those in need (the amount spent on the mortgage interest tax deduction alone, for example, is about the same as the amount spent by both the federal and state governments on Temporary Assistance to Needy Families) distributions to the poor often come with far more strings. Procedural due process prevents termination of welfare payments without administrative hearing, but, in contrast with most other modern constitutions, the U.S. Constitution does not create any substantive constitutional rights to funding for basic needs. Recipients of state administered welfare programs must also satisfy many other requirements, and

lose some of their fourth amendment rights to privacy in their homes. Advocates of these restrictions argue that they are necessary to prevent welfare dependency and fraud. Critics argue that provision for those in need should be a fundamental right, and that research shows that provision of cash benefits without strings is far more likely to lift people out of poverty.

§ 2 Labor and Investment 126
§ 2.1 Creative Labor 126
***International News Service v. Associated Press* (1918) 126**

Labor is one of the foundational justifications for property rights, but as the materials show, it is rarely sufficient to justify ownership in itself. The materials consider labor and investment claims in the context of copying intangible so-called non-rivalrous goods (*e.g.*, artistic works, ideas, inventions), in which one person may benefit from another's labor without depriving that individual of the good. You might ask students to chart the fairness and efficiency arguments for and against giving creators the property rights in intangible resources (this is also an answer to the question in **Note 1**):

	Pro	Con
Fairness/Rights	Since I worked for it, it's unfair for you to copy it without my permission	If I can copy it without taking it from you, it's unfair to stop me
Efficiency/Social Welfare	We need to incentivize people to create intangible goods	We don't want monopolies on valuable intangible resources

International News Service v. Associated Press considers this tension in the context of copying news stories. INS was taking stories from bulletin boards or early editions of AP newspapers, sometimes rewriting them and sometimes not, and distributing them in its own papers on the West Coast. AP sued INS to stop them, and the Court considers whether there is any property right in the news published in these papers, and whether INS' actions constitute unfair competition. (Note for students that the INS' actions in bribing AP members to provide INS with news before publication in violation of AP by-laws are not before the Court—that would be a much easier case.) To clear up any confusion, you might also ask why AP can't rely on copyright to stop INS. The answer: first, at that time, copyright required registration, which didn't make sense for news; second, even if registration was not a problem, copyright protects only the form in which something is written, not the facts themselves.

The majority holds that there is no property right in news itself—it's freely available to all, and there can't be a property right in basic information—but AP has a quasi-property right to prevent its direct competitors from republishing the news it has gathered so long as necessary to protect its business model. Why does it do so? The majority makes a lot of comments about unfair competition, including that competitors are "under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other." You can ask students whether this is true—

the answer (as the dissents bring out) is of course not. Fierce competitors do anything to injure each other they can, and the law only stops them when they violate other legal doctrines, such as contract or antitrust law. So why should this unfairness be stopped here? Both because INS is "reap[ing] what it has not sown," and because otherwise AP's business model for collecting the news won't work, and it will either not be able to collect the same quality or quantity of news, or will have to charge more for it, so we'll all suffer. Show them that these arguments track the fairness/efficiency chart you've created above. The right the Court creates is extremely limited (so much so that, as **Note 2** states, some say it is not a "property" right at all—Pitney coins the term "quasi-property" to describe it) to prevent the monopolization concerns against property rights for intangible resources.

So what's wrong with that? Justice Holmes in dissent argues that although news has value (because others are willing to pay for access to it), that's not enough for property—the willingness of others to pay for access to the news, after all, arises from legal exclusion. You can ask your students (as asked in **Note 4**) why others' willingness to pay for access doesn't answer the question of whether there should be property in news. The answer is that the statement is circular: value comes from exclusion by law, but here the question is whether law should exclude (and therefore recognize a claim of property). Even if unfair trade has not thus far prohibited actions like INS's (possibly in part because technology did not permit such actions) the question before the Court is whether it should. Holmes would respond to this case by requiring INS to give credit for the stories to AP. Ask whether this would help AP. The answer: not at all. In fact, the INS papers might even receive a boost by being able to claim that their stories were reported by the prestigious AP.

Justice Brandeis makes a different argument: if newsgatherers are to be given a property right in news, it should be the legislature, and not the Court, to do it. This is a case with potentially significant implications for the public interest, limiting "the free use of knowledge and ideas." The legislature is better situated to balance the public interests in a case like this, and prescribe the detailed regulations that might be necessary to protect them. **Note 3** tries to get students to interrogate this argument. What makes legislatures better at resolving issues of the public interest than courts? Well, legislatures have broader standards of who they can hear and what information they can receive; rules regarding relevance, standing, and the adversarial system generally limit what appears before a court. Courts are also limited both by the parties before them and the skill of their advocates. But courts may have some advantages. Courts have to make decisions, while legislatures (as recent years have shown) may be bound by inertia. Indeed, a judicial decision perceived as contrary to the public interest may be necessary to catalyze a legislature to act. Further, the Court doesn't have the option of remaining neutral on the public interest—refusing to recognize a property right strikes the balance one way, while recognizing a property right strikes it the other. The dichotomy between judicial activism and deference to the legislature is, as in many cases, a false one.

One interesting question is why Justice Brandeis, author of the famous Brandeis brief on social facts rather than legal principles, is advocating for deferring to the legislature on matters of the public interest, while Justice Pitney, whom Richard Epstein described as the "only consistent near-libertarian on the Supreme Court," is intervening in competition by creating a new property right. Perhaps it is because Brandeis in general had more faith in legislatures (his famous brief sought to convince the Court not to invalidate a statute) and Pitney was a greater respecter of contracts, which INS also violated (albeit in a part of the case not before the Court). Or it may be partially explained with Brandeis' allusion to the facts captured in the text box: INS was only created because Hearst's papers were shut out of AP, and then INS papers were shut out of war coverage because the Allies didn't like Hearst's editorials. Preventing INS from pirating AP stories really is shutting readers of its papers out from war coverage, largely to punish Hearst for expressing his opinions on important policy questions of the day.

Note 5. The note recites the factors of New York's common law hot news tort, derived from INS v. AP: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) a threat to "the very existence of the product or service provided by the plaintiff. NBA's action against Motorola for its early texting of game scores fails the test because it fails 2 & 3—Motorola is not free-riding by copying information NBA generated at cost, it is instead gathering reports of activities NBA stages; it also creates a very different product (scores v. games); and is not going to undercut the NBA's business model.

Note 6. The note provides a summary of the three major intellectual property regimes, copyright, patent and trademark, largely for professors that do not have time to cover all of these in Chapter 3 which follows. If you do spend a lot of time on intellectual property, you should not devote much time to these. If you don't, however, you can have fun with them. One question you can ask—why is copyright protection so much longer than patent protection? There are lots of possible answers—e.g., greater concern about monopolies on scientific inventions; more sense of identification between the artist and his work; more chance that another individual would create the same invention or discovery independently than that they would create the same artistic work—but one partial answer is Disney's efforts to prevent Mickey Mouse from going out of copyright. If they don't get this, you might amuse them by trying to draw Mickey's head on the board.

Problem 1. The advent of news aggregators and the threat the internet has posed to the newspaper industry has created a new wave of challenges of hot news misappropriation, many by AP itself. Most of these lawsuits have settled, usually with an agreement to link to the creator's website, and include no more than a certain amount of the content. One hurdle faced by plaintiffs in these cases is whether the hot news claim is preempted by the Copyright Act, but at least if it fits the added elements of hot news misappropriation as defined by the Second Circuit, the tort survives preemption.

In *Barclays*, the district court found for Barclays and the other investment firms in their claim that by reposting their stock recommendations Flyonthewall committed misappropriation of hot news, and that the reposting threatened the existence of the service by making it less likely that those that received the report would buy stock through the brokerage agencies. The Second Circuit reversed. The court did so primarily because the defendant was not freeriding, by copying and reprinting facts that the firms had gathered at cost, but instead was simply *reporting* the fact of the brokerage firms' recommendations. The court was also not persuaded that posting the fact of the recommendations would significantly undermine the brokerage firms' reason to create the reports—the connection between receiving the report from the firm and buying through the firm was too slight. The suits (a second group of photo licensers sued after X17) against Perezhilton.com pose a better case of free-riding and threat to the plaintiffs' business, but there the reposting of the photographs is a classic copyright violation as well, so is likely preempted.

Problem 2. A problem regarding fashion copying was taken out of this chapter because the question is treated in Chapter 3, but if you are not going to assign the materials from Chapter 3, this is a great one to get students talking. Clothing designs may not generally be copyrighted because pictorial and graphic works incorporated in a "useful article" may only be copyrighted if they can be separated from their "intrinsic utilitarian function." 17 U.S.C. §101; *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (L. Hand); *see also Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000) (holding that fashion designs may only receive trademark protection if they have acquired a secondary meaning of representing the brand). Copying of fashion designs has long been rampant. See counterfeitchic.com (blog by Professor Susan Scafidi); Nan Robertson, *Fashion Piracy Extends from Paris to 7th Ave.*, N.Y. Times, Aug. 27, 1958; Eric Wilson, *Simply Irresistible*, New York Times, May 21, 2008.

What are the arguments that courts should or should not extend the hot news tort to protect clothing designs? What are the arguments that Congress should or should not extend copyright protection to such designs? One argument that students rarely come to on their own is that the fashion industry does not appeared to have suffered from rampant copying—the argument that protection against copying is necessary to protect its business model does not seem to hold up, and the argument that it incentivizes instead further creativity to create the next trend seems more powerful. If that is true, does the apparent unfairness of permitting another to steal the products of designers' hard work enough to justify prohibiting copying, at least for a limited period? Or would the difficulty in figuring out what exactly was new in the next version of the little black dress in fact permit those with more money to bring copyright suits to unfairly dominate smaller designers?

§ 2.2 Commonly Owned Property..... 138

This section introduces students to two important concepts in law and economic analysis of property: the tragedy of the commons and the underlying idea of the rational self-maximizing individual. You can assign this after *INS v. AP*, but it would work equally well after *Pierson v. Post*. It is fun to quote some of Hardin's dramatic phrases, *e.g.*, "the inherent logic of the commons remorselessly generates tragedy," and "[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." Of course this over-the-top language and his coining the phrase "tragedy of the commons" to describe a phenomenon others had noted before is part of what made the article so significant. The basic concept is that when individuals share a resource, the rationally self-interested individual has the incentive to overuse the common resource because she gets all of the profits of her use but shares the costs in depleting the use with everyone else. (You can also use this example to define the term negative externality here, because this is a cost to society not fully experienced by the person creating it.) Eventually, this overuse leads to fewer resources for everyone.

If you want to try to do math on the board (always risky), say the maximum cow size is 100 pounds, and the field can fully support 100 cows. That gives us a potential maximum of 10,000 pounds of cow. But every cow beyond 100 reduces each cow's weight by one pound. So at 101 cows, each cow weighs 99 pounds, or 9,999 total pounds of cow. Although overall social wealth goes down (by one pound), so long as I am sharing the field with others, it is still in my interest to add a cow because I get 99 extra pounds of cow, which will make up for the reduced weight of my remaining cows. But now everyone wants to add cows both to make up their lost cow poundage and to get the kind of profits I make. Assuming a (totally counterfactual) constant rate of decrease of cow weight and capacity of the field, if there are 130 cows, the field only produces 9,100 pounds of beef, for 150, 7,500 pounds, and so on until the field can no longer support any cows. If I own the field and have to balance the costs and the benefits of adding an extra cow, I will stop adding cows at 100 because I will internalize both the costs and the benefits. There are lots of real life examples of this, from fishery depletion to greenhouse gas use to rush hour traffic (indeed, once you start paying attention everything can look like a tragedy of the commons).

So, what's the response? Responding with governmental prohibition on overuse raises concerns about government domination (Hardin's campaigns against the "freedom to breed" and more recently against immigration, are great examples of this), the costs of government enforcement of those controls, and of government failure to set optimal levels of resource use. Property rights get around these problems by letting owners individually figure out the optimal level of use of their property. The individual property response has problems too: as Duncan Kennedy & Frank Michelman argue, creating and policing property boundaries also imposes costs (in fact, one of the reasons for common pasturage was to get economies of scale and shared effort in building and maintaining fences and watching the herd). An environmentalist, moreover, would

point out that individual property may even exacerbate overuse of resources like clean air and water that are more difficult to propertize. (Governmental efforts to create a market for pollution credits are an example of an effort to propertize clean air that may generate interesting discussion.)

The materials also suggest that rational self-interest may not always dictate individual behavior; in some situations, cooperation and sharing are more common. Norms may have developed to encourage the kind of cooperation necessary to achieve maximum productivity; individuals may be willing to sacrifice their own immediate self-interest to punish those that violate them. Elinor Ostrom won the Nobel Prize for showing that commons may often be more productive than comparable individually owned property, both because they can take advantage of economies of scale for common tasks and because cooperation based on shared norms is in some instances less costly to police than individual self-interest.

We took out a draft paragraph on Michael Heller's idea of the anti-commons because it is covered in Chapter 3, but if you aren't assigning that, it is fun to discuss. The basic idea is that individual property rights may result in underuse of a resource if they make assembling a useful bundle of rights difficult or impossible. In biomedical research, for example, the need to assemble permissions from numerous patent holders may prevent creation of new pharmaceutical products. In an example from copyright law, *Eyes on the Prize*, a celebrated documentary of the civil rights era, for a time could not legally be shown because acquiring rights from the myriad news organizations whose clips are shown in the film was cost-prohibitive. Ultimately, the film was able to acquire new licenses and edit out some of the clips -- such as a scene in which friends sing the "Happy Birthday" song to Martin Luther King, Jr. (We discuss the intellectual property status of the "Happy Birthday" song in chapter 3.) The film is now able to be viewed again. The foreclosure crisis might also be looked at as in part an anti-commons problem, as division of rights to a mortgage among servicers, banks, and thousands of securitized interest holders, prevents modification of the terms of the mortgages to make them workable.

Carol Rose argues that some resources are only possible because they are shared with other people—hold-outs and costs would simply prevent a cross-country railroad or road from being built for a small subset of the population—while others are most valuable if they are shared—public squares and ports, for example, are more valuable if lots of people use them to share goods and ideas. Another example might be the internet, whose value to users only increases as more people use it and put content on it.

§ 2.3 Ownership of Labor 140

This section gets at the point that much labor does not result in property rights for the laborer. Those that make products today rarely own the products, but instead gain a contractual right to wages. Slaves, as the previous section discussed, labored without any compensation. Work within the home and caring for family members is still not compensated. Because this work is still disproportionately done by women, the relationship between labor and property is a gendered one.

Upton v. JWP Businessland presents the tension between a woman's unpaid work and the conditions placed on her labor by her employer, which terminates her for refusing to work long hours so that she can take care of her son. Upton argues that public policy prevents firing an at will employee because of her obligation to her children. The Massachusetts Supreme Judicial Court rejects the claim, arguing that it is not based on "general principles" but on "special domestic circumstances." Note that to construe the claim that way is to suggest that the need to care for young children affects only an idiosyncratic subset of employees, rather a need that affects most women, which are about half of the workforce in the U.S. Another way to resolve the case against Upton would have been to hold that child care is a special subject of other legislation, and employers should not be held liable to the extent that positive law does not address the conflict

between work and caring for children. Counterarguments include that given the reality that few families can afford to have one parent stay at home, many families and children would be hurt if employers were free to disregard child care needs, and society experiences negative externalities from the deficits in child care or family income that result.

§ 3 Families 142

Family is a major source of property for most people. The wealth of individuals is heavily associated with the wealth of their parents, both because of inheritance and because their parents have enabled them to obtain the educational background and credentials necessary to maintain or exceed the lifestyle that the parents possessed. In addition, marriage has played a central role in the distribution of wealth. Changing images of the role of women and the relation between paid labor in the workforce and unpaid labor in the home, as well as the fact that so many marriages end in divorce, have enormous consequences for the distribution of property.

§ 3.1 Child Support 142
***Bayliss v. Bayliss* (1989) 143**
***Ex parte Christopher* (2013) 145**

The argument for requiring all parents to provide a college education (to the extent they can afford it) for their children who want it is premised on the notion that such an education is necessary to obtain many types of jobs, that it is appropriately viewed as part of the parent's obligation to the child, that most parents in fact do voluntarily adopt this responsibility, the child would have this benefit if the parents had not divorced, and, as Professor Langbein argues, that provision of a good education is the major way that parents help their children to succeed in life and therefore constitutes the primary current form of inheritance. In addition, as the notes point out, the age of majority was lowered to 18 for reasons having nothing to do with the obligation to support.

The counterargument is that children are able to pay for college themselves by obtaining loans that can be paid back over the course of their working lives, that parents' legal obligations to their children should end when the children reach majority, that because parents who are not divorced generally have no enforceable duty to pay for college no special duties should be placed on parents who are separated or divorced. Some research, moreover, suggests that parents who have meaningful custody do support their children in college; perhaps the answer is more equivalent parental rights, not more financial obligations. Students are obviously closely invested in this issue, so class discussion can be lively.

Bayliss v. Bayliss (1989) and *Ex Parte Christopher* (2013) present both contrasting takes on this issue and contrasting judicial styles, and class discussion should try to bring out both things. *Bayliss* held that Alabama's statute permitting courts to order support for the "children of the marriage" gave them jurisdiction to order support for the college education of children who had reached the age of majority. The court overrules past court of appeals decisions based on the common law, relying on a 1983 decision that child support did not necessarily end at the age of majority for disabled children, decisions recognizing the importance of a college education in modern life, and the fact that had the parties remained married, the father would likely have supported his son in college. The opinion takes an approach more associated with a progressive philosophy of judging, in that although tied to Alabama law and precedent, it is willing to adjust the law to reflect changing societal needs. In 2013, in *Ex Parte Christopher*, the court overruled *Bayliss*. The opinion is by Justice Moore, who had just been reelected to the court after being

removed for contempt for failure to remove from courthouse grounds a monument of the Ten Commandments he had commissioned. Unsurprisingly, the opinion takes an approach more associated with conservative jurists: stating that statutes should be interpreted according to their plain language, not societal needs, valuing adherence to the common law, and decrying judicial activism. In dissent, however, Justice Shaw shows that a plain language approach is not as definitive as the majority suggests. The majority looks up "children" in Black's Law Dictionary, finds that a "parent-child relationship" is defined as that relationship between a parent and a minor, and concludes that the statute does not include those over 18. The dissent, however, points out that the statute actually refers to "children of the marriage," which in context includes any children born or adopted during the marriage who have reached the age of majority. If this is the case, which decision better adheres to the judicial role in implementing legislative acts: one that follows common law made by judges without the benefit of the statute, or one that reads all the words of a statute?

§ 3.2 Gifts and Inheritance 148

Although child support and division of property between spouses on divorce or death are legal obligations, most property transfers between family members are gifts, either during the life of the giver or after her death (as wills).

Problem 1. Intentionally made gifts may generally not be taken back after delivery, but some courts reject this rule in the case of engagement rings, which are construed as gifts given on the understanding that the parties will be married.

Some courts ask whose fault it was that the marriage fell through, refusing to return a ring to one who broke off the engagement without justification. On one hand, it would seem sensible to avoid looking into fault and not entangle courts in endless questions of who is to blame for a failed relationship. If the gift was conditional on the marriage happening, the reason that the marriage did not happen should not matter. On the other hand, it might seem fair that the one who breaks off the marriage without justification should not be allowed add insult to injury to require the victim to return all the gifts she (or he) received from the wrongdoer.

The gift in contemplation of marriage exception to gift doctrine has a deeply gendered history and result. State statutes barred so called "heart balm" suits, which were usually brought by women for damages from termination of an engagement, but then created exceptions to permit suits for the return of engagement rings, which were typically brought by men. In light of this context, the no fault rule seems less just—if one

Problem 2. Should children, like surviving spouses, be entitled to a portion of the decedent's property owned at death, as is the case in many European countries? This question is really a great one to get students going; partly because of their concerns about their parents disinheriting them and partly because of the concern about the control it gives parents over their children. If there are minor children involved, moreover, disinheritance will place the onus on others to provide for them economically – a distasteful proposition when the parents died with wealth that could care for the children. Why can individuals disinherit their children but not their spouses, given that spouses are adults who may be more prepared to take care of themselves? Particularly if the children are not dependent on their parents, however, limiting the power to determine disposition after death may seem to fundamentally interfere with the rights of owners. Note that the stakes of disinheritance have changed in the last century. As discussed in the materials, today parents support their children less by passing on a business or homestead than by supporting them in obtaining the education and other qualifications to be employed. But the stakes

have changed for widows and the elderly as well. Before women could work outside the home, spousal inheritance was one of the few sources of support for widows; and before the creation of Social Security in 1935, dangling promises of inheritance were one of the few ways to secure care in one's old age.

§ 4 Possession..... 150

Possession is a fundamental concept in acquisition and allocation of property rights. Awarding rights to possessors may encourage investment, respect personhood-based attachments to property, accord with expectations of both possessors and others, and facilitate transactions by providing easy notice of who is the owner of a property. But what constitutes possession is not stable across different resources, and even acknowledged possession may give way to rights founded in other sources. According rights to first possessors, for example, may result in allocating too much to an individual because of happenstance, perhaps denying resources to those who need them more or will make better use of them; it may also encourage a kind of race to acquire that may ultimately undermine efficient acquisition or lead to conflicts.

These materials show the impact of possession on different kinds of property claims. The section on capture discuss possession as a source of ownership for resources in motion, from foxes, to whales, to baseballs, to oil and gas. The materials on possession and real property show that even without title, first possessors of land have rights against later claimants unless the claimants can show another source of title. The materials on possession of personal property pick up this theme by exploring when finding property will and will not give rise to rights, and the presumption of lawful acquisition that arises from possession. It would be very difficult to cover this entire section in one class session, but you can assign 4.1, Capture, for one class, and whatever you choose from 4.2-4.3 in another.

§ 4.1 Capture..... 150
***A. Wild Animals*..... 150**
***Pierson v. Post* (1805)..... 150**

Pierson v. Post has headed up property casebooks since 1915. Recent scholarship on the history of the case is discussed in the notes; a handy summary by Daniel Ernst can be found in 13 Greenbag 31 (2009).

The case is a dispute between Lodowick Post, who is hunting a fox on "unpossessed and waste land, called, the beach" (what is now Bridgehampton, an extremely trendy and expensive beach community on eastern Long Island) when Jesse Pierson happens along and captures the fox out from under his nose. Post sues Pierson and the case goes to New York's high court, the Supreme Court of Judicature. (Actually, New York at that time also had an even higher Court of Impeachment and Correction of Errors, which included not only the members of the Supreme Court, but also the Chancellor and all the members of the New York Senate, but it doesn't seem to have been much used. Today of course New York's highest court is called the Court of Appeals, and its trial court is the Supreme Court. Go figure.)

The majority holds that property rights in the fox should go only to those who "occupy" the fox, and the dissent argues that pursuit in some forms should give rise to property rights. It's fun to start the discussion of the case by first asking them whether they've ever been fox hunting (One or two often have, some in interesting ways, such as chasing the foxes on ATVs in Colorado with rifles, or, in an Australian variation, catching dingoes by dragging a dead wallaby behind a jeep.) Then ask them whether they plan to go, or plan to practice fox hunting law. (No.) This is a good set up to ask why then this case is in the book. The answer: not because of the rules of fox-

hunting, but because the case so neatly presents different rationales for allocating rights in property where none have yet been established.

What is the rule from the majority opinion? A fox is acquired by "occupancy" only, not simply pursuit. Do you have to physically capture the fox to "occupy" it? No—you can also trap the fox or mortally wound it without giving up the chase. What unites these three things? The hunter "(1) manifests an unequivocal intention of appropriating the animal to his individual use, (2) has deprived him of his natural liberty, and (3) brought him within his certain control." In other words, the hunter has (2) physically affected the fox in such a way as to (1) provide notice to other potential pursuers and (3) make it certain that the hunter will ultimately possess it. You might ask why this is a better rule than that advocated by Post, who could also be said to provide notice by his elaborate hunting of the fox (the facts state that Pierson knew that the fox was hunted). Perhaps it is because although Post may have provided some notice of his intent, he hadn't yet affected the fox or done anything to show that his hunt would be successful, so others might be justified in pursuing the fox as well.

Ask how the majority justifies its opinion. As in many cases, what appears to be a reliance on precedent is also supported by the court's notion of what makes sense in this case. Although the majority relies largely on Justinian's Institutes (a sixth century codification of civil law ordered by Roman emperor Justinian), Barbeyrac (an 18th century French jurist) and Puffendorf (a 17th century German jurist), it also says that the rule promotes "certainty, and preserv[es] peace and order in society," and according rights based on pursuit alone "would prove a fertile source of quarrels and litigation." In other words, because it's hard to tell whether someone's pursuit is sufficient to give rise to property rights, it would encourage others to chase the same fox, leading to more conflicts and difficult factual disputes in court. A rule of certain physical possession, in contrast, would be relatively easily decided in court and would, the court suggests, lead parties to know who has rights to the fox without going to court, thus discouraging quarrels. You might push students on this, as suggested by **Note 3** on certainty. Ask your students if they can make a peace and order argument for a rule that obvious pursuit gives rise to property rights. A rule that rewards snatching a fox out from under someone's nose—especially if the hunter has a gun!—may in fact encourage extrajudicial violence. More generally, bright line rules that permit what looks like unreasonable behavior may encourage people to evade the law and take matters into their own hands. As Rose and Singer both discuss, moreover, courts reject bright line rules when they appear wrong under the circumstances, so that bright line rules may not in fact result in more predictable judicial outcomes (*Elliff v. Texon* is a good example of this).

As discussed in **Note 1**, the majority creates a distinction between what is "discourteous or unkind" and what is illegal. This is important for students to understand—many things may be condemned by society but not by law. At the same time, ideas of fairness are important in property law, as seen in Justice Pitney's opinion in *INS v. AP* on copying of newsgatherers, to what will and will not be held a taking under the constitution. And while Pierson's behavior was rude, maybe fairness is not really on the side of the first hunter until he does something to show he will successfully catch the fox, such as mortally wounding or trapping it as the majority suggests.

Justice Livingston dissents on two grounds: first, that the case should have been decided according to the customs of hunters, and second, that the rule will discourage hunting foxes, which helps farmers whose chickens they prey on.

The argument regarding custom is discussed in **Note 5**. What's in favor of it? First, it may be easier to administer and enforce—everyone knows the rule already and may generally be following it; when they aren't, as in the Pierson case, judicial enforcement may accord with the justified expectations of the participants. Livingston even suggests that the case itself should have been decided by an arbitral body of sportsmen rather than going through the court at all, which would achieve judicial economy. Second, the rule of sportsmen would be developed by experts in

the field, and may better accord with its circumstances. So what would be wrong with this? First, the resulting custom may serve the interests of hunters, but not society generally—as discussed below, even farmers weren't crazy about foxhunting as Post practiced it. Also, if sportsmen rather than the courts were to actually decide such matters, some kind of arbitral body would have to be set up, and there would be concerns about denying parties access to the courts.

So why did courts follow the customs of whalers, as in *Swift v. Gifford*, awarding the whale to the ship that just harpooned it but didn't mortally wound it so long as they continued the chase, or in *Ghen v. Rich* to the ship that sunk it with a bomb lance rather than the person who found it when it washed up on shore? There are several possible arguments. First, whaling, unlike foxhunting, was not recreational but an important industry supplying a valuable commodity, so that what's good for the whaling industry might better correspond what's good for society. Second, expertise is more relevant here—most people in the nineteenth century could probably figure out how to catch a fox, but catching a whale on the open seas call for more expertise. Third, it was less feasible for a whalehunter to physically possess a whale, and once it goes down to the bottom of the sea, who knows where it's going to wash up? And fourth, importantly, both whaling customs recognized require not merely pursuit, but actual marking of the whale (with the harpoon or bomb lance), both indicating successful pursuit and providing notice to the finder of the ship's claim.

Livingston's argument regarding social utility is raised in **Note 2**. This is the classic property argument that we saw in *INS v. AP* as well: that unless productive labor is rewarded with property, people may not be incentivized to engage in it. Although this is an important argument, it's not clear that Livingston is really serious about it here (or indeed that any of the justices cared about the fox hunt more than as a vehicle for a scholarly debate about property rules). Read some of Livingston's language out loud to your class—it's hysterical, particularly if you give them a rough translation of the Latin. Although legal professionals should "*de mortuis nil nisi bonum*," (speak nothing but good of the dead, or speak no ill of the dead) the fox is regarded "as the law of nations does a pirate, *hostem humani generis*," (enemy of all mankind, a public international law concept permitting any nation to punish those that violate the laws of humanity).

But if the goal was really catching foxes, might not the majority's rule encourage people to become better and faster fox hunters? As the note suggests, foxhunting with horses and hounds actually cost far, far more than any fox could be worth, and catching the fox was not necessarily the goal—a fox might be permitted to escape, on the theory that a previously chased fox would give a better hunt the next time, or if caught, the dogs would be permitted to eat it. Foxhunting was about recreation, not really catching foxes. When farmers really wanted to catch foxes, they apparently just put a bunch of old fish or meat out at night and shot the ones that showed up.

Problem 1. Fleet v. Hegeman*, 14 Wend. 42 (N.Y. 1934), applied the question of capture of wild animals to oysters. The plaintiff had placed small immature oysters in a marked bed in common waters open to all inhabitants of the town, and left them to mature for two years. The defendant then collected the oysters without the permission of the plaintiff. If you were representing the defendants, how could you use Pierson to support your client? If you were representing the plaintiffs, how would you distinguish it? How should the case be resolved?*

The case is like *Pierson* in that oysters are wild animals found on common lands, so the defendant could argue that the rule of capture should apply. (Fun fact: the tiny oysters used to start an oyster bed are called "oyster seeds.") Students will have an easy time recognizing that the *Pierson* rule should not apply, but may need help distinguishing the case in an analytical way (*e.g.*, they may just say that the oyster planter owns them, which is assuming the question the court has to decide in the first place.) You can return to the notice, deprivation of liberty, and certainty of possession factors discussed in Pierson. Here, the bed is marked, providing notice of another's claim. Second, there really isn't any liberty to deprive the oysters of—unless harvested, they're

just going to sit there. Third, the planter is certain to possess them when they're mature—unless someone comes and steal them. This suggests another reason that the court in *Fleet* ruled for the original seeder—it's not feasible to capture the oysters any more securely and let them mature in the town waters, so allowing the second comer to take them creates a serious disincentive to anyone using these beds to grow oysters, depriving the community not of recreation (as in *Pierson*) but of a means of developing a valuable resource. (By the way, oyster farming may seem like an obscure occupation, but it was once economically important enough to appear in two Supreme Court cases (*Martin v. Waddell*, 41 U.S. 367 (1842) (on ownership of submerged lands) and *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929) (requiring 10% of shells from licensed oyster packers was not a taking)) and a foundational state public trust case. *Arnold v. Mundy*, 6 N.J.L. 1 (1821))

Problem 2. *How would the rule of* Pierson v. *Post apply to other animals and other contexts? Imagine that rather than a fox in a rural area, the animal is a dog wandering in a city street. May you take the dog home and keep it? Now imagine that the animal is a tiger. If you shoot the tiger, may you claim its pelt? Or are you liable to a suit by the owner of the tiger from whose home it escaped?*

No, even if the dog is not wearing a collar, in most places a finder has notice that it is probably owned by someone (in their "constructive possession"), so is not justified in keeping it without trying to find the owner. One has notice in most places that a tiger in a city street is probably owned by someone as well, but here the action of the owner in letting the tiger wander free likely endangers others, so you might not be liable for killing it. Whether you can keep the pelt is a different question—should you be rewarded for killing the tiger and removing the public hazard, or would such a rule encourage others to destroy and claim property that they know probably belongs to someone else?

B. **Home Run Baseballs 156**
***Popov v. Hayashi* (2002) 156**

The question is about who owns a baseball hit into the stands, Popov, who had it in his glove but lost it after he was jostled by the crowd, or Hayashi, who picked it up in the melee after being tackled by the same crowd himself. It is fun to begin the discussion of the case by asking your students whether they've ever tried to catch a home run ball, and whether this "gang of bandits" description accurately reflects the norms of catching one. At some point you should show the trailer for the movie *Up for Grabs*, which shows Popov's attempt to catch it, the melee, and some pretty funny scenes of the trial. http://www.youtube.com/watch?v=NP8j_X88bSI. The full movie is available for streaming on Netflix. To get into the legal issues, you might ask how a baseball is like a wild animal—when it is hit into the stands it belongs to no one, and pursuit doesn't assure one of possession, and one must possess it to get property rights in it. The court has a nice description of why possession means different things in different contexts, and adopts a rule of physical possession in this case because one can exercise unequivocal physical control over a baseball, and the customs of the sport require that one does so.

But Hayashi did exercise unequivocal physical control over the ball—why doesn't he have full property rights in it? Because it's possible that Popov might have exercised physical dominion had he not been "interrupted by a band of wrongdoers" that "tackled him and threw him to the ground." Had he really had secure possession, and *then* dropped it, the ball would have remained in his constructive possession, so Hayashi would have no claim. But the court can't determine whether or not Popov really would have had secure possession absent the gang of bandits. Given this uncertainty, rather than award the ball to Popov or Hayashi, the court orders them to split it.

In the article discussed in **Note 4**, Parchomovsky, Siegelman, and Thel argue that equitable division remedies may be the best result where neither party could anticipate or control the conflict (another example they give is *Sherwood v. Walker*, in which the parties agreed on a low price for the sale of the cow Rose 2d of Aberlone because they both mistakenly believed she was barren). One of the interesting justifications they give for equitable division in windfall cases is that it avoids making courts undermine their legitimacy by making up a reason to award the benefit to one party or the other, when there isn't really a justification to do so. This kind of illegitimate reason-giving is one of the things Helmholz and others criticized about cases resolving conflicts between landowners and finders, discussed below.

The justification for equitable division of windfalls leads nicely into the question of what would have happened if the court had found that Hayashi was one of those responsible for tackling Popov. He wouldn't get half the ball because, from an efficiency perspective, that would create an incentive for more bad behavior in the stands, from a fairness perspective, it is unfair to let the wrongdoer profit from his wrong action, and from a judicial legitimacy perspective, it would be easy for the court to rule against him.

You might ask your students whether they're satisfied with this split the ball result—they rarely are. Why not? Perhaps it undermines the idea of litigation, that there is a right or wrong answer. You might suggest, however, that because most cases end in settlement a middle position is actually far more common than a decisive win for one party or another. (**Note 1**, discussing the difference in results for Popov, whose attorneys' hourly fees were more than twice his result in the case, and Hayashi, whose attorneys received a contingency fee, provides another opportunity to discuss the realities of litigation.)

As **Note 2** discusses, the case also raises issues of custom, in particular the custom of Major League Baseball and its component teams of abandoning balls hit into the stands to the fans. Can a team change that custom ex post, as apparently happened when Mike Piazza had security guards demand a ball from a father and his daughter? An argument that they can is that the custom is not a matter of law, but simply a gratuity of the baseball teams (*cf. Tee-Hit-Ton*, excerpted in § 2 of this chapter, holding that federal payments to tribes for their land were mere gratuities and did not reflect a legal property right in the tribes). A counterargument is that the teams do offer this right as part of the inducement to buy tickets, and therefore, coupled with the long existence of the custom, the right is implicitly part of the contract entered into in buying a ticket.

The dispute between the Red Sox and Red Sox player Mientkiewicz over the ball he caught that ending the curse of the Bambino raises questions regarding ownership of balls that remain in the field. It doesn't seem that the Red Sox have much of a claim, because the ball was supplied by the St. Louis Cardinals and caught in their stadium; one might, however, claim that if a ball hit out of the field is abandoned, perhaps a hit ball that remains in the field is as well. The custom, moreover, is apparently is that players can keep game-ending balls that they catch. But Mientkiewicz was working for the Red Sox when he caught the ball, and the argument that the right to keep balls was part of his implied employment contract is weaker than the argument that catching balls that are hit into the stands was part of the implied contract in buying a ticket. However, Mientkiewicz was employed to play baseball for the Red Sox (which he successfully did) not collect dead baseballs. Probably some overreaching by the Red Sox here, but unwise behavior by Mientkiewicz—he was traded the next season.

C. Natural Resources 161
***Elliff v. Texon Drilling Co.* (1948) 161**

These materials show that the problems, concepts, and policy arguments relevant to ownership of wild animals are also relevant to the modern context of ownership of oil and gas—an

area of somewhat greater social importance. (Water—whether aquifers that underlie more than one surface estate, or surface water that borders multiple riparian estates—may also be analyzed under the rule of capture, but needs for a continuing supply of water have in many jurisdictions led to doctrines of prior appropriation, reasonable use, and in a few jurisdictions to correlative rights according to the amount of the surface estate owned.) In *Elliff v. Texon*, the Elliffs own the surface rights and royalty rights in the gas under their land, but the gas is part of a large common pool that extends under the neighboring Driscoll land as well. (The division of rights in the surface and subsurface estates presents a nice opportunity to review the *ad coelom* rule discussed in Chapter 1, and to discuss the different ways that rights in land can be divided.) While Texon is drilling from the Driscoll well its negligence results in a blowout that burns for several years, resulting in the dissipation of much of the gas under the Elliff land. Although Elliff is clearly entitled to compensation for damage to its property, the question is whether its property includes the gas that had been under its land but which escaped through the burning Driscoll well, and which comprised all but about $6,000 of the $154,000 damage award at trial. (To get a sense of the value of gas lost, 148,000 in 1938—when the value of the lost gas was calculated—would be almost $2.8 million in 2021 dollars.)

How is the gas like the fox in *Pierson v. Post*? It moves from place to place, rather than being fixed in one particular spot. How is it not like the fox? It is fixed beneath particular lands, perhaps giving rise to constructive possession in the owners of those lands. As the court recognizes, this leads to two apparently contradictory rules: 1. each landowner has ownership of the oil and gas beneath her land; but 2. landowners also have rights to drain as much oil and gas as they can from the surface of their estates, and are not liable if some of the oil comes from beneath the lands of others over the common pool.

The court adopts both rules, but limits rule two by holding that individuals will be liable for negligent or unreasonable waste and destruction of the gas. How far does this protection go? What if the race to extract gas leads to a pace of extraction that affects gas pressure in such a way that more gas remains underground than would had it been extracted at a slower pace? Perhaps this would fall into the category of "reasonable and necessary waste" that the court says is part of legitimate production, but the new rule creates uncertainty regarding what practices will create liability. You might ask whether the rule of liability for unreasonable waste of the resource will result in more gas production or not. It may reduce gas production, by contributing to uncertainty in the legal environment facing gas drillers and perhaps by discouraging practices that would in fact be more efficient. At the same time, however, it may encourage slower drilling that is ultimately more efficient and may encourage investment by increasing security that gas will be protected from clearly waste by neighboring owners. The arguments and counterarguments are further played out in the answer to Problem 1, below.

Problem 1. *Plaintiff Corporation invests $1 million in exploring for oil on its property. After it discovers oil and begins to extract it for sale, its neighboring landowner, Defendant Corporation, begins to do likewise. Because the oil is part of a common pool underlying the neighboring pieces of property, the defendant is able to extract oil from the same pool discovered by the plaintiff. Defendant's costs are much less than plaintiff's because it does not have to undergo the expense of searching for the oil. This gives the defendant a competitive advantage. Plaintiff sues defendant, asking for an injunction ordering defendant to stop exploiting oil discovered by plaintiff's investment and labor. Defendant claims a right to extract oil from beneath its property.*

This problem is intended to highlight the arguments on both sides in *Elliff* by emphasizing the extensive investment that one owner made in finding the oil. It therefore dramatizes the conflict between the principles of *rewarding labor* and *promoting investment* and the principle of granting ownership to someone merely because they *possess* the land under which the oil and gas are located.

1. As plaintiff's attorney, what rule of law would you advocate that the court adopt? How would you justify that rule in terms of both fairness and social utility?

Plaintiff can argue in favor of an absolute ownership of the oil beneath one's land that owners of land own the subsurface minerals and that withdrawal of those minerals by one's neighbor infringes on the owner's possessory rights. The neighbor has no right to come onto plaintiff's land to dig and withdraw the oil; why should the same neighbor be able to take advantage of a quirk of geography to cause the exact same damage while staying on her own land? This rule is fair to both parties since it provides each owner with the security of knowing that they own the minerals located beneath the surface of their land. Defendant's proposed rule of capture, on the other hand, allows one owner to deprive her neighbors of their rightful share in the resource which is physically located within their borders.

Plaintiff can also argue that defendant's proposed rule of capture will encourage a race to extract oil in a way that will promote the kind of haste (and thus waste) that occurred in *Elliff*. Plaintiff's rule will not discourage excavation; if defendant wants to extract the gas without having to worry about whether defendant is withdrawing gas from beneath plaintiff's land, defendant can purchase this right from plaintiff.

Finally, plaintiff can argue that the capture doctrine will reward a party who did not invest in finding the oil. Because the defendant will be able to sell the oil at a lower cost, the capture doctrine will create a disincentive to invest in finding oil since the investor will not reap the full rewards of her investment. The rules should allow the owner to internalize the gains from her investment by establishing vested rights in the oil that is found to lie beneath her own land. This result not only encourages property owners to look for oil and gas, and therefore benefit society, but is fair because it rewards the party who put in the labor to find the resources and therefore deserves the benefits.

2. As defendant's attorney, what rule of law would you advocate that the court adopt? How would you justify that rule in terms of both fairness and social utility?

Defendant may argue that each owner is equally free to dig on their own land and withdraw as much oil and gas as they can capture. The capture doctrine is equally fair to each party; it gives each owner the same liberty to withdraw oil from beneath their own land without having to worry about whether oil is being withdrawn from neighboring land. To the extent such withdrawal harms the potential interests of the neighbor, the neighbor has no right to complain since they were equally free to exercise their rights to withdraw the oil beneath their land. Allowing the plaintiff to claim a fixed share of the oil and gas will interfere in each landowner's freedom to withdraw oil and gas from beneath their land because each owner will have to worry about possible liability to their neighbors if they withdraw more than their fair share of the gas. The uncertainty thus created will interfere with each owner's freedom to exploit resources on their own property.

As to plaintiff's claim that no one will invest to find oil if their neighbor can then come along and extract it for free, defendant can argue that investment will not be discouraged as long as the rules are clear. Owners will invest in looking for oil to the extent that it is profitable to do so; they will take into account the possibility that neighbors will drill also and count that in as a cost of doing business. Moreover, all owners are in the same position. Owners are just as likely to benefit from discoveries of oil on neighboring land as they are by discovering oil on their own land. There is therefore no systematic advantage to any party. Finally, giving each landowner the right to withdraw oil and gas from beneath their own property without fear of liability to their neighbors (as long as they do so in a non-negligent manner) will encourage the production of oil and gas and this result is desirable. Granting correlative rights will arguably discourage production since it

reduces competition between economic actors by limiting their freedom to develop the resources on their land.

Finally, defendant can argue that the free use rule is much more administrable and predictable. Each owner has the right to withdraw as much oil as they can, as long as they commercially reasonable methods designed not to waste the oil, without fear of liability to one's neighbors. This rule clarifies who owns the resource, and prevents litigation. Either the reasonable use or correlative rights doctrine is likely to create disputes and litigation about ownership of the oil which is withdrawn from beneath one's own land. Because it makes ownership rights uncertain, it will discourage oil production, raise the costs of the oil industry, and waste social resources by encouraging disputes among neighbors over ownership rights.

Problem 2. *The Exxon-Valdez ran aground off the coast of Alaska in 1989, resulting in the one of the largest oil spills in United States history. A lawsuit was filed against Exxon representing a class of tens of thousands of individuals who made their livelihood through commercial and subsistence fishing in the area.* Exxon Valdez v. Hazelwood, 270 F.3d 1215 (9th Cir. 2001). *The suit sought damages for the destruction of the fish supply. Use* Pierson v. Post *and* Elliff v. Texon *to argue for the plaintiffs or the defendants.*

The defendants could use *Pierson* to argue that the plaintiffs have no claim; because fish are wild animals, the fisherman would not have any property interest in them until they had captured them. The plaintiffs could rebut with the rule in *Elliff* to argue that even if Exxon would not be liable to the fishermen for reasonable expropriation of the fish, they would have a claim based on negligent and wasteful destruction of the fish through the oil spill. Unlike owners of land over oil pools, however, the fishermen do not have any property rights in the fish. Common law would deny recovery for this kind of loss of economic expectations. In fact, it was in reaction to the situation of subsistence and commercial fishermen relying on the fish killed by the Exxon Valdez spill that Congress enacted as part of the Oil Pollution Act of 1990, provisions that make vessels or facilities that discharge oil into water liable for damages to subsistence use or earning capacity. 33 U.S.C. § 2702.

§ 4.2 Possession and Real Property 165
***Christy v. Scott* (1854) 165**

Both these materials and the materials on finders provide examples of the relativity of title. The principle illustrates an important broader theme: that property rights are not absolute, but shift in different contexts, in this case depending on the claims and priorities of those claiming title. In cases of both finders of personal property and occupiers of land, the law will enforce the rights of possessors against substantial parts of public, even when the possessors don't have legal title.

Christy v. Scott. This case neatly provides the main justifications for relativity of title: (1) it would undermine peace and order and security in investment to push someone off of land and then defeat a claim of ejectment by challenging that individual's title, and (2) simply asking who was there first serves judicial economy by allowing courts to resolve difficult issues of title in the abstract.

The facts of the case also indirectly raise the questions of property and sovereignty discussed at the beginning of the chapter. You may or may not want to go into the history with your class, but it's pretty interesting, and if you teach *Lobato v. Taylor* in Chapter 7, it provides a nice connection to the Mexican versus state law conflicts there. Essentially, soon after achieving independence from Spain in 1821, Mexico liberalized immigration laws and encouraged settlement in the newly combined state of Coahuila y Tejas. The state also enacted its own laws to govern

colonization and settlement, and both Coahuila and Texas resisted the Mexican central government's centralization and control. The immigrants to the Texas part of the state were overwhelmingly Anglo-Americans; they were also slaveholders, and resisted Mexico's restrictions and ultimate prohibition on slavery. In 1835, Mexico prohibited further immigration into the area. Anglo-Americans in Texas revolted, establishing the independent Republic of Texas in 1836. The Mexican government did not recognize its independence, and the governmental status of Texas was not stable until after its annexation as part of the United States in connection with the Mexican-American War of 1845-46. Land claims established before that time, however, might be subject to the laws of several authorities that disputed each other's claims: the central Mexican government, the rebellious Coahuila y Tejas government, or the unrecognized Republic of Texas. One can see why the Supreme Court would be glad to avoid resolving the legal issues, and why the relativity of title doctrine contributed to peace and order in this uncertain state of affairs.

Problem 1. *Two law students rent an apartment under a one-year lease. The lease contains a ''no subletting'' clause preventing the tenants from granting possession of any part of the premises to another person during the lease term. Two months into the school year, one of the roommates has to return to her home in another state to take care of her sick mother. The remaining roommate, A, cannot afford to pay the rent by herself. She decides, therefore, to violate the terms of the lease by asking a new roommate, B, to move in. B makes an oral contract with A to pay one-third of the rent for the rest of the year.*

B moves in but has unpleasant quarrels with A. After a few weeks, A finds a friend, C, to take B's place. She tells B it is not working out and she will have to move out. B protests that she wants to stay. One day during school, A changes the lock on the door of the apartment and carries B's belongings to the basement of the building to a storage area. C moves in and takes B's place. B sues A and C, and asks the court to order C to vacate the premises and allow B to return. A and C defend by claiming that B never had a legal right to be in the apartment to begin with. You are the judge charged with deciding the case. What would you do?

Applying the principle of relativity of title, the judge might rule for the plaintiff *B*, on the grounds that she had peaceable possession of the premises under an agreement with *A*. This is true even though the landlord would have the right to evict her because the lease gave the tenants no power to sublease without the landlord's consent.

On the other hand, this case is arguably distinguishable from *Christy* for two reasons. First, it involves a landlord-tenant relationship which implies a continuing interest on the part of the landlord in the use of the premises. The court might conclude that it has an obligation to protect the landlord's rights to control use of the premises by not granting possession to a tenant who has not obtained the landlord's consent to occupy the premises, as required by the lease. Second, granting plaintiff possession would arguably invade the privacy interests of *A* by forcing her to live with someone she does not get along with. As an alternative, the court might grant *B* a right to damages from *A* for breaching the sublease agreement but not grant *B* a right to regain possession.

Problem 2. *In Florida, Mark Guerette identified 20 abandoned foreclosed homes designated as "public nuisances" by the municipalities because of lack of maintenance. Catherine Skipp & Damien Cave, At Legal Fringe, Empty Houses Go to the Needy, N.Y. Times, Nov. 8, 2010. He begins paying taxes on the properties, fixes them up, and rents them to homeless families for a small charge, explaining to them what he has done. He is arrested and charged with fraud. Has Guerette provided anything of value to the families by letting them live there?*

Guerette has provided the families both with the value of his labor in identifying the houses and fixing them up, but more importantly with the value of his prior occupation of the land. If the foreclosing banks seek to evict the families, they of course must cede to them as the true owners, but through Guerrette they have superior claims to others. On the other hand, if Guerrette is not

clear about the tenuousness of their leases, he is committing fraud. Some of his tenants later claimed he deceived them about the nature of his claims. *See The Lord of Squat: Mark Guerette Got Busted for Putting Families in Foreclosed Homes*, http://www.browardpalmbeach.com/2011-02-24/news/the-lord-of-squat-mark-guerette-got-busted-for-putting-families-in-foreclosed-homes/full/. Given this, one question is whether this example suggests the beneficial role of the relativity of title doctrine, by allowing parties to use and rehab unoccupied lands, or does it suggest that it encourages unlawful occupation?

§ 4.3 Possession and Personal Property 168
A Finders 168
***Armory v. Delamirie* (1722) 168**
***Charrier v. Bell* (1986) 171**

Armory v. Delamirie. You might begin the discussion of finders by reviewing for students the very simple facts of *Armory*, then asking what justifies the principle in the case. (In response to the text box question about trover, the chimney sweep's boy sought damages rather than replevin because he wasn't interested in having the jewel for himself, just recovering its value.) First, it prevents the disorder that could arise if people thought they could claim property simply by taking it from one whose title they doubted, as the jeweler did in this case by refusing to return the jewel to the chimney sweep's boy. Second, it facilitates efficient use and alienation of property. As in this case, rewarding possessors encourages them to share their finds publicly and sell or invest in them. The hope of legally profiting from the find may also make it more likely that the finder announces the find publicly, so that the true owner can learn of its loss. It may or may not be intended to reward productive labor. In some cases the find is the result of labor and investment, as in *Charrier v. Bell* or the shipwreck cases, but often, as in *Armory*, finds are windfalls, not the result of deliberate effort.

As suggested by **Note 2**, you might then ask students to challenge the statement in Armory that a finder "has such a property as will enable him to keep it against all but the rightful owner." The maid who found the jewel after the chimney sweep's boy forgot it on the hearth would lose against the boy, even though he isn't the rightful owner. Even thieves will often prevail against those who steal property from them. And as discussed below, finders often lose against owners of the real property on which the personal property is found. So a more accurate statement is that a finder "has such a property as will enable him to keep it against all subsequent possessors."

The first problem provides a helpful frame to discussion of the other rules of finders:

Problem 1. *Revisit the facts of Armory v. Delamirie. What if the owner of the building in whose chimney the jewel was found asserts a claim against the chimney sweep's boy? Who should win? Should the answer depend on whether the jewel was lost, mislaid, or abandoned, and if so, which category does the jewel fall in? Now assume that the chimney sweep who employed the boy claims the jewel. Who should win?*

Neither answer is clear. With respect to the conflict with the landowner, it may depend on whether the jewel appeared to have been hidden there deliberately, or to have somehow fallen into the chimney (the latter seems unlikely). In recent cases involving money found rolled up in airplane wings or hotel ceiling tiles courts have awarded the money not to the finder but the airplane and hotel owners, applying the rule that lost property goes to the finder but mislaid to the land owner. It is true that property so carefully hidden away is likely not inadvertently lost, but is it really mislaid, rather than abandoned? Would you actually *forget* that you left a valuable jewel hidden in a chimney, or thousands of dollars in a hotel ceiling, or would you rather place it there and then decide for whatever reason that you had to give it up?

This also gives you the opportunity to question whether the distinction between lost and mislaid property makes any sense. Is the true owner any less likely to check at the location for property that is lost or mislaid? Or does one who mislays something in someone else's really entrust to the landowner any more than one who accidentally loses the property there? This may be a meaningful distinction for money forgotten at a bank or in a hotel room, but not in most other circumstances.

It is also unclear whether the chimney would count as a private home (where all property usually goes to the landowner) or not. It's clearly not a public place, but landowners rarely exercise possession and control over their chimneys in the way they do, for example, their kitchens or bedrooms. And what justifies the private home/public place distinction? It is said to be the extent to which a landowner has constructive possession of all within the property. So is a chimney more like the house in the classic English case of *Hannah v. Peel*, 1 K.B. 509 (1945), where a jewel was awarded to a soldier stationed in the house after the British army requisitioned it during the war, rather than the homeowner because it was requisitioned before the owner ever lived in the property or took constructive possession of it? Or is it more like property buried in the ground, which usually goes to the landowner because the ground is thought to be within the owner's constructive possession?

Are there better ways to answer these questions? What about the desire to have found object returned to the true owners? A rule that rewards finders in most cases is more likely to encourage them to report their finds to the landowner, who is in the best position to receive inquiries about lost or mislaid property. Or what about a desire to discourage guests from poking about the property of others? Perhaps the scope of invitation to a private home does not include an invitation to claim found property, and so finders are trespassers in this case, but not for less private areas? In any case, the common law is a bit of a mess, and unfortunately the lack of uniformity of statutes in the US has made them less effective than they might be at clearing it up.

What about the claim by the chimney sweep himself? Again, the answers are not clear. Most of the cases have involved employers that were also the owners of the land on which the property was found, so the results are tied up with the lost/mislaid/abandoned distinction. One line of cases turns on whether turning in found objects was considered part of the employment relationship between the boy and the chimney sweep, but even there a duty to report is not the same as a duty to relinquish if the true owner cannot be found. Some cases have held that hotel cleaning staff, for example, were not entitled to keep finds because they were under a duty to turn in found property to the hotel management, *Jackson v. Steinberg*, 200 P.2d 376 (Or. 1948), but other cases have allowed ship's stewards and railway porters to keep their finds, even if they were initially obligated to turn them in to their employers to seek the true owner. *Kalyvakis v. TSS Olympia*, 181 F. Supp. 32 (S.D.N.Y. 1960); David Reisman, Jr., *Possession and the Law of Finders*, 52 Harv.L.Rev. 1105, 1116-17 (1939) (summarizing cases).

Charrier v. Bell is a fascinating case, especially combined with its aftermath discussed in **Note 1.** As the quick review box suggests, the hypothetical contest between Charrier and the owners of the Trudeau Plantation provides a nice tool for reviewing the common law rules. Leonard Charrier claims that he first discovered the graves when he was using a metal detector on the property with the permission of the caretaker. He digs up 30 or 40 burial sites, then tells the caretaker of the find, at which point, he alleges, the caretaker first told him he was not the owner of the property. So right away we have an argument that he was trespassing. Did the caretaker have authority to permit Charrier to be there? Did that permission include authorization to dig up graves? Did Charrier really not know that Hoshman was only a caretaker? If Charrier was trespassing, he would have no right to the finds. Even if he was not trespassing, he would lose to the landowners under the normal rule that buried property goes to the landowner, not the finder.

He might have an unjust enrichment claim if he could show was granted permission to dig on the property and reasonably believed that this included the right to keep anything he dug up, but he is unlikely to be able to prove that in these circumstances.

The real issue is whether the property was abandoned by being buried at a grave site. As the court says, it is bizarre to suggest this is true—no one intends the contents of a grave to be owned by whoever happens to take them.

A more interesting question is not discussed by the court: what gives the Tunica-Biloxi, a tribe of the descendants of merged Tunica, Biloxi, and other indigenous peoples, ownership rights in grave goods buried by the Tunica 300 hundred years before? As late as the twentieth century, American policy and law sanctioned expropriation and display of Native remains in circumstances that would be shocking in other contexts. For example, after Qisuk, an Inuit man, died in New York after the American Museum of Natural History brought him and other Inuit there from Greenland, the museum faked a burial for his son Minik, stripped his flesh from his bones, and put them on display. When Minik discovered the fraud in 1906, the museum still refused to release his father's body for burial. Similarly, as discussed in *Geronimo v. Obama*, 725 F.Supp.2d 182 (D.D.C. 2010), the renowned Yale Skull and Bones secret society boasted of having pillaged Geronimo's grave in 1918 and brought his skull back for display at their headquarters.

As **Note 2** discusses, however, even for non-Natives, American law often provides little protection for unmarked burial grounds and descendants outside a few degrees of consanguinity are often denied standing to challenge desecration of their ancestors' graves. Recognizing both the deep wrongs done to Native people through the casual rifling of Native graves and the cultural importance of many of the goods taken, Congress through NAGPRA sought to prevent grave desecration on federal or tribal land and to provide descendants with a right to seek repatriation of Native remains and cultural patrimony from institutions receiving federal funding.

As **Note 3** suggests, these claims are founded not only in the right of individuals to protect the graves of their relatives, but also in the same kinds of claims made by nations and peoples around the world for protection and repatriation of their cultural patrimony, property that is key to the identity and culture of a people. Chapter 3, § 7 discusses these claims generally and the international law governing them and provides examples in the Egyptian, Greek, as well as indigenous contexts. One question worth discussion, which Charrier and its aftermath frames nicely, is whether laws prohibiting removal of cultural patrimony without the consent of tribes or nations prevent discovery and appreciation of this patrimony or not.

Problem 2. *In nineteenth-century Stamford, Connecticut, an enterprising individual, recognizing the value of the manure left behind by horses on the public street, hires two workers to scrape it into large piles one evening, intending to take it to fertilize his own land. The next day, before he can remove the piles, another person notices them and unable to find their owner, takes them away himself. In a contest over the manure between the individual that first scraped up the piles and the individual that took it away, who should win? What alternative arguments could you make? See* Haslem v. Lockwood*, 37 Conn. 500 (1871). What if the local hackney cab company, which can show that it owns half of the horses that walk along the street, intervenes to claim half the manure? What if the Borough of Stamford claims it as well?*

This problem brings together the policy arguments involving finders, capture, and labor and investment, and allows for review of the different aspects of finders law. If the first manure gatherer did enough to claim possession of the manure, the subsequent possessor would lose under the rule of finders. The arguments that he did establish possession are that he "found" the manure, invested his labor in gathering it into collectable piles, and thereby performed a valuable service by clearing up the poop. This seems like the kind of activity we should reward as a matter of both fairness and efficiency. The counterargument is that leaving piles of manure on a public street

overnight does not provide enough notice of a claim to the manure to prevent another from taking it away, and indeed the second-comer might think he was performing a public service. One way to phrase the question, returning to the capture materials, is whether this more like the oyster beds in *Fleet v. Hegeman* or the harpooned whale in *Ghen v. Rich*, which clearly reflected such a claim and investment, or like garbage next to the side of the road, which does not. The answer might turn on the customs of Stamford at the time—was manure ever scraped into piles, and if so, was it free for the taking? The court in *Haslem* ruled for the original scraper largely to reward his productive labor.

The hackney cab company might claim that it is the "true owner" of the manure, and so should prevail over the finder. This claim would likely be defeated with an argument that when you leave your horse's poop on the street you show a clear intent to abandon it to whomever comes along. The Borough of Stamford might make a claim that it owns the manure as the landowner. Because this is a quintessential public rather than private place, the property is abandoned and not mislaid, and there is no argument that the manure was entrusted to Stamford as bailee, this argument should lose. Indeed, we might use a constructive enrichment argument on the initial scraper's behalf: he reasonably thought he had implicit permission to clean up the city's dirty streets, invested his own funds in doing so, and if he could not keep the manure Stamford would be unjustly enriched both by his labor in cleaning its poopy streets and by the now usable collection of fertilizer.

B. Presumption of Title 176
***Wilcox v. Stroup* (2006) 176**

Willcox v. Stroup illustrates the principle that possession may not only create title in unowned resources, but also leads to a presumption of title in possessors unless rebutted by superior evidence of title in someone else.

Willcox, a descendant of Confederate Major General Evander Law, finds a collection of Civil War documents worth $2.4 million in a shopping bag in a closet in his late stepmother's home and tries to sell them. Stroup, the archivist for the State of South Carolina gets a temporary restraining order enjoining the sale, and Willcox seeks a declaration of ownership. Because the only evidence is that the documents have been in the possession of Willcox's family for the last 140 years, the court holds that he has a prima facie case of ownership, which it is South Carolina's burden to rebut. Because there is no evidence of how the papers got into Law's possession or of superior rights by anyone else the court finds Willcox owns the papers.

The case provides a nice explanation of why possession is such a powerful principle. First, in the absence of other evidence, it provides a clear, easy to administer way of determining property rights. Second, it encourages stability and protection of settled expectations because one expects to keep what one has. Indeed, this protection of the status quo may even prevent the violence and disorder that would occur if one were removed from property that one was physically possessing. (This principle is echoed in the relativity of title materials that follow, the doctrine of adverse possession, in Chapter 5, and in the prohibition against self-help eviction in Chapter 11.) Third, awarding property rights to those in possession encourages investment and productive labor in property, because the possessor knows she will benefit from investment in the property. With respect to the specific kind of property, historical documents, the chain of title is often unclear; without a presumption of ownership in possessor, determining ownership and facilitating transactions to make the documents publicly available would be much more difficult.

What are counterarguments? Well, a rule that the state automatically had ownership of such documents might be pretty easy to administer, and certainly would make it cheaper for the public to acquire and display archival documents. It might be difficult, however, to determine which documents were so clearly state documents that they fell into this category; it might also discourage finders from announcing their finds publicly. As the court notes, moreover, such a rule of government ownership could not be applied retroactively without constituting a taking of property. In this case (but surely not in all cases) the sale does not harm the public's right of access because the microfilmed documents are already publicly available.

C. **Possession of Stolen Property 179**

These materials show another twist on relativity of title: subsequent possessors who justifiably believed they were true owners may prevail over prior true owners in some circumstances, perhaps reflecting different evaluations of who was in a better situation to avoid the conflict in the first place. This theme is repeated in Chapter 11 in the title search materials and the distinction between fraud and forgery in real estate sales.

Problem. *Plaintiff lent her car to a friend. The friend turns out not to be such a true friend, forges a title to the car, and sells it to a bona fide purchaser. Since the friend is not a merchant, the common law rule, rather than the U.C.C., applies, enabling the plaintiff to recover the car from the bona fide purchaser, on the ground that a thief cannot transfer good title. Defendant argues that the common law should be changed to protect the rights of bona fide purchasers to obtain title to property even when the true owner did not entrust the property to a merchant.*

1. What arguments can you make for the defendant's proposed rule of law? What can you say on the plaintiff's behalf? In answering these questions, consider whether it makes sense to distinguish merchants from other persons who wrongfully transfer title to stolen goods. How should the court rule?

The UCC allows merchants to sell goods entrusted to them in order to engender confidence in such merchants. This allows unfairness to the property owner whose property is fraudulently sold. One major difference here is that the sale is not by a merchant. The arguments in favor of protecting bona fide purchasers *may* be very strong in the context of sales by businesspeople in the ordinary course of business. However, a sale by a non-merchant, such as might take place through the classified ads in the newspaper, is arguably more marginal to the operation of the economy. In addition, in this context, people are generally more wary and have less expectations that the goods they purchase are in top notch condition, since they are used. Thus, it may accord with ordinary expectations to grant less protection to purchasers in this kind of market. Further, we may in fact want to give people incentives in this market to check out whether the seller really owns the object being sold. It is likely that there is a greater chance of thieves operating to sell stolen goods in this market than when property is being sold in an established store.

On the other hand, it might be argued that the policy reasons for protecting bona fide purchasers extend even to this market setting; *i.e.*, it is unfair to create a second victim, and protection for such purchasers is necessary for the market to operate at all. In the absence of such protection, people might be extremely reluctant to buy goods from non-merchants; each such purchase is a gamble.

2. Assume now that the car was stolen from the plaintiff's driveway rather than entrusted to a false friend. Does this make any difference in the analysis?

It probably should. We could argue that thieves should never, ever be able to convey good title and that buyers can protect themselves by seeking assurances that sellers have good title to

their property. State car licensing systems are likely to make it possible for a buyer to determine whether the seller really owns the car. On the other hand, clever thieves may forge papers and an innocent buyer may find out that a used car she purchased in good faith was in fact stolen. In that case, we could either protect the original owner and place the burden on the buyer or place the burden on the original owner and protect buyers. The answer may depend on whether owners are in a better position to avoid theft by obtaining theft protection systems for their cars or whether buyers are in a more difficult position when it comes to determining whether a car is or is not owned by the seller.

§ 5 Justifications for Property without Law 181
Erving Goffman: Asylums 181

Asylums is a wonderful piece for getting at what property is good for and what makes us recognize it in others. You can use it to tie students' own experiences with the materials they will study. A longer excerpt with other questions (as well as excerpts from many other useful readings in property) is found in Carol Rose, Robert Ellickson & Bruce Ackerman, *Perspectives on Property Law* (3d ed. 2002).

Note 1. ***Functions of property.*** *Why do total institutions strip inmates of their property? What are some of the most important kinds of property that inmates lose on entering the institution? What does the excerpt reveal about the various functions or roles of property?*

The institutions strip inmates of their property significantly to give them *control*, in Nurse Ratchet-like fashion, over the inmates; more positively, this may also to help separate them from the harmful aspects of the self and create ability to bond with either the group (in the military), with god (in monasteries), and perhaps with reality (in the asylums). In the Abbey's invocation of the concept from the Apostles, "Distribution was made to each according as anyone had need," we even see an extreme concept of distributive justice (as well as the inspiration for Karl Marx?). While the institution gives them various objects to use, these are *possessions,* things that the inmates may have at the moment, but not *property*, things which the community recognizes their right to keep and dispose of freely. Some of the most important kinds of property lost are the identikit they use to present themselves to others, a private place to store and access other objects, and a regular territory to use during the day. They want these to regain some *autonomy* or liberty, by having control over the objects they need during the day and the space within which they use them, to increase utility, by having what they want when they need it, to get a sense of *security* for the same reason, by, for example, knowing that they have food or toilet paper even if the person that dispenses these isn't available, to have something that is truly their own to shape their *identities* around, and by creating a measure of *privacy* from the outside world (even if it is just by putting a blanket over one's head in the middle of the floor).

Note 2. ***"Property" formation.*** *What are the various ways that inmates seek to replace some of the property that they have lost? What makes other inmates and staff members recognize these rights? What characteristics do these rights share with property as you understand it?*

It is fun to go over the various innovative ways to create stashes, but perhaps the most interesting set of facts from a property law perspective is the ways inmates in the asylum create territories for themselves. Because many of these territories are recognized by others, they are like property in that they create relationships in which society recognizes that the individual has a superior right to a resource of value. They are created through some of the basic means for allocating property. A primary method on the "good" wards is *possession*, while a method on the

bad wards is *might makes right*. This is tolerated only on the bad wards for some of the reasons leading to the legal rules justifying priority for prior possessors—allowing late comers to push earlier comers off simply by their willingness or ability to fight disrupts peace and order and undermines security. For territorial rights that continue even after physical possession ends, however, we see other means. *Settled expectations*—such as sitting in the same corner until one forms a soiled dent in the plaster behind one's head—creates territorial rights in one inmate (perhaps partly because the soiled dent lowered the value of the territory). *Distributive justice* also seems to play a role, enabling one elderly inmate to stake a claim on the radiator and another to a comfortable chair in the sun. *Labor* also seems to create some property rights, because private territories are accorded some inmates with hospital jobs.

Note 3. ***Personhood and property.*** *Goffman writes, "If people were selfless . . . there would of course be a logic to having no private storage place." But because "all have some self" they needed to create private stashes. What does this mean? Is that really why people create stashes?*

Goffman suggests that having control and privacy with respect to some objects is important for a sense of self, and the piece powerfully illustrates Radin's idea of the links between personhood and property. But the stashes seem to create a sense of security and serve a utilitarian function that is equally important for the inmates.

Note 4. ***Property formation in your life.*** *Goffman pioneered sociological research through the close study of everyday interactions. What aspects of property formation do you see in your life? Consider your regular seat in your Property classroom. Do you have some kind of property right in it? What would be the sources of your claim?*

One can claim property rights in one's seat because one was the *first possessor* of it; perhaps because one invested one's *labor* in showing up to class early and getting a desirable seat; based on *settled or justified expectations* if one has been sitting in that seat regularly for some time, or even if the *custom or norm* is that one gets a claim to the place where you sat in the first class; and, if one signed a seating chart, both through providing public *notice* of one's claim and through *sovereign allocation*, by enlisting the authority of the sovereign (we wish!) professor. Recognizing continuing rights to a seat leads to *efficiency*, because students don't have to figure out their seats for each class and professors can more easily remember student names and know where to find students when they want to call on them; it may also permit students to mix their identity with their seats in some sense (studies show, for example, that students do better on exams taken in the same room in which they learned their material—we mix our location with our memories in important ways); as well as *minimize violence and disorder* by preventing conflict over who sits where.

Students really respond to the question of recognizing property rights in their everyday lives, discussing conventions with respect to parking, lounge seats on cruise ships, lines at elevators, and other examples. These examples also often show that decisions by the community to recognize these claims only last as long as the claim is seen to be justified by efficiency and fairness, the resource is not overly valuable, or retribution is feared. One might move someone's towel left overnight on a cruise lounge chair, but might not move objects marking off a parking space laboriously dug out of the snow, at least if one fears that the digger out might surreptitiously damage one's car. (The Boston area is so passionate about snow parking spaces that there is actually an official right to use "space savers" in a shoveled-out parking place for 48 hours after a heavy snowfall, and still conflicts arise. See https://www.boston.com/cars/news-and-reviews/2015/01/22/bostons-space-saving-tradition-explained/).

3. What Can Be Owned?.....187

Themes

This chapter explores the limits of ownership. Specifically, what limitations do other moral considerations – such as human dignity or autonomy or freedom of speech – impose on the appropriate domain of property discourse? The chapter starts with ownership of human beings and body parts. In line with the rest of the book, the approach is not mainly historical; rather, the goal is to address the current significance of the fact that some persons were deemed to be objects of property rights rather than the bearers of property rights. It starts with a cross-reference to *The Antelope,* a case that tests the limits of Chief Justice Marshall's pragmatic approach to judging (echoing his approach in *Johnson v. M'Intosh*), in which he seems to preference settled practices over even fundamental moral principles when following those principles would seem too disruptive.

After slavery, the materials go on to explore some of the current manifestations of the practice of conceptualizing human beings as property. The idea of exchanging human beings and body parts either by gift or on the market is not an idea that is wholly in the past. Modern examples include children (surrogate mother contracts), frozen embryos, and organs for transplantation. A purpose of this chapter is to ask students to reflect on how the imagery of property is used (or misused) to analyze disputes in these areas.

The topics in this chapter also provide an opportunity to focus on the problem of commodification, *i.e.*, the conceptualization of all human interests as exchangeable "property rights." Several issues are salient. First, while it is not true that all types of property are exchangeable, most types are, and, at any rate, there is likely to be a presumption that a property interest is exchangeable. If an interest is exchangeable, then someone other than the original owner can control the resource. If conceptualizing something as "property" suggests that the item is exchangeable, it further suggests that some people or body parts can be "owned" and therefore controlled by someone else. The prime historical example is of course slavery. The continuing commodification of human beings in more limited contexts invites reflection about the role that the institution of slavery played in the development of conceptions of both property and liberty in United States jurisprudence.

After those materials, the chapter turns to intellectual property. Students are more and more interested in IP, and it can be a wonderful way to get them engaged in the subject of property more generally. The topic also has built-in features that are wonderful from a teaching perspective. First, most of the property rights in this section are based on federal statutes, especially copyright and patent. Trademarks have their origin in state common law (and are based on it) but receive added protection from federal legislation. So this area is a great one for teaching statutory interpretation, such as what constitutes a copyrightable "original work of authorship" and what is a "fair use" of copyrighted material.

Second, intellectual property raises the question of how to define what the property right actually is. It is easy to conceptualize control over a plot of land that has clear borders. But the borders of a copyright or a patent or a trademark are never precisely clear.

Third, all intellectual property must be limited to protect very strong competing interests, including interests in (and rights to) freedom of speech and economic competition. While it may be easy to focus on conflicts between owners and the state in the context of real property disputes about land use regulation, it is hard to avoid seeing that intellectual property rights that are too robust will create monopolies that deprive others of the ability to engage in creative and business activity.

Fourth, like the real property estates system, we try to make intellectual property more comprehensible by dividing it into a number of forms (trademark, copyright, patent, etc.) with somewhat different governing rules applicable to the different contexts.

§1 Property Rights In Human Beings 187
§1.1 Slavery 188
§1.2 Children 188
***In the Matter of Baby M* (1988) 188**

The case is included here to encourage students to think about a modern context in which human beings are arguably treated as commodities that can be exchanged in the market. In addition, it suggests an analysis of the difference between market exchanges (surrogacy for money) from personal, non-monetized relations (bearing a child for a family member out of love).

Note 1. *Should surrogacy arrangements be enforced? If so, by specific performance or by damages? If they should not be enforced, should they be void or voidable? Does the increasing acceptance of same-sex marriage have any bearing on the debate over surrogacy?*

Two separate issues are crucial for class discussion—rights and remedies. The rights question is whether surrogacy contracts should be enforced at all. The remedies questions are: If they should be enforced, how should they be enforced; i.e., what is the remedy? If not, what is the punishment? The decision whether or not to enforce these contracts is too general a question; just as nuisance claims can be rejected entirely or vindicated by damages, injunctions, and purchased injunctions, a surrogacy contract could be rejected either by punishment or non-interference and could be enforced by damages or specific performance. For example, if surrogacy contracts are illegal, they could be regulated either by (1) simply refusing to enforce them *(non-interference)* or (2) by criminalizing them through *punishing* individuals who enter into such agreements. The New Jersey court both holds that surrogacy is not baby-selling (thus the parties are not subject to punitive criminal penalties) and that the contract is unenforceable (thus allowing the parties the privilege of entering these agreements but denying them the power to seek the aid of the state to enforce them, i.e., non-interference). In contrast, if surrogacy contracts were enforced, they could be enforced *only* by an award of damages but not specific performance. The doctrinal argument for specific performance is that babies, like land and paintings, are unique and damages are inadequate. The argument against specific performance is that it requires too great a sacrifice of the birth mother.

The argument in favor of enforcing surrogacy agreements is that they are a legitimate way of helping some people to bear children and some women are willing to participate in the arrangement, partly for personal reasons and partly for remuneration. Refusing to enforce the agreement is paternalistic because it presumes that women who enter such agreements are not capable of determining their own interests. The refusal to enforce these contracts thus constitutes a form of sex discrimination, imposing a contract disability on women that does not apply to men.

The counterargument is that enforcement of the agreement may have the unconscionable effect of forcing a woman to give up her child. One might argue that her assent was not entirely voluntary; she agreed under a misapprehension of how she would feel after the nine months of pregnancy and should be protected from a mistake she is likely to regret. This is not paternalistic; rather, it promotes the will of the parties by allowing her to change her mind on an issue about which she should be entitled to change her mind. Patricia Williams talks about the contract as "enslaving" Mary Beth Whitehead. It therefore is reminiscent of the paradox of liberty which may require refusing to enforce an agreement by which one "voluntarily" agrees to be a slave.

The question about same sex marriage is meant to trigger a discussion about the connection between surrogacy and the reproductive rights of same-sex couples, who must necessarily rely on alternative reproductive techniques such as artificial insemination and (particularly in the case of same-sex male couples) surrogacy.

Note 3. *Should it make a difference for the law's treatment of these arrangements whether the surrogate is also the donor of the ovum used to create the embryo or whether the contract involves so-called gestational surrogacy?* This note introduces the concept of "gestational surrogacy," which is by far the most common form the arrangement presently takes. The question at the end of the note asks whether the lack of a genetic relationship between the surrogate and the infant she is carrying changes the nature of the surrogacy arrangement in ways that the law should recognize.

§1.3 Frozen Embryos 198

Note on whether pre-embryos are persons or property? *If this is correct, could Mary Sue Davis be vulnerable to a charge of child neglect or reckless abandonment if she chose* not *to implant the fertilized embryos?*

This question is intended to raise a crucial ambiguity in the idea that life begins at conception. Many persons would not want a rule of law that required Ms. Davis to implant all the embryos; yet, if they constitute human lives, she is neglecting or even killing them if she fails to do so. Perhaps an argument would be made for making them available to other women for implantation, but if no such women are found, we are faced with the same problem. Someone who took a consistent pro-life position may conclude that in vitro fertilization should be avoided altogether to prevent the destruction of human life. At the same time, this reduces the number of children that will be born and if the goal is to protect and preserve life, there may be a feeling of inconsistency in limiting the capacity of parents to bring children into this world by any available means. Throughout this section, the questions lurking in the background are: What is at stake in classifying pre-embryos as "property" or as something else? Does the use of the language of property (or the failure to use it) foreclose any policy conclusions that might otherwise be available?

§1.4 Body Parts.....203
A. Are Body Parts Property? 203
***Moore v. Regents of the University of California* (1990).....203**

Moore is a wonderful one to teach because (a) the majority and concurring opinions contain some glaring analytical errors and confusions and (b) the case raises the question about the limits of property rights, including the issue of whether and to what extent it is appropriate to recognize property rights in human body parts.

The analytical confusions and errors in the opinions arguably include the following:

First, Justice Panelli argues that human cells are useful for research and thus should be free or common property of all researchers. This argument is the *opposite* of the argument made in *INS v. AP,* in which the court argued that a property right should be recognized in the news precisely because it was so useful. If cells are so useful and if the products of the biotechnology industry are so profitable, won't there be a market for human cells? Thus the *Moore* case, in contradistinction with *INS v. AP,* highlights competing arguments about the effect and utility of private property rights. Justice Panelli appears to accept Brandeis's argument that human cells are like human knowledge; they should be free to be exploited by anyone and are therefore the common property of humankind. Recognizing property rights would have the effect of stifling free and useful

economic activity because it limits the freedom of non-owners to act in ways that infringe on or appropriate the advantages of the resource without first entering into a transaction to get the permission of the owner.

This argument is met by two standard counter-arguments in favor of recognizing property rights. First, the failure to recognize such rights will mean that individuals will not have sufficient incentives to act to create value because they will not be able to appropriate for themselves the rewards of their labor. In the context of the *Moore* case, this counterargument does not work well because Moore did not labor to create the value in his spleen cells. However, a second counter-argument rests on the notion that it is crucial to allocate property rights in resources to someone, in order to facilitate market exchanges. The most appropriate owner is the first possessor; thus people are the owners of their own bodies. By failing to create a property right in his own cells, the court did not give his doctors a license to invade Moore's body against his will to take out his spleen. Moreover, the holding of the court arguably has the effect of creating property rights in human cells anyway. This is because the court recognizes that property rights can be created in cell lines. In addition, the court rules that doctors have a duty to inform patients that their cells may be used in research; the result of the court's informed consent requirement is that patients are likely to refuse to grant consent in the absence of compensation. Thus, the duty to disclose will have the effect of creating a market in human cells with doctors purchasing the right to use their patients' cells. Similarly, Justice Arabian's concurring opinion argues that it would be undignified to enforce a right to sell one's body parts. However, he acknowledges that property rights can be established in human cell lines because such rights are useful incentives to production and distribution of medically useful products. The duty to disclose will have the effect of creating such a market anyway.

Second, Justice Panelli suggests that body parts cannot be subject to property rights because they are not unique. "Lymphokines, unlike a name or a face, have the same molecular structure in every human being…" However, it is not at all clear that Moore's spleen was not unique; it appears that it was so valuable was because it overproduced a particular substance that was useful to research; if this is so, it was useful precisely because of its uniqueness. In any case, even if his spleen were identical to everyone else's, this does not negate the possibility of a property interest. Dollar bills are not unique either, but this is not a reason to deny property rights in them.

Third, Justice Panelli suggests that body parts cannot be subject to property rights because their transmission and disposition are so heavily regulated. This argument makes no sense. The disposition of many resources is heavily regulated, including radioactive nuclear material, chemicals, animals, human bodies, etc., and the fact that their use and disposition are regulated to protect the public does not deprive them of the ability to function as property rights in other ways.

Note 1. *Suppose that before Moore's operation Golde had informed Moore of his intent to use Moore's cells to create a cell line. Would the case have come out the same way? If Golde and Moore had signed a contract in which Golde agreed to pay Moore a percentage of the earnings from the cell line, would such a contract be enforceable under the majority's analysis in* Moore*? If Golde did not commit the tort of conversion (an unprivileged appropriation of Moore's property), is Moore free to treat his body parts or cells as property that he can sell for the use of another?*

These questions are intended to induce students to think of what would have happened if the duty to disclose (which the court adopts) had been complied with. One possible result is that Moore might have refused to grant permission to use his spleen unless he were compensated. The result would be a market exchange of property rights in the spleen—exactly the result the court finds repugnant or a great disincentive to research and development. However, if Moore did not understand (and the doctor did not inform him) of the huge potential profits, he might have agreed to allow his cells to be used for free. Thus, one question that must be raised is whether the doctor

has a duty to inform Moore, not only of the intended use, but of the potential profitability of such research.

An additional problem concerns what the court should do if an agreement is made that gives Moore a nominal payment (several hundred dollars) for the use of his cells, and they turn out to be enormously profitable. Does Moore have a right to some larger payment or even a percentage share of the profits or is he limited to the compensation he has already received? There may be a perception of exploitation and unconscionability involved in making billions of dollars off of Moore's cells while he gets $300. Should he be granted a vested property right to handle this perception of unfairness? On the other hand, it might be argued that there is no unfairness at all; the bulk of the value comes from the work of the scientists who deserve the reward. Moore got what he was entitled to out of the transaction.

Note 2. *Should surviving family members be entitled to a share of any profits earned from Lacks's cell lines?*

The Lacks example raises questions very similar to the *Moore* case. It might be interesting to discuss with students whether the Lacks case offers additional support for the majority's fears in *Moore* that recognizing property in the cell lines would open a can of remedial worms.

Note 3. *Suppose these events had occurred in California. Would the California Supreme Court reach the same result as the Sixth Circuit?*

The answer is not clear. The question is intended to point out that something may be recognized as property for some purposes but not for others. The issue in *Brotherton* was whether the plaintiff in that case had a right to compensation when her brother's body parts were taken without her agreement; the legal question was whether human bodies constitute "property" under the due process clause. As we discuss in Chapter 13, the Supreme Court has traditionally employed a broader conception of "property" in the due process context than it has in the context of takings claims. Thus, it is perfectly possible to classify body parts as property for this purpose while denying them property status for the purpose of being bought and sold by patients and doctors. Because the legal issue is so different, the answer may also be different. The definition of property may not be the same for all legal purposes. It is possible the California Supreme Court would agree with the result in *Brotherton* and distinguish that case from *Moore.* The two cases cited in the note, *Perryman v. County of Los Angeles* (Cal. App. 2007) and *Newman v. Sathyavaglswaran* (9th Cir. 2002), illustrate this uncertainty about the reach of *Moore*.

The issue in *Brotherton* also raises the question of whether it is appropriate to conceptualize the right to control one's own body or the bodies of deceased relatives as property rights. It might have been possible to focus on the constitutional protection against deprivations of "liberty" rather than "property" to justify granting a remedy to the plaintiff in *Brotherton.* The interest in controlling the body of a deceased relative many characterized as a privacy interest rather than a property interest, and this characterization might be preferable.

Problem. *A man who is sick with cancer deposits his sperm in a sperm bank for the purpose of impregnating his fiancée through in vitro fertilization. He dies before they are married and before the procedure can be completed, having left a will bequeathing all his "personal property" to his two adult children. The children claim the sperm are their property and want them to be destroyed while the fiancée wants to try to have a child using the sperm. What should the court do? Cf.* Hecht v. Superior Court, *16 Cal. App. 4th 836, 846-51 (Ct. App. 1993) (acknowledging that a sperm donor had "an interest, in the nature of ownership" in the sperm, such that the probate court had jurisdiction, but holding that the donor's* intent *— and not state*

property law — should govern the question whether the surviving fiancée should gain control of the sperm).

This case raises the question of how to define what "property" is. Unless one believes in Platonic forms, this question is impossible to answer. The question is whether sperm can be treated as "property" for the purpose of determining who controls it after the donor's death. This question is better answered by addressing the competing interests of the children and the fiancée and their respective expectations based on their relationships, including the will and the agreement entered into between the decedent and the *fiancée* and between both of them and the fertility clinic.

If *Moore* is taught in the context of this chapter, rather than in Chapter 3, the emphasis is likely to be on the dispute among the judges about whether it infringes human dignity to recognize a property interest in body parts, as Justice Arabian claims, or whether to there is no choice but to recognize such a property interest, and the question simply is who will control and benefit from that property right, as Justice Mosk claims. Is there a way to adjudicate the case without using property concepts? What other concepts might be used?

On one hand, it may be naive to think that property concepts are irrelevant here. Whatever one thinks about the propriety of using property concepts, the question will still remain: Who has the right to control human bodies and body parts? If human bodies and body parts are physical objects, then the question of control of those objects is what property is all about. On the other hand, the use of property language may be both dehumanizing and unnecessary. It may be possible to talk in terms of decision making power over medical procedures, rather than ownership of body parts or genetic codes. It is important to note that the failure to use property concepts does not mean that Moore would lose the case; indeed, under the majority's reasoning, the doctor's failure to inform Moore of the intended use of his spleen violated the doctor's disclosure obligations; the *remedy* for this failure to disclose might very well be a share in the profits of the body parts exploited by the doctors.

B. Markets in Body Parts.....212
***Flynn v. Holder* (2012).....212**

This case involves a constitutional challenge to the National Organ Transplant Act, which prohibits acquisition of human organs for use in transplantation in exchange for valuable consideration. The statute defines organs as including kidney, liver, heart, lung, pancreas, bone marrow, eye, bone and skin but as excluding (by omission) blood and semen. The case focuses on the inclusion of bone marrow on that list. Bone marrow is a fatty material in the central cavities of large bones. Within the bone marrow are stem cells that the body uses to generate all the various types of blood cells, including the white blood cells of the immune system. As the court notes, there are two techniques for obtaining bone marrow donations. The first (and oldest) is known as "aspiration" and involves the use of long, thick needles that literally suck the marrow out of donor's hip bones. The second, and newer method, called "apheresis," captures stem cells that leave the bone marrow and circulate in the blood stream.

Plaintiffs' principal argument is that the statute violates equal protection because bone marrow is different from the other organs on the list in that (unlike, say, a kidney or cornea) it regenerates after donation, leaving the donor no worse off than she was before. Styling this claim as an equal protection claim is a little confusing, because that provision is usually used to evaluate categorizations of persons, not organs. The equal protection violation of which the plaintiffs complain must be the violation that would result if plaintiffs were to be prosecuted for trying to procure bone marrow transplants in exchange for payment. The claim would probably more naturally be styled as a due process challenge to the rationality of the distinction Congress drew in the statute between tissues that can and cannot be sold for transplantation.

The court applies a rational basis standard of review, but, strangely, it does not apply that analysis to the distinction Congress drew among types of organs – the distinction between those that may or may not be sold. Instead, the court focuses on a different question: whether it was rational for Congress to prohibit organ sales even where the organ in question regenerates. In the course of making this argument, the court summarizes several of the most prominent arguments frequently made against organ sales. It concludes that Congress did have a rational basis for writing the law as it is, although it never really offers a reason that is responsive to the question the plaintiffs raise. Its arguments about commodification would seem to apply just as strongly (or weakly) to organs that Congress failed to include on the list.

The court does not stop its analysis there, however. It goes on to argue that the statute – as written – simply does not prohibit the sale of "bone marrow" (more properly, stem cells) collected using the apheresis technique. Since that technique is little more than a blood donation in which stem cells are filtered from the blood, it concludes that it does not involve the collection of "bone marrow" as that term is used within the statute. The court's analysis provides an opportunity for a very interesting class discussion on statutory interpretation.

Note 1. *Who do you think has the stronger argument concerning organ sales? How are the considerations the same as those at issue with surrogacy and pre-embryos? How are they different?*

Postrel's arguments raise a variety of objections to the prohibition on kidney sales. The ease with which the wealthy can circumvent the restrictions on organ sales undermines the effectiveness of those prohibitions. On the other hand, the sorts of egalitarian concerns she raises are in tension with the use of markets to allocate organs for transplantation, since the wealthy will be better positioned to participate in that market. Her argument depends on the notion that the poor will be no worse off in a world where organ sales are universally permissible than they are in the current state of affairs. And that argument turns implicitly on the contention that permitting markets will not displace free donations – merely add a paid layer on top of it. This is different from the claim that permitting organ sales will increase the overall number of available organs for transplant. That latter point could be true while still shifting the overall availability of organs away from those who cannot afford to pay for them. The empirical basis for the claim that no (or little) substitution will occur is highly contentious, as note 2 makes clear.

Note 2. *Does this argument about crowding out relate to the distinction between blood and organs? If Titmuss was wrong, might there still be reasons to oppose the sale of organs?*

The argument about crowding out does not seem to have much bearing on the distinction among the types of organs drawn by the National Organ Transplant Act. If crowding out does not occur, there may still be dignitary and distributive reasons to oppose payment for organ donations. Those arguments are not strictly consequentialist.

Note 3. *Do you see why the express exemption for paired donations was necessary?*

The express exemption for paired (or daisy chain) donations was necessary because receipt of an organ for one's preferred recipient would seem to be "valuable consideration" and hence prohibited by the strict language of the National Organ Transplant Act.

§ 2 Property and Personal Identity: Publicity Rights 220
***Martin Luther King, Jr. Center for Social Change v. American Heritage Products* (1982) 224**
***Rosa and Raymond Parks Institute for Self-Development v. Target Corp.* (2016) 227**

Note 1. *Can you reconcile the disparate results in the* Martin Luther King *and* Rosa Parks cases? *How might you harmonize the Georgia Supreme Court's treatment of the busts as not protected speech with the outcome in the ETW Corp. case? Should it make a difference if someone is simply trying to make money from a person's image — for example, using her to sell a product — or using her image to express an idea or point of view?*

Many of the issues associated with publicity rights are analogous to the issues that arose in *INS v. AP*, which we discussed in Chapter 2, and that came up in *Moore*. What acts are sufficient to create vested property rights that legitimately limit the freedom of action of others and require them to get the consent of the owner of a valuable resource in information before using it? A special issue that arises in this context is the role of free speech rights as a limit on property rights. Publicity rights claims may protect the commercial value of a person's labor in engaging in actions that made her a celebrity; however, it may illegitimately interfere with the rights of others to use cultural images in their own free expression. In addition, limiting the ability of individuals to use the identities of others for their own commercial advantage prevents misleading the public by inducing the belief that a celebrity endorses a particular product when this is not true. In this way, publicity rights not only protect the ability of the celebrity to market the celebrity's identity and to obtain the full benefits of this market, but it arguably both protects the celebrity from embarrassing associations with products the celebrity does not endorse and protects the public from false and misleading advertising.

In discussing personhood justifications for publicity rights, you might steer the discussion towards the rights of noncelebrities. Recent attention to so-called "revenge porn" sites can be usefully discussed in terms of publicity rights violations. Even if someone voluntarily submitted to having a sexually explicit photograph taken and even if they do not own the copyright to the photograph, the publication of the explicit photograph on a revenge porn site could still be separately analyzed in publicity rights terms. In fact, this hypothetical can help students to see the difference between the claim of copyright infringement and publicity rights. It can also show the value of publicity rights to people who have no interest in profiting from their likeness. Plaintiffs recently filed a lawsuit in California against a company called justmugshots.com, which posts police mugshots (and names of the accused) online and does not take them down unless the individual either (1) pays $199 or (2) proves that charges were dropped or that they were acquitted. One of the arguments plaintiffs make in the lawsuit is that the site violates their right to publicity under California law.

Note 2. *If you were representing Samsung, how would you distinguish your ad from the Ford ad in the* Midler *case*?

The strongest argument would seem to be that mimicry is intended to mislead the viewer (or listener) into thinking that the actual celebrity is involved in the endorsement whereas the Samsung ad merely reminds the viewer of the celebrity without any risk of deception. No reasonable viewer would think the robot in the ad was actually Vanna White whereas reasonable listeners might think Midler was actually singing in the Ford ad. The question then becomes whether this makes any difference to the reasons behind protection of a celebrity's name and likeness.

Problem 1. *Suppose a suit is brought in state court in a state where the beer is sold seeking an injunction against the use of Crazy Horse's name in connection with the sale of liquor. Assume that the state in which suit is brought recognizes publicity rights, but does not allow them to be inherited, at least where the individual did not take advantage of commercial use of the name during his lifetime. Plaintiff claims that publicity rights are a form of personal property and that the domicile of a person at the time of death ordinarily applies to determine who inherits such*

property at death. Because Crazy Horse was domiciled on the Rosebud Sioux Reservation at his death, Rosebud law should apply to govern the case. Defendant beer company argues that such cases concern the regulation of business enterprises and the law of the place where goods are sold should control the case. Which law should apply?

The company would argue that it has a right to do business in other states under the laws of those states. If the place where one sells the beer refuses to recognize a property right in the name of Crazy Horse, then it would constitute illegitimate extraterritorial regulation for the tribe to extend its law to limit what the company can do there. Plaintiff would argue that control of a name is a question of personal property and ownership of personal property is normally governed by the situs of the property. Intangible interests are generally governed by the law of the domicile of the owner. In particular, succession to personal property on death is normally governed by the law of the decedent's domicile at the time of death, that is, the Rosebud Sioux Reservation. It would constitute a taking of property rights for another state to refuse to recognize a property interest validly created at a person's domicile.

Problem 2. *Assume now that the court has decided to apply its own law (the law of the place of sale) and is asked by plaintiff to allow publicity rights to be inherited whether or not they were exploited during life, citing* Martin Luther King, Jr. *Defendant argues that publicity rights should not be inherited. Alternatively, if they are inherited, they should lapse at some point after death – certainly after 100 years have passed. How should this issue be resolved?*

Problem 3. *Defendant now argues that it has a first amendment free speech right to use the name of a deceased public figure to sell its product. Argue both sides of this legal issue. How should it be resolved?*

Plaintiff argues that it is up to the domicile (Rosebud Sioux Tribe) to determine whether and to what extent (how long) personal rights persist after a person dies. There is no reason to set an arbitrary deadline for exercising such rights. While it is true that ownership of such rights infringes on first amendment interests, that is true of all intellectual property rights. The interest in using the name is less important in the context of commercial property; the sale of goods can be regulated to protect consumers and this sphere is less central to the first amendment's core speech areas, including religion and political speech.

Defendant would argue that, at some point, exclusive control over a name should pass into the public sphere. Both the copyright and patent clauses of the constitution suggest a time limit for recognition of those rights, in order to balance interests in free speech against interests in promoting the "useful arts." One hundred years is enough to tip the balance in the other direction.

§3 Property and Community Identity: Cultural Property 235
§3.1 Native American Cultural Property 235
***Wana the Bear v. Community Construction, Inc.* (1982) 235**

Although we have placed it with cultural property, *Wana the Bear* may also be usefully taught with *Charrier v. Bell,* in Chapter 2, which compares the interests of the tribe, the landowner, and the finder in sacred burial objects. The court's failure in *Wana the Bear* to limit the landowner's rights to protect the interest in human dignity associated with respect for the dead is intended to be understood in light of the excerpt from Tony Hillerman's novel. That excerpt, in turn, is intended to evoke an emotional response in those who did not fully identify with the American Indian victims of the historical treatment of American Indian human remains as objects for study rather than as human remains which are to be treated as the ancestors and descendants would want.

Note 5. *As between the Museum and American Indian nations, who has a stronger claim to the unidentified human remains held by the Smithsonian?*

The museum's claim is based on find or purchase. The tribe's claim is based on prior possession, the lack of abandonment, and the importance of human equality and dignity. As the Hillerman excerpt attempts to demonstrate, United States museums have treated American Indian human remains in ways they would never treat non-Indian remains.

Problem 1. *(a) Is this study "specific," as required by §3005 (b)? (b) Is it "of major benefit to the United States," as required by §3005 (b)? Is there any other information you would need to know to answer this question?*

On one hand, it could be argued that more information is probably needed to determine the reasons for the study and the benefits it may reap. On the other hand, it could be argued that the purpose of the statute is to end the discriminatory practice of exploiting American Indian human remains for scientific purposes while not exploiting non-Indian remains for similar purposes. One way to approach the question of whether the museum should be allowed to continue the study is to ask Tony Hillerman's question: Would a museum be morally entitled to dig up the graves of non-Indians to carry out the study in question? If it would not, there is no warrant for less protection for American Indians.

Problem 2. *Does NAGPRA answer the question of who owns the items Taylor took? Does state property law? What is the relevance, if any, of the law of Native Hawaiians who claim an affiliation with the items?*

Without a federal hook, it is not clear that NAGPRA applies. The artifacts were not found on federal or tribal land. And we are not told whether the museums are subject to NAGPRA. State property law would therefore seem to govern the question whether Taylor has attempted to exert control over the "property of another" and therefore, by extension, the question whether Taylor's actions amount to "theft" as defined by the criminal statute. Applying the common law doctrine of abandonment and finders, Taylor might argue that the items left in the cave were abandoned and therefore not the "property of another." The state might argue that because the artifacts were obviously placed with care on state land, they were not abandoned and were arguably the property of the state itself. (In fact, Hawaii has a statute to the effect that historical artifacts on state land belong to the state. We omitted the statute from the problem to avoid making the facts too one-sided and to help spur discussion of the property question.) The question of the relevance of Native Hawaiian property law raises an issue that – to a certain extent – parallels the question in *Schultz* about the relevance of Egyptian law. It might be interesting to explore the question why, if Egyptian law was relevant to determining the status of the property in *Schultz*, Native Hawaiian law might nonetheless not be relevant in this case.

Problem 3. *Did the court interpret the statute correctly? Did it do the right thing?*

The question is whether the term "Indian" was intended by Congress to have a racial component and if so, whether the identification of Kennewick man as Caucasian makes him a non-Indian. It is certainly possible that that Kennewick man was a member of the tribe who intermarried with others in the tribe. It is also possible he lived among the local tribes even if he was not genetically related to them and thus counts as among their number. The ultimate question is whether Congress intended such remains to be under Indian jurisdiction and/or ownership. Because the statute is ambiguous, the courts must define what constitutes the relevant group of protected human remains. If the goal of the law was to protect the religious sensibilities of the tribes, then it would

seem to violate the statute to turn over the remains to scientists on the basis of criteria for membership that are not accepted by the tribes themselves.

It is also important to know that tribes never had rigid criteria for membership in the nineteenth or eighteenth centuries. It was the federal government in the nineteenth century that forced a racial definition of tribal membership on the tribes in keeping with the obsession of the United States for distinguishing the races.

Problem 4. *(a) What arguments could you make in favor of the legislation? (b) What arguments could you make against it? (c) What is the right thing to do?*

This problem arguably pits strong religious interests against current property interests. At the same time, as *Charrier v. Bell* demonstrates, the tribe may retain a property interest in the human remains even though it does not have title to the land. If this is so, the question is: What is the content of the easement owned by the tribe? Does it have a right to keep the bodies where they are and prevent surface development or does it merely have a right to move the bodies to another location and to control that process? For an extended analysis of laws relevant to the question, see H. Marcus Price III, Disputing the Dead: U.S. Law on Aboriginal Remains and Grave Goods (1991).

One way to shape class discussion about this question is to consider a hypothetical situation in which a developer wishes to purchase a cemetery plot, move all the bodies, and build a shopping center. This does happen but it may be emotionally painful to the families of those buried there. One difference in the context of American Indian spiritual beliefs is that some tribes consider the land itself sacred and the burial place is not simply the place where the body lies but is the "home" of the body; moving the body may have the effect of disturbing the spirits of the dead and interrupting their journey to their ultimate destination. How should these religious beliefs be weighed against the interests of property owners in development of their land? Should all burial sites be protected against development in the absence of consent by the representatives of all persons buried there? How would one identify all representatives—would it include all family members? All friends? Could such assent ever be achieved? If it could not, what do we make of this?

§3.2 The International Dimensions of Cultural Property 241

***Republic of Turkey v. Christie's Inc.* (2019).....241**

The case involves a lawsuit by the Republic of Turkey against the auction house, Christie's, seeking the return of an artifact removed from Turkey in violation of a Turkish law regulating the ownership of antiquities. After resolving the question of the statute of limitations under New York law (which will also be relevant in the discussion of the *O'Keefe* case in Chapter 4), the district court applies Turkish law and denies the defendants' motions for summary judgment, concluding that there are genuine issues of material fact regarding the timing and location of the artifact's excavation, which would be determinative of ownership under the applicable Turkish law.

The notes following the case introduce more fully the concept of cultural property and the debate over whether and when the rhetoric and legal tools of property are appropriate for safeguarding communities' interests in protecting their cultural heritage. The excerpts from Carpenter, Katyal and Riley stake out the position that the concept of property provides useful tools for protecting what they call (reframing Peggy Radin's personhood theory) "peoplehood." Pushing back in the other direction, John Henry Merryman offers some reasons for questioning the

normative attractiveness of the kind of cultural nationalism underlying many claims of cultural property. Any or all of the questions in the notes provide ample fodder for classroom discussion.

Note 3. *What interest does the United States have in enforcing Turkish law governing antiquities? … Is that the right law to apply? Or should we evaluate the legality of the Marbles' removal in terms of contemporary international law?*

Property law is often very local. But in a world where property routinely crosses international boundaries, conflicting local laws generate important questions about whose law should govern and whether and when one jurisdiction should recognize (or refuse to recognize) the property law of another jurisdiction. This question provides an opportunity for discussing the factors decision-makers should consider in determining which law should govern. Some possibilities are the deeply held moral commitments of the decision-making jurisdiction (imagine a case involving surrogacy, for example) and the incentives that disregarding the foreign jurisdiction's laws would create for bad-faith actors.

§ 4 Property and Ideas: Intellectual Property 249
§ 4.1 The Concept of Intellectual Property 249
§ 4.2 Theories of Intellectual Property 249

There are many different ways you might present the theories of intellectual property. Obviously, you could just lecture about the different approaches. Or you could engage in Socratic dialogue about the theories directly. Alternatively, and perhaps preferably, you could weave the discussion of the theories into the class discussion of the various cases, perhaps focusing on different theories in different contexts. For example, you might use *Qualitex* to talk about utilitarian theory, pivoting off problem 2 to introduce the material on the uses of piracy in driving the fashion cycle. You could use *CraftSmith* or *Myriad* to talk about Lockean approaches. And, of course, the material on publicity rights provides a useful scaffold for talking about personhood theory.

In response to the question on page 173, government provisions might take the form of grants or prizes for useful ideas. Of course, these government funded options raise the question of how to allocate grant and prize money. The benefit of intellectual property is its decentralized quality. But some mixed approach is likely the best. We do in fact see government subsidies for basic research where intellectual property may not be as effective an incentive.

§ 4.3 Unfair Competition and Misappropriation.....255

§4.4 Trademark Law 255
***Qualitex Co. v. Jacobson Products Co*. (1995) 256**

Qualitex is a fun case to teach. Once you get the facts and holding out, a great approach is to probe the ambiguity that remains. For example, in later cases, some lower courts misinterpreted the *Qualitex* court's definition of functionality as requiring a showing of some competitive disadvantage in order for a product feature to count as functional (and therefore not protected by trademark). In other words, even if the claimed feature affected cost or quality of the item, the feature would not be functional (on this reading) if there were plenty of alternatives that worked just as well. *See, e.g.*, *Market Displays, Inc. v. TrafFix Devices, Inc*., 200 F.3d 929 (6th Cir. 1999). The Supreme Court reversed, holding that the functionality doctrine is very broad and encompasses any feature that is essential to the use or purpose of the article or affects its cost or quality, even if there is no showing of competitive disadvantage. *See TrafFix Devices, Inc. v. Market Displays,*

Inc., 532 U.S. 23, 32-33 (2001). Problem 2 – which concerns the potentially distinctive role of color in the fashion context – also provides a nice basis for classroom discussion.

Note 4. The questions at the end of the first paragraph are just intended to spark discussion about what exactly is the nature of the problem, if any, with cybersquatting. In the land context, people free ride on the positive externalities of neighboring land uses all the time, without Congress getting involved. In the cybersquatting context, the problem seems somewhat worse for the brand owner, since only one person can have the domain name. Whatever the merits (or demerits) of cybersquatting, consumer protection does not seem to have been the principal concern. Rather, Congress no doubt got involved because owners of famous marks are a small and well-resourced group capable of throwing their weight around in the legislative process.

Note 5. *Do these examples demonstrate that 15 U.S.C. §1052(a)'s prohibition of offensive trademarks is not necessary?*

Commercial speech is subject to greater regulation than political or other forms of speech. Laws can be passed prohibiting deception of consumers to enforce antitrust laws and antidiscrimination laws. To the extent that the prohibition against offensive marks can be viewed as either a consumer protection measure (protecting consumers from being "scandalized" while shopping) or as an antidiscrimination law (ensuring equal access to public accommodations without regard to insults directed at a protected group, the restraints on speech should be allowed. The copyright and patent clauses themselves represent limitations to the first amendment, as does the fifth amendment's implied equal protection requirement. Equal protection arguably justifies prohibiting a restaurant from putting up a "whites only" sign and use of an offensive name for American Indians is equivalent and thus is not protected by the first amendment.

The counterargument is that trademarks, unlike copyright or patent, are not mentioned in the Constitution and thus deserve greater first amendment protection. Any prohibition on the use of the Redskins name is a content-based restriction on speech that is inherently suspect under first amendment analysis. Commercial speech may be more highly regulated than political speech but it is not devoid of constitutional protection. If many people view the name as non-offensive, it arguably violates the free speech rights of the owner to prevent it from using a name to protect the sensitivities of a minority group.

§4.5 Copyright Law 263
A. Original Works of Authorship 263
B. *Copyright Act of 1976* 263
C. "Original Works" 265
***Craft Smith LLC v. EC Design LLC* (2020) 265**
D. Fair Use 276
***Dr. Seuss Enterprises, L.P. v. ComicMix LLC* (2020) 276**
E. Moral Rights 288

Note 4. *(a) Fan fiction. When these derivative works are published on a website like fanfiction.net, do they constitute a fair use of the copyrighted work?*

This is a widespread social practice now particularly on the Internet. On one hand, it likely does not affect the market for the underlying work; if anything, it may increase its popularity and marketability. Moreover, fans know the difference between sequels written by the author and those written by fans. On the other hand, there is a significant use of the intellectual property of the author and one of the central rights given authors in the statute is the right to control the publication of

derivate works, of which fan fiction is certainly an example. In practice, it appears that authors who strongly object to fan fiction may seek to stop its publication on the Internet. This issue may be very interesting for students to discuss because they may even be engaged in reading such fan fiction involving characters and fictional worlds that they admire.

(b) Warner Bros. Entertainment, Inc. & J.K. Rowling v. RDR Books, *575 F. Supp. 2d 513, 535 (S.D.N.Y. 2008) holds the Harry Potter Lexicon, an on-line encyclopedia about the Harry Potter books, did not constitute fair use. Did the court decide the case correctly? When is an encyclopedia like the Harry Potter Lexicon a legitimate "fair use"?*

The court rules that the encyclopedia is not a "derivative work" because it is not the same type of work as the original (a piece of fiction). It is not clear that this ruling is correct. The fact that seems to have mattered most was the commercial nature of the plan to sell the encyclopedia when Rowling was planning to sell one herself. But in that case, why isn't the encyclopedia a "derivative work"?

In any event, it is the law that "facts" cannot be copyrighted. Does that include "fictional" facts, i.e., facts about the content of a fictional work like Harry Potter? It may or it may not. The court ruled that the encyclopedia violated J.K. Rowling's copyright because it copied too many of her original words without needing to do so. This may seem valid because the law prohibits comment that is unnecessary for commentary under the fair use regulations; on the other hand, if the quotes are the *evidence* for the comments, it would seem necessary to quote them; nor does it seem that the encyclopedia is a substitute for the original. It seems that the website (which remains as of the end of 2013) dealt with the case by removing most of the quotes and retaining just the encyclopedic recitation of facts about the characters, places, and events in the books. Rowling did not ask for the website to be shut down, just the project to publish a book. It is not clear what would have happened if she had asked for the website as well to be shut down on the ground that it would make it hard for her to sell a Harry Potter encyclopedia and compete with a free, Internet version created by someone else. On the other hand, it is not clear one could prove an effect on Rowling's market since a book by her would be "definitive" in a way that the Lexicon could never be and she might well make lots of money despite the existence of the free Harry Potter Lexicon.

In any event, the case is one of topical interest that should spark great class discussion about the extent and limits of the rights of copyright owners when a phenomenon like Harry Potter is at issue.

Note 5. *If you have a music file on your computer's hard drive, downloading it to your iPhone requires making a new digital file for storage on the device. This is plainly making a copy of the song within the meaning of the Copyright Act. Is such space shifting copyright infringement or protected fair use?*

The industry position on "space shifting" has been something of a moving target. At times, it seems to have conceded that space shifting amounts to a fair use. At other times, it has argued that it tolerates space shifting as a permissive use but reserves the right to block it as infringement. As the *Diamond Multimedia* case suggests, the law seems to be moving towards the position that space shifting among a single user's devices is fair use. It is interesting to discuss whether this conclusion can be made to fit within the four factors set out in the Copyright Act. After all, space shifting does not serve the sorts of purposes of commentary and criticism envisioned by the statute. It typically uses the entire work. And, if consumers would otherwise have to purchase separate content for each of their devices, it might well have a negative impact on the market for the work.

Problem. *In 1994, the artist Samuel Kerson conceived of an idea for two murals depicting Vermont's role in the Underground Railroad, and its efforts to help enslaved*

people seeking freedom in the years prior to the Civil War. The University of Vermont Law School agreed to allow him to paint the murals on its campus, within Chase Hall. Kerson painted the murals directly onto the sheetrock walls of Chase Hall. The murals existed without controversy for several years. They were featured in a book about the Underground Railroad in Vermont. In early 2020, Vermont Law School received several complaints from students, who objected to the caricatured style in which Black people were depicted in the paintings. The law school announced that it planned to paint over the murals. Kerson objected, claiming that this would violate his rights under VARA. The law school then responded that Kerson could either remove the murals at his own expense or the law school would cover the murals with acoustic tiles that would leave the painting intact underneath. Kerson sued in the federal district court, claiming there was no way to remove the murals without damaging or destroying them, and that covering the murals, even in a non-destructive manner, would violate his rights. The law school filed a motion to dismiss his complaint, arguing that nothing in VARA prevents the law school from merely covering the artwork. How should the district court rule?

On the facts as presented in this hypothetical, the artist's claim appears to be weak, although there is a textual argument that covering the work without harming it is "modification" of the work that – in imputing that the work is somehow shameful – is "prejudicial to [the artist's] honor or reputation." The VARA does not on its face guarantee an artist that the work will be accessible to the public. Classroom discussion could be made more interesting by introducing a variation in which the installation of the acoustic tiles does not harm the painting but that the installation cannot be undone without harm to the murals. In the actual case in question, the district court ruled against the artist. *See Kerson v. Vermont Law School, Inc.*, 2021 WL 4142268 (Mar. 10, 2021).

§4.6 Patent Law 290
A. Patentability 291
***Association for Molecular Pathology v. Myriad Genetics, Inc.* (2013) 291**
***Juicy Whip, Inc. v. Orange Bang, Inc.* (1999) 295**

The facts in *Myriad*, while somewhat technical, are not overly complex and the Court does a good job of summarizing the basic biology. The key point for students to understand is that the two genes BRCA1 and BRCA2 play a significant role in women's risk of developing breast and ovarian cancer. Women with particular mutations in the genes are several times more likely to develop those cancers. Through meticulous labor, Myriad was able to discover the precise location, sequence and (most importantly) significance of these genes. Myriad obtained patents covering the two genes – the patents, in effect, covered the DNA sequence for the two genes as a protected "composition of matter." The patents also covered cDNA – an inverse copy of the mRNA that cells use to actually produce proteins encoded in the DNA strand. Unlike DNA, mRNA only includes the active portions of the gene (the so-called exons). As a consequence, cDNA operates like a copy of the DNA code for the genes with the inactive segments (the introns) removed. Unlike either DNA or mRNA, both of which are present within everyone's cells, cDNA never occurs in nature.

Using its knowledge of the BRCA1 and BRCA2 genes, Myriad developed a diagnostic test to help women determine their risk of breast and ovarian cancer. Because of its patents, it was able to block any other entity from selling a competing test to detect the presence of the mutations. Myriad was very aggressive in its pricing, charging $4000 per test. Plaintiffs were patients, advocacy groups, and doctors who sought a declaration that Myriad's patents were invalid. The

Supreme Court held that the patents were invalid insofar as they covered naturally occurring substances, like DNA.

The case presents a very nice vehicle for talking about the scope and requirements of patentability. As the Court points out, not everything that is "[g]roundbreaking, innovative or even brilliant" is protected by patent law. Someone who labors to create such an innovation must still be able to show that it falls within the scope of the Patent Act as interpreted over many years by the courts.

As with copyright, the starting point is the statute, which requires the patent to be a "machine," a method of "manufacture," or a "composition of matter." The Court is careful to note that the patents in this case do not cover "methods." While the genes covered by the "composition of matter" patents are naturally occurring, that would not prevent a company from patenting a particular method for determining whether a mutation is present. The problem is that, once the gene is identified, the methods for detecting the mutation are probably sufficiently well known and (at this point) routine such that they would not qualify for patent protection.

But the core of the case focuses on "an important implicit exception" to the apparent breadth of the patent statute: the prohibition on patenting "[l]aws of nature, natural phenomena, and abstract ideas." This exception is not derived from the language of the patent statute itself. Instead, it comes from judicial decisions interpreting that statute in light of its broad policy goal of "promot[ing] creation." It obviously introduces some serious line-drawing problems. The case provides a good opportunity for talking about statutory interpretation, judicial competence, and the policies behind intellectual property protection, which call for a balancing of the creation of incentives to innovate through the reward of property rights against the preservation of the intellectual infrastructure for future innovation. It also brings into stark relief the human costs at stake in the patent system.

Juicy Whip, Inc. v. Orange Bang, Inc. raises many similar questions, though with more a more lighthearted set of facts. Juicy Whip's patent covers a beverage dispenser that creates the (mis)impression that the beverage being dispensed is coming from a "pre-mix" reservoir bowl that is visible to the customer. Sellers like the bowl, because it stimulates impulse buying, but the bowls have limited capacity and must be cleaned frequently. The patented invention creates (from the seller's point of view) the best of both worlds: the impulse buying with the convenience of the under-the-counter, post-mix dispenser. Juicy Whip sued Orange Bang (and Unique Beverage Dispensers, Inc.) alleging patent infringement. Orange Bang moved for summary judgment on the ground that the patent was invalid because it lacked "utility."

The district court ruled in favor of the defendant, concluding that the invention lacked utility because its sole purpose was to increase sales by deception. The Federal Circuit reversed. It held that the utility inquiry is a very low threshold, requiring only that the invention be able to do something useful. Interestingly, the court does not go into much detail about what it considers utility to entail. Instead, it spends most of the time rejecting the claim that something is not useful merely because it makes a product appear to be something it is not. Many of its examples seem to involve products that provide consumers with some benefit – e.g., cubic zirconium allows someone to wear something that looks like a diamond without spending thousands of dollars; synthetic fabrics provide similar benefits. On the other hand, the Juicy Whip invention provides no such end-user benefit. While there is no law specifically directed against this particular subterfuge, the behavior of the store-owner using the device might in some circumstances fall within a technical definition of fraud. It might be interesting to discuss with students whether, after this case, there is any content to the "utility" requirement apart from the requirement that the invention actually work.

Note 2. *Why should the question whether a substance (or organism) is naturally occurring be decisive for the question of patentability? Does the distinction make sense for a Lockean theory of intellectual property? A utilitarian theory? A Hegelian theory? In addition to naturally occurring substances ("natural phenomena"), abstract principles and laws of nature are also not patentable, even when discovering them requires the investment of substantial resources and effort. Which principles, if any, do these exclusions from patentability all share?*

These questions try to get students to think about the policy behind the exclusion of patents for naturally occurring substances laws of nature. While the exceptions make some sense within the various theories, the justifications for the exclusion differ based on the theory at work. From a utilitarian standpoint, for example, the basic problem solved by patent law is the gap between the cost of developing an invention and the marginal cost of producing a product incorporating the invention. This gap is present, irrespective of whether the invention is a naturally occurring substance or constitutes an abstract (but useful) principle. So the utilitarian case for the exception must rest on the social costs associated with privatizing inventions that are in some sense too useful to other inventors. In contrast, the Lockean argument against granting patents for naturally occurring substances or laws of nature would be framed more in terms of a universal entitlement to the commons that granting the patent might infringe. This could be framed in terms of the Lockean proviso: others are made worse off by fencing in laws of nature, notwithstanding the effort that an inventor put into discovering its operation. On any theory, the lines separating excluded "abstract ideas" and naturally occurring substances from patentable inventions are going to be indistinct. It is worth asking students whether the human subject-matter of the patent in *Myriad* influences their thinking about the case. That is, is there a difference between patenting some bacterial DNA sequence, even if naturally occurring, and patenting the sequence for a human gene?

Note 3. *Are you convinced by the Federal Circuit's reasoning in* Juicy Whip*? If you were the lawyer for Orange Bang, how would you distinguish the examples of cubic zirconium, imitation gold leaf, and synthetic fabrics? Is the sole purpose of those products to fool consumers? Might a consumer, informed of the nature of those products, nonetheless have reasons for wanting to purchase them? Do the products in* Rickard *and* Aristo Hosiery *have more in common with the Juicy Whip machine in being aimed solely at fooling consumers? Is the shift away from Justice Story's moral approach to utility a salutary one? Is it the proper role of the PTO to evaluate whether an invention promotes "sound morals"? Is it a proper role for Congress?*

We discuss the questions about the Federal Circuit's comparisons in the description of the case above. The other questions get more at the policy considerations behind the utility requirement. It would be interesting to discuss with students whether social consensus about morality might once have been strong enough to justify Justice Story's approach.

Note 5. *Why might a business prefer patent protection for information conceivably covered by trade secret? Why might it prefer trade secret law? Can it protect the same information with both?*

Trade secret law requires that the business owner to take reasonable steps to keep the information secret whereas patent law requires public disclosure in exchange for legal protection. So the two bodies of law cannot be used to protect the same information. Businesses that can comply with the requirement of secrecy may be drawn to the lack of time limits for trade secrecy. But secrecy may not be feasible where a business needs to collaborate with outsiders to bring a product to market. And the protections provided by trade secrecy are narrower – protecting owners only against misappropriation. Patent, on the other hand, protects against infringement, even in the absence of misappropriation. In other words, independent invention is a defense against a trade secret claim but not against patent infringement. Where the risk of independent invention (or reverse engineering) is low, trade secrecy is a more attractive option.

B. Patent Remedies 301
***eBay, Inc. v. MercExchange, LLC* (2006) 301**

MercExchange held a business method patent that covered aspects of eBay's business model. After unsuccessfully attempting to license its patent to eBay, it sued for patent infringement and won. The District Court denied MercExchange's motion for a permanent injunction. The Court of Appeals for the Federal Circuit reversed, holding that it is a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." The Supreme Court reversed. It held that the question whether to grant a permanent injunction rests within the discretion of the trial court, which should consider the traditional four-factor analysis: (1) irreparable injury; (2) no adequate remedy at law; (3) balance of hardships; (4) public interest. Appeals courts should review the decision whether to grant an injunction only for abuse of discretion. The case provides an opportunity to talk about several important issues, both within patent law and at the boundary between IP and tangible property law. For instance, Justice Kennedy's concurring opinion introduces the problem of patent trolling and the costs that trolling creates for the patent system.

The case also raises the question of the connection between remedies and underlying substantive rights, an issue that will come to the forefront again in a number of contexts throughout the course. The most salient are the remedial discussions in the law's treatment of innocent encroachers and in the nuisance context, but it is also relevant to the choice between property rules and liability rules in the partition of concurrent ownership interests and in the enforcement of servitudes. Those later discussions can be enriched by introducing the various considerations at work in the discussion of this case.

The *MercExchange* Court, in its majority opinion, sharply distinguishes between rights and remedies. But it is hard to separate the two quite so cleanly. If, as some have argued, property (as a legal institution) is distinguished by its delegation of decision-making power to owners – either through the right to exclude or the exclusive rights to determine use – then there seems to be a tight connection between property and the relatively liberal availability of injunctive relief to enforce owners' prerogatives. Disagreement on this point seems to drive the various separate opinions in the case. Chief Justice Roberts in particular seems intent to emphasize that, even if he agrees that whether to grant a permanent injunction rests within the discretion of the trial court, in most cases the injunction should issue almost as a matter of course.

Note 1. *Is there a connection between the value (to owners) of the right to exclude and the presumptive availability of injunctive relief? Does it matter what kind of property we are considering (e.g., whether it is valuable to its owner primarily because of the income it might generate or whether instead it has some noncommercial value to the owner)? What was Chief Justice Roberts trying to accomplish with his separate opinion?*

The questions are addressed in the discussion of the case above.

4. Adverse Possession 309

Themes

In teaching adverse possession, one approach is to spend a lot of time just letting the students talk about the cases. The focus of the discussion can be on the facts of the cases and the reasons for adverse possession doctrine with criticisms of those reasons. Adverse possession is one of the central doctrines of property law and, for most property teachers, the justifications for the doctrine form a central part of the course. The doctrine is counter-intuitive to many students, who are often shocked when they learn about it. There are several ways to use this surprise in teaching the doctrine.

First, it allows discussion of whether ignorance of the law is an excuse. Should an owner who allows a neighbor to encroach on her property lose her property rights when she did not know about adverse possession law? Is it fair to transfer title—and without compensation in most cases—from the true owner who did nothing wrong simply because she failed to give explicit permission to her neighbor to use the property? On the other hand, maybe the owner did do something wrong by failing to protect her rights. Moreover, there are good reasons for not allowing claims of ignorance of the law to furnish an excuse; everyone can claim ignorance, so allowing the excuse would make the law more uncertain and discourage compliance with legal norms of conduct.

Second, the students' surprise at adverse possession doctrine focuses attention on the conflict between expectations and formal legal rules. Should social custom and generally accepted social norms prevail when they conflict with technical rules of law? You might also press on the precise meaning of what students take to be the relevant social norms. If adverse possession has been going on for 50 years, is the prevailing norm really so clearly in favor of the title owner?

Third, the adverse possession cases highlight the conflict between title and possession as bases for property rights. Most students assume that ownership follows title; these materials show the historical and legal importance of possession.

Finally, adverse possession doctrine places attention on the obligations that accompany property ownership. Ownership confers rights, but it also implies duties, such as the duty to pay property taxes, the duty to comply with local land use regulations, perhaps the duty to shovel the sidewalk, and the duty not to engage in wrongful discrimination when the property is opened to the public or placed on the market. The duty to protect one's property against adverse possession by either bringing a trespass suit or giving the adverse possessor explicit permission to use the property is another obligation that the legal system places on title holders. It is interesting to discuss with students the reasons why the law might impose this obligation: to promote the active use of land? To foster efficiency? Distributive justice?

§1 Title versus Possession 309
§1.1 Border Disputes.....309
***Brown v. Gobble* (1996) 309**

Brown v. Gobble illustrates the typical boundary case. Most twentieth century adverse possession cases concern boundary disputes – like *Brown* – rather than wholesale occupation of a parcel. The case presents an opportunity to discuss a number of issues, some of which are raised in the notes following the case. For example, why would the law employ a "clear and convincing" evidence standard in the adverse possession context? You could frame a discussion around the difference between type 1 and type 2 errors (false positives, and false negatives, respectively) and the reasons why the law here departs from preponderance of the evidence, which is, in principle, neutral between the two types. That is, by adopting a clear and convincing evidence standard for

evaluating a claim of adverse possession, the jurisdiction expresses a tolerance for false negatives – unsuccessful adverse possession claims under circumstances where the underlying facts (if they were knowable) would establish a valid claim of adverse possession.

The case also provides an opportunity to discuss the various approaches to the "state-of-mind" required of adverse possessors (and owners). The court focuses its analysis on these issues, holding that the adverse possessor's state of mind is irrelevant. All that matters is whether or not the use was permissive. As the notes discuss, some states have moved in recent years towards a good-faith requirement. You might talk about the considerations that weigh for and against the four principal options: (1) the objective test; (2) intentional dispossession, which requires knowledge of the adverse possession; (3) the good-faith test; and (4) the claim of right test. The intentional dispossession rule is the one that students find the most perplexing. One way to think about the rule is as favoring certain kinds of adverse possession (intentional occupation of absentee-owned property) over others (accidental adverse possession, which seems likely to involve disputes between neighbors). Might there be situations where this rule makes sense? Perhaps where the local community views concentrated absentee ownership to be undermining the health of the community. Historically, this may have been true in frontier settler communities. Today, it may be true in communities hit hard by foreclosure or in parts of the developing world.

Finally, the case includes a discussion of "tacking," which students often find confusing. The court correctly states that, to successfully "tack" on the possession of the claimant's predecessors, the claimant must be "connected by privity of title or claim." But the court does not define what privity means. It becomes clear from context, however, that privity requires the intent to transfer the claimed property in an uninterrupted chain among those on whose possession the claimant is basing the adverse possession claim. You might ask students to come up with a definition of privity from the court's somewhat opaque discussion of tacking.

Note 11. *If you were the lawyer for a landowner facing a claim of adverse possession, which of these would you advise your client to do?*

Filing an ejectment action and obtaining a judgment against the adverse possessor is the most sure-fire way to stop the clock from running, and to do so without the risk of a physical altercation.

§1.2 Color of Title 321
***Paine v. Sexton* (2015) 322**

Paine v. Sexton provides an interesting case for considering one of the goals of adverse possession – clearing up title where formal title is complex or murky due to long and sometimes conflicting chains of title. One question you might ask your students as you consider the facts of the case is why the case is an adverse possession case at all – that is, whether it is obvious that the adverse possession claimant is not in fact the title owner. The case also introduces the concept of "color of title," which students often confuse with "claim of right" and "claim of title." You might spend some time emphasizing the difference between the concepts. You could also spend some class time on the conceptual puzzle presented in note 3 after the case. If the key to adverse possession (and prescription) is nonpermissiveness, how is it that the conveyance of color of title in the form of a defective deed does not block adverse possession from occurring since, in many color of title cases, the adverse possessor comes into possession of the disputed parcel with the title owner's permission? Discussing this issue – and explaining how the person who claims under color of title does not claim under the ongoing permission of the title owner but under his own assertion

of title – can help to clarify and deepen students' understanding of both "color of title" and "claim of right."

§1.3 Squatters 325
***Nome 2000 v. Fagerstrom* (1990) 325**

Nome 2000 v. Fagerstrom is reminiscent of situations that were more common in the nineteenth century than now. The open spaces of Alaska make it more possible for such occupations to occur. The case illustrates adverse possession doctrine generally, but focuses on the problem of what constitutes actual, continuous possession and what acts are sufficiently open and notorious. The case also has a wonderful twist in the argument by the true owner that the adverse possessor should lose because the use was typical of American Indian use and was therefore not sufficient to establish property rights. The claim that native peoples did not establish property rights recognizable under the US Constitution recalls the holding in *Tee-Hit-Ton Indians,* which the casebook covers in Chapter 13, §1.4, a case that (in part) denies claims for property rights based on Native American occupation. However, the Alaska supreme court decisively rejects this argument, finding both that the use was sufficient to constitute "actual possession" and that the claim is not defeated by the fact that the adverse possessor generously allowed others to use the property.

Question in *Nome 2000* Context Box. *The plaintiff in* Nome 2000 *claimed that the Fagerstroms had not acquired the property by adverse possession because they were Native Alaskans and their use did not establish sufficient "possessory" control as to constitute a claim of ownership protectable by adverse possession law. The court rejects this argument. Why? If you were the attorney for the true owner, what better argument could you have presented to support your client's position?*

The court rejects the argument because the "adverseness" requirement does not entail any particular mental state on behalf of the adverse possessor; it simply means that the true owner has not given permission. The court cannot accept the true owner's argument without changing the law by adopting a rule that would allow intentional trespassers to prevail while providing that innocent mistaken possessors do not acquire ownership rights through adverse possession doctrine. *No* state has adopted this solution because it perversely rewards land pirates while failing to protect those who possess land in the good faith belief that they own it. Alternatively, the court could adopt such a rule *only* for American Indians or Native Alaskans or Native Hawaiians; but such a solution is discriminatory. Thus, any way you look at it, the argument made by the true owner was unwise.

The true owner's best alternatives are to argue that some other elements have not been met. The available candidates include: (1) arguing that the *open and notorious* requirement is not met on rural land unless the true owner is put on actual notice of the adverse possession and (2) arguing that the *adverseness* requirement is not met for rural land on the ground that the use should be understood as presumptively permissive and therefore not adverse in this kind of situation. Either argument requires a change in the law, but at least the proposed changes are neither perverse nor discriminatory.

Note 1. *Should an adverse possessor gain title to property if she knows she is occupying property belonging to another, as the Fagerstroms did? Would your opinion of the proper result in* Brown v. Gobble *change if you knew that the adverse possessors intentionally and knowingly built the fence in a manner that encroached several feet onto their neighbor's property?*

Would you favor passing such a [good faith] statute in your jurisdiction? Should border cases be treated any differently from those who squat on someone else's land? What are the arguments for and against adopting a good faith requirement in these cases?

The arguments against a good faith requirement are:

Fairness. An occupation that starts out as wrongful becomes rightful after enough time has passed. Although the use was in bad faith, the true owner has also acted badly by waiting so long to claim her rights. The true owner's acquiescence in longstanding use constitutes a form of abandonment of the property, by which the true owner conveys a message to the prescriptive claimant that the true owner has relinquished her rights. The true owner, by her own inaction, induces the prescriptive claimant to come to rely on continued access to the property. Although the adverse use was wrongful, the true owner's failure to intervene for such a long time changes the character of the situation such that it becomes wrongful for the true owner to assert her right to exclude. The law should protect customary arrangements rather than mechanically allocating property rights to the title holder. Protecting customary practices is more likely to accord with the parties' expectations than is rigid adherence to formal title.

Social utility. A good faith requirement would make prescription law much less predictable. A test that rests on objective conduct (open and notorious use) clarifies property rights. Making property rights clear is crucial because bargains can only occur if it is clear who owns what; making property rights predictable lowers the costs of transactions and allows bargaining to take place. Further, this rule best promotes cooperation among neighbors because it recognizes border arrangements based on longstanding custom, rather than the alternative rule, which would encourage true owners to renege on an implicit agreement to allow continued access. Further, the prescriptive user is likely to value the entitlement the most because (1) she has used the property while it was not important enough to the true owner to protect her interest by excluding the adverse user; (2) in some cases, the prescriptive claimant's interest may be personal in the sense that the longstanding user becomes emotionally attached to the property; (3) the diminishing marginal utility of money suggests that an unexpected windfall gain to true owner would benefit the true owner less than the loss of the property would harm the longstanding user (this argument works only if the true owner was not aware that the adverse user was encroaching on her property).

Formal realizability. An objective test for adverse possession which rests on the character of the use, rather than the adverse user's state of mind, is more predictable, thereby clarifying property rights, reducing litigation, and allowing bargains to occur. A good faith test would make the assignment of property rights much less predictable, increase the cost of transactions, inhibit the alienability of property and thereby prevent property from shifting to its most highly valued use. Certainty comes from reliance on existing arrangements regardless of motives.

Judicial role. The refusal to adopt a good faith requirement is a long-standing rule, based on precedent interpreting the statute of limitations. Unfairness results only if the statute of limitations is too short, but this is something that can only be remedied by legislative change. The courts should not change rules that assign title to real property on their own, but should leave these kinds of fundamental changes to the legislature which has democratic legitimacy and can amass the information needed to judge the wisdom of the change.

The arguments in favor of a good faith requirement are:

Rights. The courts should not reward wrongdoing. A willful trespasser has no right to prevail in dispute with an innocent owner. When the adverse claimant has acted in bad faith, knowingly intruding on neighboring property, her expectations of continued access are not justified or reasonable. A good faith requirement would therefore prevent unjust enrichment of the bad faith intruder. When both parties are mistaken about the boundary between their lots, it makes sense to protect the one who relied on continued access, but when the intruder is not innocent, it is unfair to

reward her. If it is the case that the adverse user values the property more than the true owner, let her pay for it.

Social utility. We should encourage property owners to use care in not encroaching on neighboring land. A good faith test better encourages cooperation among neighbors because it denies property rights to a knowing trespasser. If the neighbor wants access to the property, let her offer to buy it; we should not enact a legal rule that encourages her to take over neighboring property by stealth. The best way to tell who is the most valued user is to require a sale. Even if adverse claimant "values" the property more than the true owner in some sense, we do not just redistribute property from one person to another unless some other public purpose is served, and then we use eminent domain law and pay just compensation. The impediment to giving the entitlement to the most valued user is the fact that someone rightfully owns the property, and they have the power to determine whether or not to sell. When there is a mutual mistake, it is reasonable to settle property in the longstanding user, but when one party knowingly tries to take over someone else's property, this is behavior we want to discourage, and expectations based on such conduct are unreasonable. If the intrusion takes place because of bad planning, we should not reward that bad planning by reassigning property rights; this lowers incentives to plan carefully.

Formal realizability. We must sacrifice predictability to get justice in the individual case. If goal of prescription doctrine were simply to quiet title, it would not matter who winds up with the entitlement; we might as well keep title in the record owner if that is the only goal. This suggests that the goal of prescription law is not just to quiet titles but to protect the legitimate expectations of the parties. When someone *knows* they are trespassing, their expectations of continued access simply are not legitimate. While a good faith test does make the assignment of entitlements more unpredictable, the failure to recognize a good faith requirement would result in substantial injustice.

Judicial role. Injunctions are equitable remedies which are traditionally discretionary. The goal of equity is to do justice. Thus, recognizing a good faith exception to achieve justice is compatible with the traditional judicial role. There is a social consensus that it is unfair to reward trespassers by redistributing property rights; since the point of prescription law is to settle property rights based on legitimate expectations and social custom, it is appropriate to recognize a good faith exception, given the fact that awarding prescriptive rights to bad faith claimants violates widely shared understandings of how property rights should be allocated.

Note 2. *Rural land.*

a. Actual possession. Some courts hold that actual possession can be established by lesser acts than would be required in an urban area. This is because the law requires the adverse possessor to use the land as an average owner would use it and if land in the area is not used intensively, then actual possession may be shown with fewer acts on the land. However, other courts focus on the fact that the use must be "open and notorious" and that greater acts should be required in rural areas to ensure that a reasonable owner would be notice of the occupation of her land. Most courts refuse to adopt a special rule for rural, wooded, or unimproved land. Which of these three approaches is best?

Argument against creating special requirements of notice for rural land. Creating an exception for rural land would make adverse possession doctrine even more unpredictable than it already is. The distinction between rural and urban land may be hard to draw. The reasoning behind it is that owners of rural land may not be able to determine whether someone is actually possessing their land. However, this principle would equally apply to owners of urban land who may not know that their neighbors have encroached on their borders because owners do not do surveys every year or so to determine if there have been inadvertent incursions. Any owner can dream up excuses to explain her failure to discover the adverse possession until it is too late.

Argument for creating special requirements of notice for rural land. Rural land is more isolated and if a tract is large, as in *Nome 2000,* then it may well be that an owner will not be on notice of the occupation of part of the land. If the owner does not know of the trespass and cannot be held to have reasonably been on notice of it, then it seems unfair to deprive the owner of her property rights, especially when the trespasser knows that she is on land belonging to another. Requiring greater acts of possession—even actual notice to the absentee owner—may better protect the legitimate expectations of both parties.

b. Adverse. Should the courts presume that possession of rural land is permissive rather than nonpermissive? The owner in Nome 2000*, for example, may have had no objection to the Fagerstroms' use of the land because it did not, for the moment, interfere with any of the owner's interests. Should the presumption that land is nonpermissive be reversed for unimproved land in areas that are wooded, remote and unimproved?*

When the true owner explicitly tells the adverse possessor to get off the land, the use is obviously nonpermissive (unless circumstances indicate a change of heart). When the true owner explicitly gives permission, the answer is also clear. The question is what the courts should do when no conduct by the true owner explicitly gives permission or explicitly attempts to exclude the adverse claimant. Is use of another's property presumptively permissive or nonpermissive? The rules in force presume that use is nonpermissive; this problem is intended to bring out arguments on both sides.

One thing to watch out for here: Students often get very confused about this issue. Remember that the adverse claimant wants to prove that she did *not* have permission; if the use was permissive, the adverse possession or prescription claims fail. This confuses students because it puts litigants in the position of arguing that it should be presumed that their client acted wrongfully, i.e., by trespassing on neighboring property. This seems perverse; most of the time, we want to argue that our client's behavior was lawful. However, the doctrine in this context provides that lawful, i.e., non-trespassory use, is subordinate to the true owner's interests and the prescription claim therefore *fails*. In order to obtain an easement by prescription or adverse possession, the claimant must allege that she was committing a trespass, i.e., entering land possessed by another without consent. This goes against the grain and bewilders many students.

One way to explain the doctrine is to suggest that, although trespass is wrongful—especially if it is willful and done with knowledge of the intrusion—the true owner's failure to interfere becomes wrongful after a long time passes. Maimonides, the great medieval Jewish Talmudic scholar, wrote that one who wrongs another person must ask the victim for forgiveness. If the victim refuses to forgive, the wrongdoer must return several times, with witnesses, to ask for forgiveness. If the victim *still* refuses to forgive the wrongdoer, then the victim has become the wrongdoer and the original wrongdoer must forgive the victim for the victim's failure to forgive. This analogy perhaps applies to adverse possession. The trespass is wrongful, but if the true owner allows it to continue for a long enough period, the true owner's own conduct creates legitimate expectations on the part of the trespasser and it becomes wrongful for the true owner to assert her own property interests. A similar moral principle may be said to underlie statutes of limitation generally.

Another explanation is that the true owner's acquiescence in the occupation or use of her own land creates expectations in the non-owner such that the continued use appears to be consensual on the part of the true owner. Although the doctrine requires the use to be nonpermissive for prescriptive rights to be recognized, the true owner's acquiescence in the adverse use may convey a message to the adverse user that the adverse use is in fact permissive. In other words, the true owner, by her conduct, is conveying *mixed messages* to the adverse user. On the one hand, the use is presumptively nonpermissive since no explicit consent has been given and the property is not open to the public; on the other hand, the long-term acquiescence in the adverse use appears to

demonstrate that true owner does not care about the intrusion, thereby implicitly consenting to it. When these mixed messages are present, the adverse user may come to rely on continuation of the existing state of affairs. After a lengthy period of reliance, it would be wrongful for the true owner to change the terms of the relationship between the neighbors by denying access.

In addition, you can emphasize the difference between the owner's state of mind and the adverse possessor's. The question of the permissiveness of the use refers to the owner's state of mind, not the adverse possessor's. It is possible for a use to be both nonpermissive (from the owner's standpoint) and still in good faith (from the adverse possessor's standpoint).

Adverse possessor's arguments that use is presumptively non-permissive. An adverse possessor would argue that use of another's property is presumptively nonpermissive. If this is the rule, the adverse user will prevail unless the true owner can present credible evidence that the true owner explicitly gave permission for the adverse use. Arguments supporting this approach include:

Fairness. This approach promotes the policies underlying adverse possession doctrine generally because it has the effect of protecting the reliance interests of the adverse claimant or prescriptive user who has relied on access to the property for many years without interference by the true owner who has implicitly abandoned the property.

Social utility. The adverse possessor is likely to value the property more than the true owner given the longstanding use and the true owner's failure to exercise its rights. Protecting longstanding expectations will also arguably promote predictability in the marketplace. This rule also encourages cooperation among neighbors by enforcing informal and longstanding arrangements. It thereby promotes stability of expectations. The opposite rule would allow the true owner to renege on an implicit deal by which the true owner induced the non-owner to rely on continued access to the property.

True owner's arguments that use is presumptively permissive. The true owner will argue, in contrast, that use should be assumed to be permissive in the absence of evidence to the contrary. This rule would substantially alter the common law of adverse possession by placing the burden on the adverse claimant to show that the true owner explicitly told the adverse claimant to stay off the land. Arguments supporting this rule include:

Fairness. This approach is probably closer to social custom. Most owners who allow their neighbors to enter or cross their land from time to time have no objection to these periodic entries. Acquiescence in entry by others should be understood as implicit permission. This rule would protect owners from casual loss of their property rights. Moreover, most people do not know about the law of adverse possession and are surprised when they find out about it. This suggests that prescription doctrine is out of step with the times; presuming that the use is permissive better accords with the justified expectations of property owners.

Social utility. Presuming that the use is permissive better promotes cooperation among neighbors because owners will be less afraid to allow others to walk across or intrude upon their property. If entries are presumed to be nonpermissive, owners will more vigilantly try to keep others off their property, rather than acting in a neighborly fashion by tolerating occasional intrusions. Moreover, if the strip really is more valuable to the prescriptive claimant, let him purchase it from the true owner. While it is true that transaction costs may prevent a bargain from taking place, bargains are still the best way to determine the most valued user. This approach also puts the true owner on better notice that someone else is using the true owner's property in a way that may result in a loss of entitlement unless the true owner acts to protect its property interests.

So far, we have given general arguments about what the presumption should be. One can also argue that the presumption should be reversed for rural land because unoccupied and unimproved land generally is subject to casual use of non-owners while urban, improved land is not. Custom may therefore provide a reason to distinguish the two types of land. The counterargument is, again, that it may be hard to distinguish urban from rural land and that the

presumption is intended to simplify resolution of otherwise difficult proof questions. A presumption of non-permission may also better accord with the policies of adverse possession law in protecting the expectations and reliance interests of a longstanding possessor.

Note 3. *Should the law apply the same policy against self-help to conflicts between owners and adverse possessors? Between owners and squatters?*

Many of the same considerations – such as a desire to avoid violence and disorder and the tendency of people to be poor judges of the merits of their own cases – seem present in the context of adverse possession. On the other hand, the parties have typically not engaged in a contractual relationship with one another, so the restriction on self-help in the adverse possession context is more intrusive for owners than it is in the landlord-tenant context. An additional consideration is the difficulty of distinguishing tenants from adverse possessors under certain circumstances. A tenant occupying a dwelling pursuant to an oral lease agreement can easily be made to look like a squatter. Prohibiting self-help in both situations increases the chances that tenants' rights will be protected.

§2 Justifications for Adverse Possession: ''Roots Which We Should Not Disturb'' or ''Land Piracy''? 332

The textual materials present a series of different justifications for adverse possession law. These materials may be used either as background reading for a discussion of the arguments for and against adverse possession as a legal institution, for discussion of the principal cases, or for analysis of the problems. It is important to note that both rights/fairness and utility/efficiency arguments have been suggested to justify adverse possession; both kinds of arguments are rehearsed in the text presented here.

§3 Prescriptive Easements 335
***Frech v. Piontkowski* (2010) 336**

Some may prefer to teach prescriptive easements along with the rest of servitudes law. But it also makes sense to teach prescriptive easements immediately after adverse possession because the circumstances and doctrines are so similar. Doing this allows a somewhat more extended period of treatment of the topic than is possible when revisiting the topic later in the semester. Teaching prescription and adverse possession together also allows discussion of the difference between uses that rise to the level of "possession" and uses that are more limited and generate only prescriptive easements rather than a transfer of title. A second issue on which you might focus in teaching prescriptive easements is the topic of good faith, as the problems demonstrate. (See above for analysis.)

Although it can be hard to bring out the differences between adverse possession and prescription without getting too deep into the concept of servitudes, it is interesting to talk with students about whether they find prescription to be less troubling than adverse possession. On the one hand, the impact on the owner can be less severe – the loss of an easement rather than a total loss of ownership. On the other hand, the consequences of an easement for an owner can be nearly as severe as a loss of ownership. Questions about the uses that the owner of the underlying land can continue to make and about how the recognition of the easement limits what the owner can do help to bring out this distinction. Although an owner retains many rights, a poorly located right-of-way can leave very few developmental uses for the property.

Question About Trees Within Context Box. *Can a tree owner obtain a prescriptive easement allowing the tree's branches to remain over neighboring land?*

Courts do not allow such easements to be established because owners may well acquiesce in intrusions by tree branches until they determine that it is interfering with sunlight or their own structures. We not want to induce owners to cut branches that intrude onto their property as soon as they do so to protect themselves from losing their rights because they should not have to be so vigilant and most people do not mind some intrusion by branches over their land and wish to be free to enjoy such intrusions without worrying about losing air rights over their land. The counterargument is that such intrusions are no different from other intrusions and cutting branches may affect the appearance of a tree or even its health; allowing the intrusion for a long time arguably gives the tree owner the right to continue the intrusion. This argument seems weak and it is unlikely many (if any courts) will allow prescriptive easements to be established except in very unusual cases when tree branches are involved.

§4 Other Informal Ways to Transfer Title to Real Property 343
§4.1 The Improving Trespasser 343
A. Removal of Encroaching Structures: Relative Hardship 343
***Hoffman v. Bob Law, Inc.* (2016) 344**
B. Enrichment versus Forced Sale 348
***Ward v. Ward* (2016) 348**

Borrowing from the Calabresi-Melamed scheme of property rules and liability rules (which we discuss in connection with nuisance in Chapter 5), when a non-owner builds a structure that encroaches onto neighboring property, four remedies are possible: (1) an injunction ordering the structure removed; (2) no remedy to the landowner at all, allowing the encroachment to remain in place; (3) damages paid by the trespasser plus a transfer of either an easement or title to the occupied land to the trespasser; (4) a purchased injunction where the property owner must pay for the costs of removing the encroachment. In practice, virtually all cases in this area opt for either (1) or (3). When the structure either decreases the value of the land or interferes with the use to which the true owner has decided to devote the land, the true owner is likely to want an injunction ordering the structure removed unless enough compensation is provided (either through a private deal or by court order through a damages award).

When an entire structure is on land owned by another, the possibility arises that the structure increases the value of the land on which it is built. This is unlikely with a mere encroachment. Where the entire structure is on her land, the true owner may want to keep the structure there rather than have it removed. At common law, the structure belonged to the owner of the land. More recent cases (and some statutes) have softened that rule somewhat, permitting courts to require the landowner to compensate the innocent improver for the value of the structure the owner wishes to retain (option (4) above). Option (2) above is the domain of easements by estoppel, which are discussed along with servitudes in chapter 7.

The materials in this section start with the question of when an injunction should be issued to force the encroaching structure to be torn down or removed and then moves to the question of whether the trespasser has a right to be compensated by the true owner of the land when the structure increases the market value of the property upon which the structure was built. This second issue is the focus of *Ward v. Ward.* Alternatively, the law may give the owner of the encroached upon land the right to force the property to be sold to the improving trespasser (option (2) above).

The problems complicate the issue in *Ward* (1) by placing the structure on the line between two separate parcels, rather than wholly on another's land; (2) hypothesizing a situation in which

the structure has already been sold to bona fide purchasers who were unaware of the mistaken boundary; and (3) positing multiple owners in a condominium complex.

One word of caution when teaching this material: Students often get confused about the interplay of these doctrines with adverse possession. It is worth emphasizing in class that these remedial doctrines (e.g., relative hardship) operate without regard to statutes of limitations. Although the passage of time may be relevant to determining the balancing of equities, there is no requirement that the statute of limitations expire before an owner might be forced to sell his property to an encroacher under relative hardship. The balance of equities can kick in and require the sale as soon as the encroachment is in place. Of course, the owner will likely be compensated, unlike in the adverse possession context.

Note 1. *Does this rule make sense, given the fact that the landowner stood by and allowed the construction to occur without intervening? Does the owner have any obligation to look out for her own rights? Does the landowner have to compensate the builder? The builder claims that failure to compensate will leave the landowner unjustly enriched by the builder's investment; moreover, both parties made a mistake — the builder by encroaching on neighboring property and the landowner by not noticing that someone was building on her own land and not taking action to prevent it. Which property claim should prevail?*

These issues are hard because both parties arguably acted negligently—the builder in constructing on land belonging to another and the landowner in standing by while the builder encroached on her land. No solution is going to be completely satisfactory. Most courts will exercise discretion in determining what result seems fair under the circumstances. Sometimes the landowner will be forced to transfer title to the land on which the encroachment sits to the builder, allowing the builder to benefit from her investment and punishing the true owner of the land for allowing the incursion to take place without objection. Sometimes, the landowner will be allowed to keep the improvement upon paying compensation to the builder so that the landowner does not become unjustly enriched.

Conversely, the courts could simply leave the parties where they find them, holding that the landowner owns any structures built on her land and leaving it to the parties to negotiate a solution the dilemma. The problem is that the parties may well have developed bad feelings toward each other and negotiations may break down. In that case, a court order may be needed to respond to the situation when a private transaction is not possible. The court may also wish to avoid violence that may come from individuals using self-help to occupy the building or tear it down.

Note 2. *Should the burden be on the builder to make sure she is building on her own land, or should the landowner have an obligation to determine if someone else is building on her own land and act to stop the trespass?* Betterment statutes raise the same basic questions as the relative hardship doctrine. From a certain perspective, both parties bear some of the blame. On the other hand, from the perspective of property rights as (fundamentally) rights of exclusion, the burden should be placed squarely on the builder.

Problem. *Were the courts correct to hold that the Seneca Nation owned the improvements built on their land? Does it matter that, in the past, the United States had consistently sided with the settlers and protected their interests when they conflicted with the interests of the Seneca Nation? Does it matter that Congress had several times passed statutes ratifying and extending the leases without regard to whether the Seneca Nation wanted the leases to be extended? Would it matter if the United States had, in the past, verbally assured the settlers that, at some point, the land would be transferred from the Seneca Nation to the non-Indian settlers?*

What are the arguments for and against requiring the Seneca Nation or the United States to compensate the builders for the improvements placed on Seneca land? What are the arguments

for a forced sale of the land from the Seneca Nation to the home builders who had lived on the land for more than 100 years?

The law generally does leave ownership of buildings on land of another to the landowner. However, as *Ward* demonstrates, the courts, sitting in equity, may arrange other solutions to the problem as justice and practicalities seem to require. In this case, the Senecas can argue that there was no way the non-American Indian possessors were misled here. They knew their homes were on property owned by another and that they merely had leases and that when those leases terminated, so would their possessory rights. On the other hand, they were arguably led to believe by the State of New York and the federal government that their possessory rights would be protected. While the homeowners can argue that the Seneca Nation would be unjustly enriched by obtaining ownership of their homes, the Seneca Nation could argue that the home owners were unjustly enriched by being able to lease Seneca land for almost nothing for 100 years and that the home owners would be unjustly enriched if they were granted continued rights to possess Seneca land.

These issues are further complicated, of course, by the fact that this situation is part of the colonial process by which the United States wrested landownership from American Indian nations and that it would arguably constitute a continuation of conquest to fail to protect Seneca property rights. It would also deny the Seneca Nation equal protection to deny it rights it would otherwise have if it were a non-American Indian owner. In addition, whatever result would be reached by the court could be affected by federal legislation to compensate either side or determine the property claims at issue in the case.

§4.2 Boundary Settlement 354
A. Oral Agreement 354
B. Acquiescence 354
C. Estoppel 355
D. Laches 355

As with the adverse possession and prescriptive easement materials, the doctrines described in this section address legal rules that assign property entitlements on the basis of informal arrangements rather than more formal transfers of title. They further illustrate this fundamental tension in property law. And, as with relative hardship, it is important to emphasize that these doctrines operate independently of adverse possession.

§5 Adverse Possession of Personal Property 355
***O'Keeffe v. Snyder* (1980) 356**

The section begins by observing that the unmodified application of adverse possession principles created in the context of conflicts over land to personal property would put enormous burdens on the owners of chattels. The text asks if students understand why this is the case. They usually understand this without too much trouble. Because chattels are moveable, even the open and notorious use of a chattel not too far from the location of the actual owner will not do much to put even a highly vigilant owner on notice of the location of her property. No jurisdiction applies the traditional standards for adverse possession of land to chattels.

The doctrine of *O'Keeffe v. Snyder* provides that the statute of limitations for adverse possession of stolen personal property starts to run when the true owner discovers or should have discovered the whereabouts of the property (the discovery rule). This rule arguably imposes a duty on the true owner to act reasonably to attempt to recover the stolen property, for example, by contacting the police. In contrast, the holding of the *Guggenheim* case is that the statute of

limitations only starts to run when the true owner makes a demand that the property be returned by a bona fide purchaser. The court in *Guggenheim* reasoned that it is only at that point that the good faith purchaser has done anything wrong. (Note that the Court in *Republic of Turkey v. Christie's*, Inc. – in Chapter 3, §3.2 – applies the demand rule to analyze the statute of limitations in that case, which concerned ownership of an artifact.)

The *Guggenheim* court justified its approach by arguing that it did not want to place obligations on the true owner to demonstrate that it had acted with due diligence in order to recover the stolen painting; its rule therefore better protects the interests of the true owner. On the other hand, the *O'Keeffe* rule can be defended by noting that it arguably places legitimate duties on the true owner to recover the object within a reasonable period of time; if the owner waits long enough, it arguably conveys a message to the bona fide purchaser that the true owner will not insist on return of the painting and thereby may induce the bona fide purchaser to rely on continued possession of it and develop an emotional attachment to it.

Note that the *Guggenheim* court also held that the true owner could not wait an unreasonable amount of time after discovering the whereabouts of the stolen property to make a demand for its return. The *laches* doctrine might be applicable to bar such a lawsuit. The availability of a laches defense protects the interests of the bona fide purchaser by limiting the amount of time the true owner can wait before making a demand for the return of the stolen object after finding out where it is.

An interesting way to discuss the two rules is to ask which rule is more favorable to the development of markets in art. The discussion brings out the idea that markets for property require protection of ownership, but not without limit. Overprotecting prior owners undermines the stability of present possession and may have the effect of discouraging markets for property. That may be a price worth paying in some contexts, but it is not a free lunch. You might ask students to argue for one rule or another.

a. What are arguments for adopting the discovery rule?

Owners of property should retain their rights until they can be reasonably expected to exercise them. That is the holding of the *O'Keeffe* case. On the other hand, the long passage of time may suggest that the discovery rule should not apply because of the reliance interests that have built up around the current possession of the painting. If the discovery rule is adopted, it can be argued that public display of the painting means that the family should have discovered its existence and demanded it years ago and that their rights have been lost through long possession by the museum. Museums will be unable to function or purchase artwork if they cannot rely on longstanding possession as a way to acquire title to works they possess.

b. What are the arguments for the demand rule?

The demand rule better protects the rights of owners and rests on the view that they may or may not be aware of public exhibitions of their work. It places the burden on museums to try to locate the actual owners of paintings. Arguably, museums are better positioned to find owners than owners are to find which museum has their property. In addition, as between the museum and the original owner, one can argue that the rights of original owners should be prevail, particularly when works are stolen or taken through racially discriminatory laws or policies. Museums can protect themselves by contract when they purchase paintings by getting contractual rights to restitution of moneys paid the works they buy are claimed by others or by purchasing insurance.

Problem. *Under the* O'Keeffe *"discovery" rule, when would the statute of limitations begin running? When would it begin running under the "demand rule"? Applying the HEAR Act statute of limitations, is the granddaughter's case timely? Is the HEAR Act fair to the museum's interests?*

Under *O'Keefe*, the statute would begin to run in 2010, when the painting was put on display, at which point, the true owner could – through reasonable diligence – discover its whereabouts. There is no obligation that the granddaughter actually know that she has an ownership interest. Under the demand rule, the limitations period would not have begun running until the granddaughter actually demanded the painting from the museum (by filing suit in 2020?). Under the HEAR Act, the limitations period would begin running in 2018, when the granddaughter actually learned where the painting is located (and that she has an ownership interest in it). Both the HEAR Act and the demand rule tilt the balance in favor of the original owner (as compared to the O'Keeffe rule), but the HEAR Act is somewhat more protective of the current possessor than the demand rule, since it places an obligation on the original owner, once they have all the information they need, to make a demand within the limitations period or lose their claim.

5. Nuisance: Resolving Conflicts Between Free Use and Quiet Enjoyment 363

Themes

You can teach these materials in several places: right after covering the materials in Chapters 1 and 2 (perhaps plus some portion of the materials in Chapters 3), or after Chapter 4, on adverse possession. Because the materials provide both an analysis of potential remedies and a more detailed explanation of law and economics in a relatively simple context, it is useful to teach them before the chapters that follow it. This chapter together with the materials on zoning and servitudes also form a nice unit on different ways to resolve and avoid land-use conflicts between owners.

Like the materials on trespass, the factual settings of these cases are easy to understand and illustrate both the limits of property rights and the problem of competing interests. The trespass cases revolve around the conflict between owners who wish to control access to their property through retaining a right to exclude or to admit others and non-owners who claim rights of access to the property for specific purposes or in specific types of situations. Chapter 5 has a similarly simple structure. All the cases here concern conflicts among neighbors regarding owners' land use decisions. This factual setting is similarly easy to understand, especially compared with the complexities of servitudes.

The themes of this chapter include:

1. Property rights are limited to protect the rights of others. The conflicts in this chapter are between neighboring property owners or between owners and others in the community whose own property interests are adversely affected by an owner's conduct. The cases illustrate the conflict between one owner's interest in freedom of action which justifies a right to develop one's own property and the neighbor's interests in security which justify placing limits on the freedom to develop to protect the neighbor's right to have her own property not illegitimately harmed. The cases explain why absolute property rights are impossible; because no owner has the right to destroy the property of others, each owner's liberty to use her property must be limited to protect the legitimate interests of other owners.

2. Range of solutions. The cases illustrate the fact that a range of solutions is possible in adjudicating the conflict between freedom of action and security. At one end of the spectrum is absolute freedom of action, granting the defendant the privilege to act in ways that harm the plaintiff's interests without liability. At the other end of the spectrum is strict or absolute liability; any action by defendant that harms the plaintiff's property interests can be enjoined and damages must be paid for the harm that has already occurred. In between are a range of middle positions, including a variety of reasonableness tests (including reasonable use, negligence, nuisance), forced sharing (correlative rights), and priorities based on which use was established first (prior appropriation) or how long the use has lasted (prescription).

3. Precedent. The materials in this chapter are structured to provide further instruction in precedential argument and reasoning. I would like to encourage teachers to treat each of the cases in the chapter as relevant precedent for the others. Since the range of solutions for land use conflicts is so wide and varied, it is useful to ask whether or not a particular case is distinguishable from another case in the chapter. In teaching about precedent, it is important to force students to cover two steps in the argument. To distinguish a case, they must first identify a factual difference, and second, explain why that difference matters, perhaps by explaining why the policies applicable in the prior case are not applicable here or are overcome by competing policies. To argue that two cases are not distinguishable, they must similarly explain why the factual differences do not matter

and do so by explaining why the policy justifications for the result in the earlier case apply here as well.

4. Policy arguments. The chapter includes analysis of the most important types of policy arguments given to justify common law decisions, including arguments based on (1) rights, fairness, or justice; (2) maximizing social utility, the general welfare, or economic efficiency; (3) administrability (or formal realizability), i.e., promoting predictability by adopting rigid rules versus promoting flexibility and justice in the individual case by adopting general standards; and (4) institutional role considerations about the relative places of courts and legislatures in the lawmaking process.

5. Statutory interpretation. The materials, particularly those regarding organic farming regulation and building codes, require continued attention to statutory interpretation and the relationship between statutes and common law. Just as the materials in Chapter 1 start with common law questions about the right to exclude (trespass) and then proceed to statutory analysis (public accommodations laws), the materials in Chapter 5 start with common law analysis (common law nuisance) and then introduce interpretation of statutes designed to regulate land use. This material is partly introduced to focus discussion on statutory interpretation techniques and partly to make students acutely aware that the same problem may be regulated by common law rules, by statutory provisions, and by administrative regulations passed by a state agency pursuant to legislatively delegated authority.

§1 Land Use Conflicts Among Neighbors 363
§2 Nuisance 365
§2.1 Defining Unreasonable Interference 365
***Dobbs v. Wiggins* (2010) 366**

Rather than start the chapter with specialized land use rules, as did previous editions, we have reorganized the chapter to begin with the general law of nuisance. We have split the section on nuisance into two subsections, one focused on introducing students to the substantive law and the second on the question of remedies. Although the two issues obviously cannot be completely separated, focusing on the two stages of the inquiry matches many academic discussions of the subject and makes it a little easier for students to digest the doctrine.

Dobbs v. Wiggins provides a nice overview of substantive nuisance law in the form of a recent case with fairly simple facts. After summarizing the facts, you might start by highlighting the court's distinction between negligence and intentional nuisance. Virtually all nuisance cases involve intentional nuisance rather than negligence claims, and so many courts simply fail to talk about the distinction. Intent does not require that the defendant wants or desires that the plaintiff suffer harm. Instead, it simply requires that the consequences of the defendant's conduct that cause the plaintiff's harm be consequences that defendant knows (or should foresee) will occur. Thus, the distinction is between consequences that the defendant knows will result from his land use and consequences that arise by accident, which is the domain of negligence law. The nuisance in *Dobbs* is intentional because the defendant knew his hounds would make noise that would reach his neighbors' properties. Emphasizing this distinction will help students keep the nuisance doctrine conceptually separate from the negligence doctrine they are likely to be covering in their torts class.

Because it is an intentional nuisance, the focus in *Dobbs v. Wiggins* is on whether the barking dogs on Wiggins's property substantially and unreasonably interfered with the plaintiffs' use and enjoyment of their land. This is the inverse of the typical tort action, which usually looks to the reasonableness of the defendant's conduct. Moreover, it is different from trespass, where harm to the plaintiff is irrelevant. The court's analysis also introduces students to the kinds of considerations courts typically consider in evaluating whether the impact on the plaintiff is more

than a reasonable property owner should be required to bear: (1) utility of the defendant's and the plaintiff's conduct; (2) suitability to the area; (3) priority of use; (4) cost to the plaintiffs and defendant of avoiding the harm; and (5) practicability of abating the nuisance. None of these factors is by itself decisive, giving nuisance law a flexible and unpredictable quality. Note, moreover, that although the balance of utilities is frequently cited in the *Restatement* and academic analyses of nuisance, like many courts, the *Dobbs* court did not devote any explicit attention to this factor, focusing instead on the harm to the plaintiffs.

Most courts employ a "threshold" approach to determining whether a defendant's conduct imposes harms that a landowner should not be required to bear. One way to think about the relevance of these factors is to think of them as raising or lowering the threshold between nuisance and *damnum absque injuria*. For example, the fact that the plaintiff came to a nuisance does not categorically bar her claim, but it raises the burden on her by requiring her to show a greater degree of harm than she would have to show if the nuisance came to her. You might tie the concept of *damnum absque injuria* to previous discussions of property obligations. The fact that not every impact is a nuisance reflects the need to accommodate the right of quiet enjoyment with the right to make active use of your property. Having to put up with low-grade impacts from your neighbor's land use is one of the costs we have to bear to live in an organized society – a kind of duty of tolerance, at least to a point.

The standard employed for evaluating the reasonableness of the defendant's harm to the plaintiff is that of a typical plaintiff. Again, this inverts the usual approach in tort law, which takes plaintiffs as it finds them. In contrast in nuisance, unreasonable sensitivity by the plaintiff will bar a successful nuisance claim. You might introduce students to this concept of unusual sensitivity by exploring why the plaintiffs (and defendant) had each of the various witnesses testify to the effects they observed on the properties.

Similarly, inquiries into the suitability of the defendant's use get at what a normal landowner should be entitled to do (or to put up with) in the area. *Dobbs* is interesting on this front because of the conflict between two competing conceptions of the types of use that are appropriate to the "country." The defendant says he moved to the country to raise dogs. The plaintiffs say they moved to the country for peace and quiet. This conflict might provide a nice opportunity to talk about "right to farm" laws, which are discussed in a context box after the case (on page 349).

A recent development raising the questions of trespass versus nuisance comes from the practice of using light displays for protest purposes. The most famous example is the 2017 projection of the text of the U.S. Constitution's Emoluments Clause and the words "Pay Trump Bribes Here" on the façade of the Trump Hotel in Washington, D.C. In at least one similar case, the target of the projection claimed the invasion of light was a trespass. The Nevada Court of Appeals rejected this claim, but a concurrence suggested (correctly, we think) that the claim was better analyzed under nuisance principles. *Int'l Union of Painters v. Great Wash Park*, LLC, 2016 WL 4499940 (Nev. App. 2016). This may be an interesting hypothetical to try with your class. How would the Trump projection fare under common law nuisance principles? What if it involved more universally condemned speech, such as projection of a swastika on a synagogue or African Methodist Episcopal church? What would happen if you changed the facts, so that the projection is onto a private home? Should free speech principles come into play in any of these cases?

Notes

The notes in this section help flesh out the details of nuisance doctrine. One topic that bears emphasis is the question of when to sue, which is the subject of Note 4. In particular, the doctrine of anticipatory nuisance as it operates in most jurisdictions makes it hard to bring a nuisance action before a nuisance is physically in place. This is worth highlighting for students because (combined with the unpredictability of the nuisance analysis) it limits the utility of nuisance as a tool of

prospective land use planning. Thus, it helps explain why so many jurisdictions have turned to public law tools, such as zoning, and why private residential developers make such heavy use of servitudes to accomplish similar nuisance-avoidance goals.

Problem 1. *A half-vacant apartment building is used by drug dealers and drug users.*

More and more cases are being brought in the courts against owners of property that is being used for drug dealing and which places the community at risk. The question is whether it is fair to impose either injunctive or monetary relief on the landlord for conduct committed by trespassers.

(a) What arguments could you make on behalf of the plaintiffs for both damages and injunctive relief?

The landlord is responsible because it has the legal right to control the conduct of trespassers by keeping effective locks on the building and hiring security guards, if necessary. Because the landlord has the legal *right* to do this, the landlord *should* have a legal *obligation* to do this. Because the landlord is the only one with the legal right to eject trespassers, the landlord has a special duty to prevent its property from being used to further criminal actions that threaten the community. The landlord's failure to control the conduct on its property causes foreseeable harm to other property owners in the community. The landlord has an obligation to ensure that its property is not used in such a manner as to create a substantial interference with the use and enjoyment of neighboring property. The landlord's failure to take these steps should be sanctioned by imposition of damages. This will deter other landlords from allowing similar situations to arise.

(*b) What arguments could you make on behalf of the defendant landlord that it is not responsible for criminal actions committed by its tenants and that it is certainly not responsible for the actions of trespassers and therefore is not liable either for damages or injunctive relief to abate the nuisance?*

The landlord can argue that it is in no way responsible for criminal conduct being conducted by trespassers. The landlord is not responsible for the conduct of trespassers who come onto the property to commit criminal acts. Not only does the landlord have no contractual relationship with these persons, but the landlord is the *victim* of their criminal conduct. It would be inappropriate to punish the landlord for the criminal conduct of others. In addition, it is too heavy an obligation to require an owner of residential property to hire a guard to prevent its building from being used by others. The appropriate remedy for neighbors who observe criminal conduct taking place is to call the police.

(c) What should the court do?

In the last couple of years, several courts have allowed cases of this type to get to the jury. It is for you and the class to judge whether this is appropriate.

Problem 2. *Although smoking is now prohibited by law in many places in restaurants and workplaces, no law prohibits smoking at home, and if the owner cannot smoke at home, where can she smoke? Should a judge rule that the smoking constitutes a nuisance and, if so, should she grant an injunction ordering the condo owner to stop smoking at home?*

This problem nicely allows consideration of the fact that smoking can be both very bothersome and dangerous to neighbors who inhale second hand smoke. At the same time, it seems that smokers should be able to smoke somewhere, including in the "privacy of their homes." The problem arises that apartments in the same building are not private in that sense; smoking can indeed affect the neighbors so that it is not a "self-regarding" act to engage in it. Making people smoke outside is a common thing now in restaurants and office buildings but has not generally been applied to apartment buildings or condominiums, but all that is changing as evidence of the harms imposed by second hand smoke and knowledge of smoking allergies becomes more established.

§2.2 Nuisance Remedies 381
***Boomer v. Atlantic Cement Co.* (1970)..... 383**

Boomer provides useful vehicle for talking about the remedial question in nuisance law. It links up well with the discussions of relative hardship in Chapter 4, and particularly with *Somerville*. Especially interesting is the gap between the way the New York court describes the state's case law as previously requiring an automatic injunction once a nuisance is found, irrespective of the balance of equities. As discussed in the notes following the case, this is almost certainly a mischaracterization of New York's actual practice even before *Boomer*. Nevertheless, *Boomer*'s approach brings the law of nuisance into harmony with the trend in the law of encroachments. The case is a good vehicle for introducing (or, if you talked about it in the context of chapter 4's relative hardship discussion, reinforcing) the Calabresi-Melamed property rule/liability rule scheme discussed on pages 381-82.

It also provides an opportunity to talk about qualitative differences among land uses. The case pits homeowners against a cement factory. Some of the discomfort people sometimes express with the court's decision relates to ideas about the special status of homeownership; are one's personhood connections to one's home adequately reflected in monetary calculations or money damages? On the other hand, the social costs of an injunction tip the balance of equities so heavily in favor of the defendant that the case presents a useful opportunity to discuss the necessary limits to the home's status as a particularly favored form of property. As with *damnum absque injuria*, you might also talk about the denial of injunctive relief in the case as yet another kind of property obligation – the duty to submit to a nuisance when the balance of social costs strongly favors its continuation. This foreshadows future discussions of eminent domain (a topic mentioned by the dissent in *Boomer*).

Finally, you can use *Boomer* to explore the time value of money, which is nicely captured by the concept of permanent damages. How can a court award, once and for all time, a finite amount of money for an ongoing harm that will extend far into the future? You might talk with the students about how economists think about the time value of money through the concept of the discount rate. Economists tend to think that the same benefit (say, the payment of some sum of money) is worth more the sooner it occurs. Inflation is one obvious reason, but even setting that apart, they think most people would rather get benefits sooner instead of later. Economists calculate the present value of a future payment using the following formula: the present value of Y dollars in t years = $Y/(1+R)^t$. R is the discount rate. For a positive discount rate, as t approaches infinity, the value in the bottom of the fraction approaches infinity and the present value of the future payment approaches zero. The present value of the future payment decays more quickly with a higher discount rate and more slowly with a lower discount rate. In any cost-benefit analysis involving evaluation of costs and benefits at different times, economists need to use a discount rate. There is an enormous literature on discount rates. For one helpful discussion of discounting when consequences affect more than one generation, see Douglas A. Kysar, *Discounting . . . on Stilts*, 74 U. CHI. L. REV. 119, 124 (2007). Discounting is particularly relevant to the use of cost-benefit analysis in environmental policymaking, but it is also relevant to the concept of permanent damages. By bringing out the moral complexity of selecting the appropriate discount rate, you can show the difficulty of evaluating the costs and benefits of land uses according to a single metric like utility or wealth maximization.

§2.3 Nuisance or Trespass? 387
***Johnson v. Paynesville Farmers Union Cooperative Oil Co.* (2012) 387**

Students often express confusion about the boundary between nuisance and trespass, particularly since nuisance is sometimes defined as a "nontrespassory" invasion of the plaintiff's use and enjoyment of her property. The key difference for the parties is that trespass is a strict liability doctrine, providing damages regardless of the degree of harm, while nuisance requires that the harm be both substantial and unreasonable. Cases involving particulate pollution – such as the droplets of pesticide in *Johnson* – bring the distinction to the forefront. Some courts have blurred the boundary between trespass in nuisance by permitting claims for trespass by small particles. Most notable among them are *Bradley v. American Smelting and Refining Co.*, 709 P.2d 782 (Wash. 1985), and *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979), both of which are mentioned by the court in *Johnson*. At the same time, however, these courts have required plaintiffs asserting such claims to show some evidence of harm, a significant deviation from the usual practice in trespass law. One way to get students to see the silliness of reliance on the physical mechanism to distinguish trespass from nuisance is to talk about how smells work or to ask them how large a particle has to be before it gives rise to a trespass claim. Rather than looking to the physical mechanism by which the defendant's land use delivers its impact on the plaintiff, a better approach is to look to the nature of the harm the plaintiff is asserting. Harm to her interest in exclusive possession is properly analyzed using a trespass framework whereas harm to her interest in use and enjoyment of her property is analyzed using a nuisance framework. This interest-based approach is the one the court adopts in *Johnson*. An interesting way to discuss the case would be to ask students whether the same conduct by a defendant might be able to give rise – simultaneously – to a nuisance and a trespass. It seems to follow from the *Johnson* approach that this would be possible. The case also presents an opportunity for students to deepen their skills in statutory interpretation.

§3 Light and Air 395
***Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.* (1959)..... 395**
***Prah v. Maretti* (1982) 398**
***Law and Economics Analysis of Nuisance* 406**

Fontainebleau illustrates another rule of law that grants property owners freedom to use their property without liability for the harm their use causes to particular interests asserted by their neighbors (*damnum absque injuria*). It is thus analogous to the common enemy rule and the free use test applicable to groundwater and oil and gas. The case also highlights the problems of predictability that might be associated with the adoption of a reasonableness test to adjudicate conflicts about access to light and air.

Fontainebleau also addresses the problem of malice. The plaintiff alleges that one motive of the defendant was ill will toward the plaintiff. In some states, liability will be imposed when one owner constructs a "spite fence" or otherwise interferes with her neighbor's light and air *solely* out of a desire to harm her neighbor. In other states, malice is not allowed as an exception to the rule that harm to light and air is *damnum absque injuria*. In this case, however, it is unlikely that malice was the sole motive; the defendant would not likely have started this huge expansion of its hotel unless it was likely to be profitable. On the other hand, it may be the case that the *location* of the building was determined by malice; if defendant could relocate the building and obtain the same result, then the decision to locate the building close to the border between the two properties may have been solely motivated by a desire to harm the neighbor.

Prah v. Maretti is a law professor's dream. While the fact situation is somewhat unusual, the opinions recite every major type of argument in the lawyer's arsenal, including arguments about precedent, statutory interpretation and the relation between statutes and the common law, and policy arguments, including rights, social utility or efficiency, formal realizability, and institutional roles. It shows students how lawyers use these arguments in particular cases. It also highlights the flexibility of nuisance law. You might ask the students whether solar panels are constituted an unusually sensitive land use at the time the case was decided and, if so, whether they are one today or whether they are likely to count as unusually sensitive in the future?

You can teach the law and economics material in many different ways. One way is to lecture, repeating many of the points made in the text. Some students find it difficult to understand the economics material and learn it better by hearing it orally than by reading it. Other students find a lecture, or a mini-lecture that summarizes the textual material, helpful to solidify the points made in the reading. As suggested by the materials, you can accompany lecture by using the Fontainebleau/Eden Roc dispute as a core example, first asking students how it would be analyzed under *Coase I*, then what is left out from this analysis (first distributive effects, then transaction costs, then the difficulty finding a stable measure for the value of the object to a party). In lecturing about this material, you might describe it in terms of a debate between arguments that favor liability (π's arguments) and those that can be made against liability (Δ's arguments). Here is an example of how to do this:

(1) *π argues to internalize external costs.* The π argues that liability should be imposed on defendant because "those who profit from an activity should bear its costs"; this means that any developer should have to pay for the harms the development will cause to already established property interests. Imposing liability will make the private benefit/cost calculation of the defendant congruent with the social benefit/cost calculation, thereby inducing defendant not to implement a project whose social costs exceed its social benefits.

(2) Δ *argues that these are joint costs, and that there is therefore no reason to arbitrarily choose to impose liability on the second developer.* The Δ argues that there is no reason of efficiency to choose the defendant (the second developer) over the plaintiff (the first developer) when attempting to create appropriate incentives. The problem arises because the projects conflict *with each other*. Forcing the parties to internalize the external costs of their projects could just as easily be accomplished by *denying* liability. This would force the plaintiff to take into account the costs its development will impose on restricting the development of neighboring land. In other words, the first developer (who knows the second developer will not be liable for damage caused by runoff of surface water) will have to determine whether to bargain with the neighbor to insure that any construction on the neighboring property avoids or minimizes harm to the plaintiff's property. The plaintiff will thus be forced to determine the costs its own project will impose on its neighbor by making development on neighboring property more expensive (in order to protect plaintiff's property). Because the argument can go either way, the issue is either how to avoid the greater harm (by minimizing the joint costs of the two developments) or, if the projects really are totally incompatible, how to maximize social welfare by choosing which of the projects is more beneficial to society.

The Δ further argues that imposition of liability will not increase efficiency if no transaction costs exist. Because the costs are joint, denying liability internalizes externalities as well as imposing liability. Moreover, whoever values the entitlement more will either keep it or buy it. If transaction costs are low or non-existent, social wealth may be maximized by denying liability. This result both avoids litigation costs and clarifies property rights by adopting a rigid rule

rather than a flexible, and therefore unpredictable, standard such as reasonableness. It therefore facilitates bargains and makes it more likely that the party who values the entitlement most will end up with it. Transaction costs are likely to be low in two-person situations such as exist between a developer and a neighbor; in addition both the positive and negative externalities of the projects (effects on third parties) are likely to be less than the costs and benefits to the owners, who are the parties most affected by the projects.

(3) *The π will respond that transaction costs are likely to be present and may be high even in two-party situations.* The parties may engage in *strategic bargaining* by stubbornly refusing to reach agreement because they falsely think they can bargain the other party down. If this occurs, the parties may not reach an agreement that is mutually beneficial. Further, the parties may have *imperfect information* about the effects of their actions. The defendant may underestimate the harm its development will cause the plaintiff(s); this may occur when the plaintiff is in a better position to know what those effects will be. At the same time, the plaintiff may be unsophisticated and may not realize the effect Δ's development will have on π's property. Finally, third parties may be affected by the decisions of the two property owners. If they jointly decide to act in a way that destroys one of the parcels, it may decrease the amount of land available for development, thereby wasting a valuable resource and increasing the costs of development of property. If the court has better information than one or more of the parties about which of the parties is likely to be able to avoid the joint costs of their projects at the lowest cost or about which of the parties is likely to value the entitlement more, it may be able to increase efficiency by *giving the entitlement to the party who would purchase it (or keep it) in the absence of transaction costs, including imperfect information.*

(4) *The Δ may respond that the court is unlikely to have better information about which party values the entitlement more.* The better result is to clarify what property rights are and then to enforce traditional allocations of entitlements. This procedure will then *leave it to the market* to determine how rights are allocated. The Δ may reiterate that transaction costs are low in two-party transactions and that third parties are almost never affected more than the property owners whose property is in question. Alternatively, the Δ may argue that the presumption should be that there is no liability; this at least saves litigation costs and may help clarify who owns the entitlement, since litigation is always somewhat uncertain.

(5) *The π may respond that it is not the case that assignment of the initial entitlement will not change the result because of the offer/asking problem and the impacts of wealth effects.* As to the former, if it is the case that people value entitlements they have more than entitlements they are thinking about buying, assignment of the initial entitlement may create a presumption that that person will keep it rather than sell it. This can be due to any number of reasons, including the "endowment effect" and wealth effects. Assignment of the entitlement to *either* party may be efficient in the sense that no transaction will occur to correct the assignment of the entitlement by a sale to the other party. Where this is the case, the court has no choice but to determine which party has a greater claim to the entitlement. Further, if transaction costs are low, and the efficient result will be achieved no matter who is granted the entitlement, the court may as well use considerations of rights and justice to assign the entitlement to the party who is thought to deserve it the most. The judge can then appeal to notions of fairness to determine who should win the case. Wealth effects might also disadvantage certain kinds of landowners from bargaining with the types of users who create large-scale impacts.

No matter how you present the material, it will be useful to point out that the textual material on law and economics is just an introduction to the subject. Proponents of some variation of this method of analysis have come up with extremely sophisticated and nuanced ways of engaging in either economic analysis generally or efficiency analysis specifically. The above

discussion will seem primitive and oversimplified to those versed in a variety of economic approaches.

§4 Surface Water 416
***Armstrong v. Francis Corp*. (1956) 416**
Policy Arguments and Counterarguments…..... 421

Note 1. *What reasons did the court give in* Armstrong *for adopting the reasonable use test? Are you persuaded? What are the disadvantages of the reasonable use test? What arguments could you make that the common enemy rule is preferable? What arguments could you make that the natural flow rule is better than both of the other rules? Why might a court retain the natural flow or common enemy rule in name, even as it adopts standards that require that landowners act reasonably? What are the disadvantages of doing so??*

This question is a prelude to the problem which follows the policy arguments section. The textual material gives students some guidance about the types of arguments that are relevant to deciding what rule of law should be adopted. For a fuller discussion, see the notes on the problem which follows. The question also asks students to read the case carefully to discern the reasons given by the court for the result reached. Those reasons include:

(1) *Precedent.* Each of the extreme rules (common enemy and natural flow) has been modified by exceptions such that courts have been groping toward a middle position. Rather than continue to expand the exceptions to one rule or the other (the court is not clear about what the prior rule in New Jersey was), the court adopts a middle position as the rule of law. Note that this switches from a rule system to a more flexible standard; in this sense, the court clearly changes the law. In addition, a general reasonableness test will generate different results than either of the traditional rules with their exceptions; this is because those exceptions were quite specific and did not allow the court to exercise discretion in the particular case. The result is that the court both argues that the reasonable use test has been established by precedent (since the states have been groping toward it) and that application of the reasonableness test means that the court is not actively making new law but acting in a manner consistent with judicial restraint *and* that precedent should be changed or modernized as circumstances and values change (judicial activism).

(2) *Flexibility.* The court notes that, although rigid rules may create predictability, they sacrifice flexibility. Why is flexibility important? The answer is that it enables the court to achieve the "correct" result in any particular case— "correct" in the sense that the legitimate interests of both parties are protected to some extent, that "illegitimate" uses of property can be disfavored, and that the relative interests of the owners can be balanced both to protect certain base level property interests and to maximize social welfare by promoting desirable economic development while minimizing its costs. The traditional rules—even with the exceptions that developed—were too rigid. They did not precisely distinguish the circumstances under which it would be unfair to allow development to take place without compensation from the circumstances under which it would be fair; nor did they allow careful consideration of the relative magnitude of the harms and benefits in particular situations, thereby mandating results that might not only be unfair, but decrease social wealth and welfare over all.

(3) *Fairness.* The reasonableness test allows direct consideration of the fairness of the result. In particular, it allows the court to look into (a) the question of whether the harm could have been *foreseen* (under the view that it would be fair to hold owners liable when they commit such foreseeable harm) and (b) whether the *purpose* of the defendant is legitimate or whether the harm was committed purely out of *malice* and not for any useful social purpose. It also allows consideration of whether the harm is of the *type* that owners should have to bear for the good of the community.

(4) *Social utility.* The reasonableness test allows direct consideration of the relative harm and benefit of allowing the harm to be committed versus not allowing it to be committed and the relative harm and benefit of requiring versus not requiring compensation to be paid.

For further arguments for and against each of the three tests, see the problem below.

Problem. *Assume that the defendant in* Armstrong *advocated the common enemy rule, while the plaintiff advocated the reasonable use test.*

In some ways, this problem is mechanical. It requires students to apply the abstract arguments contained in the notes following the case to the issue in the case. At the same time, the problem is not mechanical because, once students know the basic building blocks of policy argument, they must attempt to make those arguments *persuasive* in the context of the particular fact situation before the court. Making the policy arguments persuasive requires two separate inquiries.

First, the students must contextualize the arguments by applying them to the specific facts of the case. For example, a student may argue on behalf of the Δ developer that the common enemy rule is preferable because "social utility will be maximized if we give owners incentives to invest by giving them the freedom to develop their property without undue fear of liability for all the social effects of their development." This investment argument *may* be plausible; however, the opposing attorney will bring up the counter-argument that no one will invest if their investment is not secure from being destroyed by other economic actors. Precisely because both arguments have some plausibility, it is necessary for the Δ's attorney to make the abstract argument about deregulation of the market more convincing by explaining why it is particularly relevant in the context of flooding issues. The student might argue, in addition to the general statement made above, that "the cost of protecting one's own property from flooding is likely to be lower than the cost of ensuring that development of land does not cause flooding problems to other owners, and since we want to encourage land development, we should place the obligation to minimize the harms attendant upon such development on the owner who can avoid the loss at the lowest cost." This argument, in turn, needs to be backed up by facts about what the relative costs are of protecting one's own property versus the costs of preventing harm. In any case, the point is that the very general and abstract statement of the argument may be plausible as a general consideration but cannot be persuasive in a particular case unless it is supported by more detailed reference to the particular social context and factual setting in which the rule choice is being made.

Second, in addition to referring general arguments to the specific facts of the case, advocates must take into account the competing arguments of the other side, and must respond to them, either by explaining why they are wrong as applied to this particular fact situation or legal issue, or why they are correct but are outweighed by the argument on the other side. Thus, for example, advocates must explain why the right of security outweighs or takes precedence over the right of freedom of action (or vice versa). Given the fact that regulation of land use may either impede development or encourage it, they must explain why the judge should conclude that the actual effects of the alternative rules are as they predict rather than as their opposing attorney predicts. They must explain why predictability (or flexibility) is particularly important here. Arguments are likely to be more persuasive if they are not one-sided. After all, the judge will hear the arguments on the other side, and advocates should concede the weak points in their argument by stating that "yes, it is true that the rule I propose will have some negative consequences but the other side's rule will have even worse consequences and the negative consequences of my proposed rule are outweighed by its positive consequences."

1. Construct arguments on behalf of the defendant in favor of the common enemy rule.

Rights. The defendant will argue that each owner has the *right* to develop her property without undue fear of liability to other owners. The harm is *damnum absque injuria,* damage without legal redress. Requiring each owner to foresee and prevent the harm from runoff of surface water is unreasonable since this may place a large obligation on a particular owner (especially owners of more elevated land) to prevent harm to many parcels, while possibly placing little obligation on other owners. The common enemy doctrine imposes a *fairer distribution* of the burdens of minimizing the costs of land development since it requires each owner to undertake some obligation to look out for the security of her own property. This is fair because each owner should fairly bear the cost of upkeep of her own property under the principle that *those who benefit from an activity should bear its costs.* Builders and owners should protect their own structures from flooding problems rather than externalizing these costs onto their neighbors. This means that each owner should *foresee* development on neighboring land and protect their own property from these foreseeable developments. This result best promotes *equality* among property owners. The mere fact that someone built first does not give that person the right to impose additional costs on their neighbors who follow them. The reasonable use test promotes this unfair result because it requires each owner to foresee the harm her development will do to all other neighbors; the more developed the surrounding property, the greater the costs of any flooding that will result from the development. The neighbors, by development of their property, have no right to deprive a later developer of the equal right to develop her own property by imposing greater costs on the later developer than the first developers had to bear. Any alternative rule would unequally distribute the costs of development.

Social utility. Liability for harms caused by flooding to neighboring property will increase the costs of development of land and stifle it. Imposing liability allows each owner to externalize onto their neighbors the cost of protecting their own property. Social welfare will be maximized if we refuse to impose disincentives to development by imposition of liability and substitute an appropriate incentive on each owner to take into account foreseeable development of neighboring property and invest in protecting her own land from flooding. This result is efficient because it requires owners to internalize the external costs of their own property uses by paying for the maintenance of their own homes and businesses, rather than imposing these costs on others. If an owner cannot afford to pay for the costs of protecting her own property, then the costs of her development on other owners (who would have to change their development plans under the reasonable use test) may exceed its benefits; however, the imposition of liability will encourage the development to take place despite its external costs, thereby promoting an inefficient result. In addition, the reasonable use test is inherently unpredictable; it therefore discourages development because owners cannot tell beforehand what the costs of the development will be. Further, because the reasonable use test is unpredictable, it discourages private bargaining to allocate entitlements to the highest valued user; bargains cannot easily occur if the parties cannot tell who owns the right in question. The common enemy rule therefore saves the cost of litigating questions about liability for flooding, promotes bargaining among private owners, and enables developers to ascertain more precisely the costs of development.

Formal realizability. The reasonable use test is flexible but creates a large amount of uncertainty. Property owners will never be sure about whether they will be liable to neighbors when they develop their property. This unpredictability is both unfair to individual property owners and discourages economic development. In addition, an unpredictable standard gives too much discretion to judges and juries. Like cases will not necessarily be treated alike, decreasing faith in the legal system and providing room for bias and prejudice as determinants of the outcome in particular cases.

2. Construct arguments on behalf of the plaintiff in favor of the reasonable use test.

Rights. Ever owner has the *duty* to use their property so as to avoid injury to the legitimate property interests of others. *Sic utere ut alienum non laedas.* The common enemy rule is inherently unfair because it entitles an owner to destroy the property interests of her neighbor. Owners should be free to develop their own property, but they have no *right* to do so in a manner that is inconsistent with a similar entitlement in others. Those who *profit from an activity should fairly bear its costs,* rather than imposing those costs on others. Each owner should foresee the harm her development will cause to others and act to prevent that harm from occurring. Each owner has an *equal* right to develop her own property; this right would be meaningless if her neighbors could simply destroy that property. Each owner has the equal right not to have her property destroyed or injured by her neighbors. This rule creates a fair distribution of obligations since each owner has the duty to ensure that her own property uses minimize harms to others. The first developer *does* acquire property rights that legitimately limit the freedom of subsequent developers under the same principles that justify protecting first possession; those who labor and invest have a right to be protected against having the fruits of their labor taken by others. The reasonable use test fairly places obligations on all owners equally and is likely in particular cases to require a sharing of the burden of preventing harm on all owners in the vicinity. The common enemy rule, in contrast, allows the burden of particular developments to be avoided by the developer entirely, placing the entire obligation on the neighbors.

Social utility. Owners of property are more likely to invest if they know that the value of their investment will not be carelessly destroyed by others. People will be discouraged from building homes and businesses if neighboring property owners have no obligation to ensure that their development will not result in the destruction of pre-existing structures. The reasonable use test induces each owner to minimize the costs of development to other property owners. The reasonable use test does not impose a *monopoly* on the first developer, but rather, assigns a *property right* not to have one investment harmed unreasonably by other economic actors. Unlike both the common enemy rule and the natural flow rule, it does not rigidly impose the entire burden on a particular developer but allows consideration of the particular factual context to ensure a correct result. It therefore requires developers to internalize the external costs of their development so that only projects whose benefits exceed their costs will go forward, while not imposing an undue burden; it allows for results that distribute the burdens and benefits of economic development in a fair manner and thus provides sufficient incentives for development without imposing unreasonable disincentives on development. Because of its flexibility, the reasonable use test will neither over-deter or under-deter development of land.

Formal realizability. The reasonable use test is sufficiently predictable. In general, it requires owners to take actions to prevent significant harm to neighboring property owners when they develop their own property. It does not require owners to prevent any change in runoff patterns as does the natural flow doctrine; nor does it require owners to adopt methods of preventing harm to neighbors when they could have prevented the harm to themselves by significantly less expensive precautions. It therefore requires owners to undertake reasonable investments to protect their own property while similarly acting to prevent harm to their neighbors. It allocates to each developer a duty to undertake reasonable precautions to protect both her own and her neighbor's property. Social custom and the practice of the construction industry are likely to create predictable standards for land development that will allocate reasonable burdens on each owner. To the extent the doctrine is unpredictable, it has the advantage of flexibility. Because it is flexible, it both allows courts and juries to achieve the fair result in particular cases, and to allocate the costs of development so as to promote development while minimizing the costs of development. Any other rule predictably results in both unfair and inefficient results.

§5 Support Rights 427
§5.1 Lateral Support 427
***Noone v. Price* (1982) 427**
Massachusetts State Building Code 434
International Building Code §3307 435

Students find the rules of law applicable to lateral support of land confusing. This confusion arises from the distinction made between support for buildings and the land itself. Support for land is buttressed by a strict liability rule, while support for buildings is based on negligence only. At the same time, excavators *are* strictly liable for harm to buildings if the harm to the building was caused by withdrawal of support *for the land*. If the land was strong enough even in its natural condition to support the building, and support for the land is taken away, thereby undermining the building, the excavator is strictly liable for the harm to the land and the building. If, on the other hand, the land in its natural condition was not capable of holding up the building, then withdrawal of support for the land will not cause the excavator to be liable for resulting damage to the building, unless the π can show negligence. This second situation is hard to understand. An obvious question is this: If the land was not strong enough to hold up the building, how did the building stand up? There are two answers to this. First, the building may have been supported *both* by the land on which it was situated *and* by the neighbor's land. However, when the neighbor excavates (as she has a right to do), leaving enough to support the land in its natural condition, the building may be undermined by its own weight. Second, it may take time for the building to collapse or to sink when the land cannot adequately support it; this does not happen all at once. Thus, in some cases, the building would have sunk with or without the excavation on neighboring land; the excavation may simply have hastened the inevitable. The factual distinction can be understood by asking whether the land would be strong enough to hold up the house if all the land around the property were taken away, but support was provided that would be sufficient to hold up the land if there were nothing built on it. If the structure could withstand such conditions, then withdrawal of support for the land will create liability for any resulting damage to the building without proof of negligence; if the structure could not withstand such conditions without additional support, then undermining of lateral support of the land will not create liability for the building in the absence of negligence.

A second point to emphasize is that the definition of negligence in this context is different from the concept generally applicable in tort law. It is quite specific, as the notes explain. In general, liability will exist only if the excavator imposes unnecessary damage to the neighboring structure, by failing to notify the neighbor of the excavation (so she can protect herself), by failing to adopt constructions methods that are as inexpensive as alternative methods which achieve the same result without causing damage, by acting recklessly, or by acting simply out of malice.

Finally, you can use this occasion to introduce the students to the concept of an easement. The right of lateral support for land can be conceptualized as a negative easement—a right to prevent the neighbor from engaging in certain activities on her own land to protect one's own property interests. Introducing the concept helps students start thinking about property rights as divisible interests that can be bought and sold, giving several people property interests in the same parcel. Thus, in the absence of legislation preventing this result, a surface owner can sell to a mining company the right to excavate for minerals underneath one's own land and can also give up the absolute right to subjacent support of the surface which otherwise would be owed by the owner of the mineral estate. Similarly, in the absence of a building code to the contrary, an owner could buy from her neighbor the right to excavate on her own land without liability for any resulting damage to lateral support of the neighbor's land.

Note 2. *Does this explanation [for the distinction between land and buildings] make sense?*

The explanation for the distinction between rights of support for land and structures presented in *Thurston* is formalistic and contradictory. The excerpt is included because, in one paragraph, it includes the traditional legal Latin phrases used in property law decisions to characterize rights of freedom of action *(damnum absque injuria)* and rights of security *(sic utere tuo ut alienum non laedas).* It also contains conflicting rights and foreseeability arguments. At one point, the court argues that an owner should foresee the natural consequences of his construction on neighboring land, has a duty to foresee the harm to the neighboring property and either prevent it or be liable for the damage. At another point, the court argues that an owner "built at his peril" and should have foreseen that his *neighbor* would build and affect his own house and therefore should have provided support for his own structure.

One way to teach this is to ask students to come up with a better reason for distinguishing between support of land and buildings than did the court in *Gilmore* or the court in *Noone v. Price*. One answer may be that providing support for neighboring land is not likely to be onerous, while providing support for a neighboring structure may constitute a big burden, especially if the neighboring structure is large. Moreover, if one owner has a large structure and her neighbor has a small structure, then the support burdens will be unfairly allocated. The owner of the large building will have only a small obligation while the owner of the small building will have a large obligation. This result arguably allows the developer to externalize part of the costs of her project onto the neighbor. The resulting allocation of costs is distributively unfair; those who benefit from a project should pay its costs. Moreover, since transaction costs may prevent the parties from agreeing to remedy the situation, the result may also be inefficient since a project may go forward that should not since some of the costs of the project can be foisted off on the neighbor.

These arguments can be countered by noting that, as a matter of fairness, no owner should be able to use their property in ways that substantially harm the interests of their neighbor. All development should be structured with a view to minimize harm to pre-existing structures. This legitimately protects the rights of all existing property owners to have their investments protected against unreasonable harm, and promotes efficiency by inducing all developers to take into account the external costs of their projects. Even if we view the problem as one of joint costs, it is still desirable to impose liability on owners for harm to other property, since transaction costs are arguably low in lateral support cases, which usually involve only two neighbors. They are therefore different from nuisance situations which may involve many affected parties.

Related to this last point, you might link the lateral support rules to the *ad coelum* doctrine. That doctrine defines property's boundaries vertically from the surface in both directions. A rule that limits a neighbor's duty to the preservation of the surface of the earth (without the additional weight of buildings) encourages parties to direct their activities vertically rather than horizontally in ways that are more likely to cross property boundaries. Thus, an owner who wants to build right up to a property line has to construct her building in a way that is self-supporting from the resources within her column of space. That is, her building cannot rely on her neighbor for some of its support on land across the line. Similarly, an owner who wants to excavate close to the property line must do so in ways that do not undermine the surface of the land across the property line.

The materials in this section are intended to show (1) that statutes regulating the use of real property may alter traditional common law rules; (2) that building codes and other regulations passed by state and local agencies may similarly alter common law allocations of rights and responsibilities; and (3) that it is crucial to understand the interaction between the common law and statutes.

Problem 1. *Applying the Massachusetts laws and building code excerpted above, what is the plaintiff's argument that the law entitles her to recover such damages, either expressly or implicitly? What is defendant's argument in response?*

Plaintiff would argue that the regulations create an express or an implied private right of action. She would argue that the building code creates a duty to "protect[]" property "from damage during construction." The counterargument by Δ would emphasize that no provision of the statutes or regulations creates, either expressly or by implication, a right to sue for damages to lateral support of one's building. The regulations create an obligation to support the neighboring building, at one's own expense. This means that the builder has a legal duty to undertake the costs of building a temporary or permanent wall to support the neighboring structure when excavation takes place. When a builder *fails* to do this, the statutes clearly provide a limited set of remedies for the violation of the building code, i.e., (1) a fine of not more than $1000, Mass. Gen. Laws ch. 143, §94; and/or (2) imprisonment for not more than one year, Mass. Gen. Laws ch. 143, §94. These remedies conspicuously omit a right of an injured property owner to sue for damages. In addition, the local inspector may bring a lawsuit for an injunction ordering the builder to provide lateral support for the neighboring structure, Mass. Gen. Laws ch. 143, §59 (providing that the court may "enforce by any suitable process or decree…the state building code"). This provision does not authorize a lawsuit for damages for harm that has already been committed, but only an injunction to force a builder to comply with the law. Moreover, the statutes do not grant owners the right to bring lawsuits for damages caused by violation of the building code. Rather, they *only* authorize lawsuits brought *by the building inspector*. For example, Mass. Gen. Laws ch. 143, §3A provides that it is the obligation of the "local inspector" to enforce the state building code." In addition, the superior court *only* has jurisdiction to enforce the building code "upon the application of the…local inspector." Mass. Gen. Laws. ch. 143 §59. The superior court "shall have jurisdiction in equity to enforce…the state building code…, *the enforcement of which is the responsibility of [the] local inspector…"* (emphasis added). Thus, the court has *no jurisdiction* to hear a case by one neighbor against another that is based upon violation of the state building code.

The remedies included in the statute were intended by the legislature to be exclusive. While the code should be interpreted broadly to accomplish its remedial purposes, it cannot be rewritten. Nor can clear statutory language be ignored. If the legislature had intended to create a private right of action, it could easily have done so; it knows how to create a right to sue for damages when it wants to do so. If the court creates a right to sue for damages, it may have the effect of replacing public administrative enforcement of the building code by actions brought by building inspectors with private litigation between property owners. This litigation might exclude the building inspector from the process and substitute the decisions of juries for expert decisions by administrative officials charged with administering the building code. Further, if the available remedies are insufficient to induce builders to comply with the housing code, then the legislature should amend the statute to impose greater, or different sanctions. It is not up to the court to rewrite the statute by imposing greater sanctions than those identified by the legislature.

Problem 2. *If the state law does not provide a private right of action for non-negligent harm to buildings on neighboring land, what is plaintiff's argument that the common law should be changed to provide such a remedy? What is defendant's argument that the common law negligence standard should be retained?*

Even if the regulations do not, by their own force, require Δ to compensate π for damaging the lateral support of π's structure, the court should change the common law rule which relieved Δ of liability for damage to lateral support of a neighboring structure in the absence of negligence. The statute and regulations do not state that they are intended to establish the exclusive remedies for land use conflicts or for harms caused by building techniques. Moreover, the jurisdictional

statutes, Mass. Gen. Laws Ann. ch. 143, §§57 and 59 *add* to the jurisdiction of the superior court; they do not take away jurisdiction established by other statutes. The superior court has general jurisdiction to adjudicate a dispute between neighbors. It would violate the remedial intent of the statute to interpret provisions which grant state courts jurisdiction to hear complaints by building inspectors against property owner to *deprive* the courts of jurisdiction to hear civil complaints *by one neighbor against another*. For the same reason, the remedies of fines and imprisonment contained in Mass. Gen. Laws Ann. ch. 143, §94, are intended to apply only to suits brought by the local inspector; this statute does not prevent the court from assessing damages against Δ in addition to the fines that may be assessed by the state.

Finally, the common law rule that liability for undermining lateral support of structures is unavailable in the absence of proof of negligence should be overturned. The common law should be revised to accord with the standard of care imposed by the regulation—i.e., strict liability. This change would make the rules about lateral support of buildings identical to the rules applicable to lateral support of land. This change would further the legislative policy of requiring builders to protect neighboring buildings against structural damage and thus would be in accord with the legislative intent. The old common law rule is both out of date and contrary to current legislative policy. The fact that the legislature created a building code commission and authorized it to implement a building code does not mean that the legislature intended all common law rules about obligations of neighbors under nuisance law and the like to remain unaltered. Indeed, the legislation says nothing about the common law. It is obviously not intended to disallow all nuisance lawsuits; thus π should be able to bring a suit for damages for withdrawal of lateral support.

Defendant will argue, in contrast, that it is inappropriate for the court to change the traditional common law rule that property owners are not liable for damage to lateral support of neighboring structures in the absence of negligence. When the legislature has acted comprehensively in a particular area, the court should assume that it addressed a closely related question and intended to resolve it. The fact that the legislature did not change the common law rule means that it intended to leave the law is it was. For the court to go beyond the statutory language would violate the careful compromises reached by the legislature and constitutes illegitimate judicial activism.

§5.2 Subjacent Support 436
***Friendswood Development Co. v. Smith-Southwest Industries, Inc.* (1978) 436**

The material in this section allows the teacher to continue consideration of the policy arguments introduced earlier in the chapter. In addition, it allows specific consideration of techniques of argument based on precedent and the proper allocation of authority between courts and legislatures. You can teach *Friendswood* by focusing on the problem which follows it. This problem requires the students to develop broad and narrow holdings for both *Armstrong* and the *Acton* and *Houston* cases (explored in the *Friendswood* opinion). You can also devote some class time to the retroactivity issue discussed in Note 4 because it helps to highlight the difference between *ex ante* and *ex post* approaches to resolving legal disputes (see below for further explanation).

Note 4. *What arguments does the court give to justify refusing to apply the new rule retroactively to withdrawals of water that occurred in the past? What arguments could you make on behalf of the plaintiffs for retroactive application of the new rule? How could you argue that even if the new rule is applied prospectively as to all other landowners, it should be applied retroactively to benefit the plaintiffs who brought this particular lawsuit? Was the court correct to apply its new rule to future withdrawal of water from existing wells?*

The issue is difficult because the justification for not imposing the new rule retroactively is to avoid unfairness to those who invested in reliance on prior law. As the court notes in the section entitled *"Stare Decisis,"* this argument applies to every owner who drilled a well prior to the effective date of this opinion. To impose a new obligation on the owners of *existing* wells will effectively impose the new rule retroactively on them. However, if the new rule does *not* apply to them, this defendant would have the legal right to continue withdrawing water in a manner that could result in the *destruction of all other property in the county.* This result is arguably unfair to all other property owners and decreases social utility overall.

The argument for applying the new rule prospectively only to wells drilled after the date the opinion became final is that owners who drilled wells previously relied on the existing law when they invested in developing their property and thereby obtained vested rights to the benefits of those laws. To apply the new rule retroactively would be akin to imposing an *ex post facto* law on these owners, making unlawful conduct that was lawful at the time engaged in. Applying the new rule retroactively penalizes them for investing in those wells when, at the time they invested, they had no reason to understand that they would be subject to such far reaching liability. It is fundamentally unjust to punish people for conduct that was lawful at the time engaged in. Moreover, it arguably constitutes a taking of property without just compensation. In addition, social utility will be maximized if people know that they can rely on the law at the time they invest; otherwise no one will have any secure expectations that they will reap the rewards of their investment. If it is the case that allowing future withdrawals of water without liability will cause more harm than good, it can be enjoined, but it is unfair to deprive existing owners of their investment. One possibility, then, is that plaintiffs should be granted an injunction but only if they agree to compensate the defendant for the loss of its investment, i.e., a purchased injunction. If this cost is too great for the plaintiffs to bear and the harm caused by defendant's activity substantially outweighs its benefit to defendant, then the proper resolution is for the government (county, town, or state) to take defendant's property by use of its eminent domain power and pay just compensation. This procedure would ensure that activity which is harmful to the community ceases while not unfairly imposing the cost of this change in the law on particular property owners. If it is true that society will benefit overall by retroactively changing the law, then the public should be able to compensate the individual owners unduly harmed by this *ex post facto* law; if, on the other hand, the public is not willing to tax itself to compensate these owners for their losses, this provides evidence that the benefits to society of retroactive change in the law are less than the costs, and in such a case, retroactive change in the law is inefficient.

The argument for applying the new rule of law retroactively at least for the particular plaintiff who brought the lawsuit is that such a result would encourage individuals to bring lawsuits to modernize the law. They will only bring such lawsuits if they think there is a good chance they will win and therefore recoup the costs of the lawsuit. If this plaintiff is not given the benefit of the new rule of law, no one will ever bring a lawsuit to change the existing law since, although this would benefit the community, the costs of the change will be borne solely by this particular plaintiff. The failure to allow the plaintiff to benefit from its own lawsuit will therefore stifle needed legal development, freezing legal rules in a form that may no longer fit with either current social values or conditions, thereby resulting in both unfairness and inefficiency. (Note that the proponent of prospective application of legal rules can argue that changes in the law should generally be made prospectively, and in the rare cases—of which *Friendswood* may be one—where an old rule of law comes to be seen as allowing serious harm to the public interest, the appropriate remedy is legislative change in the law with compensation paid to those owners who invested in reliance on prior law.)

The arguments in favor of retroactive application of the new rule are as follows: First, it may be argued that a new rule is *not* being applied retroactively. The dissenting opinion

distinguished earlier cases that the majority characterized as deciding this case (the cases concerning withdrawal of water). (See the problem below for further explanation of how the court did this.) The dissenting judge also referred to other precedents and found them to be applicable here (the cases concerning subjacent support and nuisance). Thus, the advocate may either (a) distinguish earlier cases and treat this issue as a case of first impression so that any result will not be retroactive since the law was never clear before; (b) apply other specific rules of law to the case, such as general principles of nuisance law; (c) apply overriding general principles that lie behind property rights generally and inherently qualify them, such as *sic utere* (use your property so as not to injure that of another); or (d) argue that the law has been generally changing in a particular direction (imposing greater liability on property owners for environmental damage) such that the owner's reliance on prior law and the owner's belief that it would never change were unreasonable. Second, it may be argued that no owner has the right to use their property in a way that destroys the entire community. Nor can any owner have reasonably expected that the law of property extended their rights so far. Such a result would not only be unfair to all other owners but be inefficient in practice, allowing particular groups of owners to substantially harm the public welfare. Compensation should not be required because no owner ever had the right to use their property in a way that will destroy everyone else's property. Third, while it may be unfair to surprise an owner by retroactive change in the law, it is also unfair to allow one group of owners to surprise other owners by engaging in activity on their own land that results in the complete destruction of their neighbors' property. The free use rule of law is both inherently unfair to its victims and is inefficient since it provides no incentives to minimize the costs to others of one's own land use. Thus, although retroactive application of the law is unfair, it is equally unfair to allocate property rights in an unfair manner. Either way the court goes, it will be doing something unfair. The problem then is to avoid the more serious harm. The right to rely on existing law is not absolute; rules may be changed in order to protect the public welfare. Thus, the defendant's expectation that the law would never change is unreasonable when the effect is to authorize the destruction of an entire county.

Note 5. *What precedents did the majority and dissenting opinions rely on to decide the case in* Friendswood*? Which rules of law did the opinions mention?*

The majority focuses on rules concerning water rights while the dissent focuses on rules concerning lateral and subjacent support. The case is hard because both sets of rules are arguably involved and they arguably conflict under the circumstances of this case.

Problem.

You are in a jurisdiction that has no precedent on the question whether an owner can excavate on her property in a way that undermines subjacent support for property located some distance away. At least two prior cases, however, are relevant. Your jurisdiction has adopted the reasonable use *test to govern conflicts over flooding caused by diffuse surface water, as established in Armstrong v. Francis: Owners have a duty to act reasonably in developing their property so as to avoid causing unreasonable harm to neighboring owners resulting from the runoff of diffuse surface water. Your jurisdiction has also adopted the* free use *or* absolute ownership *test to govern disputes over groundwater, as established in* Acton v. Blundell*, 152 Eng. Rep. 1223 (Exch. 1843), and* Houston & T. C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904). In addition, your jurisdiction has adopted the common law rule concerning lateral support of land: an absolute duty to support neighboring land in its natural condition but only a duty not to act negligently in withdrawing support from neighboring structures.*

This problem is intended to help introduce students to the process of reasoning from precedent by developing alternative holdings for prior cases, alternatively distinguishing those

cases and applying them (or arguing from them by analogy). Several points are important to emphasize to students. When distinguishing a prior case, it is necessary to do two quite different things (and then blend them together): (1) identify a *factual* difference or differences between the current and the prior case and (2) explain why the difference *matters* by explaining why the *policy* concerns justifying the result in the earlier case do not apply here or why they are outweighed by *competing considerations* in the present circumstances. The result of this process of argument will be to identify a *narrow* holding for the prior case that will apply only to the fact situation in that case (and cases like it) but not to the present case. In arguing that the prior case applies to the current situation, it is necessary to generate a *broad* holding for the prior case which encompasses both it and the present case; this holding will (1) characterize the *facts* in both cases in a more general fashion (such that both cases are examples of a single problem or social context) and then (2) explain why the *policy* concerns underlying the prior case *apply* to the present case as well—either directly or by analogy—and are not outweighed by any *competing considerations.*

The following chart illustrates the exercise. The π must argue that the rule of law in *Armstrong* applies here either directly or by analogy and that the *Acton* and *East* cases are distinguishable. The Δ argues the reverse. The answers given below are representative of the *types* of arguments that are appropriate. Students and teachers may be able to come up with better ways of distinguishing or applying the relevant cases to the *Friendswood* situation.

	π/plaintiff arguing for nuisance (or reasonable use)	*Δ/defendant arguing for free use*
Armstrong (reasonable use test for harm caused by diffuse surface water)	apply	distinguish
Acton & East (free use of groundwater without liability)	distinguish	apply

1. Make the argument for the plaintiff that precedent justifies giving them a right to stop the subsidence and get damages for past subsidence.

i. Applying the Armstrong *reasonable use test. Armstrong* held that property owners have a right to develop their property only so long as they do not interfere unreasonably with their neighbor's use and enjoyment of their property. Property owners have no right to cause substantial harm to neighboring property. The reasonable use test is a version of the nuisance standard, which is the general rule of law applicable to land use conflicts. The reasonable use test is therefore not limited to the context of flooding caused by diffuse surface water but extends to all land use conflicts with only limited exceptions (such as those contained in *East,* as explained below). It is reasonable to extend the nuisance or reasonable use test to the context of withdrawal of groundwater because it is possible, under current scientific methods, to predict when such withdrawal will affect other properties. Imposition of liability will therefore not unduly inhibit desirable investment in production of water resources.

ii. Distinguishing the Acton/East *free use rules.* The prior case of *East* held that owners are free to withdraw as much groundwater from their own property as they like even if this has the effect of withdrawing groundwater from underneath neighboring property. First, the groundwater free use rule is intended to determine ownership of a resource that has not yet been reduced to possession or captured. Although each owner has the exclusive right to drill for water on their own property, the groundwater is not owned by anyone until it is in fact withdrawn. This case *(Friendswood)* concerns not a question of assigning ownership but liability for harm to property which is clearly owned by someone else. The *East* rule does not authorize withdrawal of water in such a way as to destroy other people's property. Second, the *East* rule is intended to promote investment in the withdrawal of groundwater because such water is socially useful. To the extent one owner withdraws more than it needs, and others are not able to withdraw water from their own land, a market will be created, as *Friendswood* demonstrated; Δ sold the water to industrial users. Since people can purchase water from those who produce it, the harm to neighboring interests in groundwater is not fatal; it does not decrease social wealth generally. Thus, the free use rule encourages investment in producing water and thereby increases social welfare. In *Friendswood,* however, the withdrawal of water is not an unmitigated social good; it is causing the destruction of other property. When you undermine subjacent support, there is little the victim can do about it. No market is created to exchange a valuable resource; rather, in most cases, the land is destroyed and left with no economically viable use. Even when the land can be repaired by filling it in, this process is costly and may require destruction of any buildings located on the land. While we want to encourage the withdrawal of groundwater, we want to discourage owners from undermining subjacent support and destroying neighboring land. Thus, the doctrine of free use in *East* must be qualified by an exception; owners are free to withdraw groundwater without liability for harm to their neighbors' interests in the groundwater (as long as they do not act negligently), but they may not freely withdraw groundwater when this substantially harms the subjacent support of neighboring landowners.

2. Make the argument for the defendants that precedent gives them freedom to withdraw the water without any liability.

i. Distinguishing the Armstrong *reasonable use test.* The reasonable use test applicable to flooding, and nuisance doctrine generally, do not apply to withdrawal of groundwater because of the difficulty of predicting the exact consequences of withdrawal of groundwater. The reasonable use test in the context of surface water will not unduly deter land development since it is possible to anticipate the amount of the runoff; imposing liability is therefore not unfair to defendants in such cases. In contrast, liability would be unfair to impose on Δ in *Friendswood* since the extent of damage was not foreseeable at the time the wells were drilled.

ii. Applying the Acton/East *free use rules.* The holding of *East* is that land owners are free to withdraw groundwater without liability for any resulting harms to neighboring property owners. That rule clearly applies to the present case. The rule is based on the fact that it is difficult to tell when excavation or withdrawal will affect property, especially when it is located far away. Both the fact and the amount of liability is uncertain and hard to predict. To impose liability would create such uncertainty about possible liability that it would unduly inhibit desirable investment in production of water resources, thereby inhibiting desirable economic development. If the withdrawal results in harm to other properties, this can be remedied by contract among the affected property owners.

In addition to this problem, you can focus attention on the question of the proper judicial role in lawmaking. Assuming the majority was correct in *Friendswood* that the traditional rule was that the harm committed by Δ was *damnum absque injuria* and that the plaintiff had no legal

remedy, was it appropriate for the court to change the common law rule, even prospectively, especially since legislation existed on the subject? The argument for changing the rule is that the common law should adapt to changing social values and conditions. Moreover, if a statute promotes policies at odds with older common law rules, judges should modernize the common law to accord with expressions of public policy embodied in legislation. Such a result defers to the democratic legislature, rather than acting in defiance of it. The fact that the legislature addresses a topic does not mean that every single issue is considered; rather, it is more likely the legislature did not think of everything. It is therefore appropriate for courts to change peripheral rules of law that the legislature might not have considered to bring them in line with the legislatively mandated policy. The counterargument is that changes in property rules should generally be left to the legislature, which not only has democratic legitimacy in lawmaking but has the capacity to amass necessary information to determine the costs and benefits of changes in the law. This is especially true when the legislature has already acted in a field; the fact that traditional rules of law were *not* changed give some indication that the legislature did not want them to change.

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6. Land Use and Natural Resources Regulation 447

Themes

Land use law is covered in several places in the book. After an introductory discussion of the nature and legal validity of zoning, this chapter primarily addresses three core issues: the interplay of zoning administration and preexisting property rights, challenges to zoning arising out of concerns about exclusion and fundamental rights, and natural resources law as a companion regulatory regime to land use law.

Many of the doctrines in Chapter 6 bear resemblance to, and may even be required by, constitutional principles—especially the takings clause. Nevertheless, court opinions on the doctrines in this chapter often treat them simply as matters of either common law or of statutory interpretation. Chapter 12 covers federal and state statutes that prohibit discrimination in housing and mortgage markets, many of which have been interpreted to regulate the actions of public officials as well as private housing providers, most notably in the context of zoning laws. Chapter 13 covers the takings clause and comprehensively addresses the question of when a land use regulation constitutes an unconstitutional taking of property without just compensation.

Land use and natural resources regulation appear in Part Two of the casebook, which is entitled "Relations Among Neighbors." This is because each of the topics in Part Two address a different set of institutional responses to similar patterns of primarily localized use conflicts. Adverse possession and related doctrines – Chapter 4 – deal with border disputes and conflicts over possession. Nuisance and related doctrines – Chapter 5 – provide a judicial venue for adjudicating conflicts over land use generally after those conflicts materialize. And although servitudes, which we turn to in Chapter 7, provide functions that go beyond land-use conflicts, one important use of private agreements that run with the land is to bind neighbors ex ante to agreements about compatible property arrangements. Placing land use regulation in this panoply of approaches can help students compare and contrast the advantages and disadvantages of each regime, while recognizing that these approaches overlap in practice and work in concert in many instances.

Some teachers prefer to teach the takings clause directly after teaching zoning law. This is a perfectly sensible way to proceed. We have organized the book as we did for the following reasons. First, starting with land use regulation earlier in the course connects it to trespass and nuisance cases, which are easy to understand. The materials in Part Two cover the wide range of techniques the legal system uses to regulate property owners, starting with tort-like issues of trespass and nuisance, and concluding with rules regulating private land use agreements (servitudes). In this edition, however, we have moved the materials on equal protection, due process, and other fundamental rights issues into Chapter 6, to ground the connection between constitutional structure and our system of property. First-year law students have not yet learned the difference between constitutional law and nonconstitutional law and are forever arguing that something is unconstitutional; they also often fail to understand that something can be unlawful even if it is not unconstitutional. They often want to argue that a particular legal rule should be promulgated and proceed directly to the argument that the Constitution compels this result.

Property law is complicated, and it is important for students to understand this complexity before addressing the takings issue—an issue often best addressed at the end of the course as a whole. The more students understand about how difficult it is to decide property questions, and the complexity of the ways in which the rules in force have traditionally allowed or required property rights to be limited or divided among several parties, the more skeptical they will be of arguments that particular property rules should be frozen for all time as fixed constitutional principles. This is not meant to teach students that they *should* not come to this conclusion, or that they should not favor expansion of constitutional protection for property rights; it is, however, meant to increase

the likelihood that they will be able to make sophisticated, rather simplistic, arguments when they define core property rights which they think should not be altered by legislation or court action without paying compensation. For this reason, the more nonconstitutional law the students know, the more sophisticated and plausible will likely be their constitutional arguments.

A few other themes in Chapter 6 to highlight:

1. *Relations between the state and property owners.* Because many of the doctrines in Chapter 6 have a quasi-constitutional status, particularly in terms of the protection for property rights that precede zoning, the cases allow students to ponder questions of fundamental fairness in legislative regulation of property rights before getting into the detailed and murky law of regulatory takings. While most of the other materials in Part Two address conflicts among property owners, and while zoning law can be conceptualized as regulating property to protect the property rights of others in the community, as a formal matter, zoning law disputes generally take the form of conflicts between property owners and the state. Zoning law therefore arguably shifts attention to the state/citizen relationship, which is present, but can be more muted, in the other materials in this Part.

2. *Limits on the state's power to regulate property to promote the public welfare.* Because many of the doctrines in this chapter share common concerns with constitutional doctrines (including prior nonconforming uses, vested rights, and variances), they not only focus attention on the state/citizen relationship, but also prompt questions about what limits there should be to the power of the state to regulate private property to promote the public welfare. The central question of the takings clause analysis is therefore relevant here: what burdens on property owners are legitimate sacrifices citizens must bear for the public good and what burdens are illegitimate because they ask too much or because they ask a kind of sacrifice that owners should not have to bear or because they wrongly single out particular citizens to bear burdens that should, as a matter of distributive fairness, be borne by the public as a whole. The materials in Chapter 6 about race, intimacy, speech, and religion present other normative and constitutional frames through which to explore the limits of state power over property.

3. *Equality.* Many of the doctrines in this chapter address equality concerns that are analogous or related to antidiscrimination principles. Most of these cases arguably address the question of what *burdens* on property rights are unfair if they are imposed only on particular owners or groups of owners rather than spread around to the community as a whole through use of taxation and the eminent domain power (prior nonconforming uses, variances, vested rights, environmental liens). Some of them arguably also address provisions that grant undue *benefits* on particular property owners. Spot zoning doctrine, for example, prevents legislators from giving particular property owners special benefits that do not promote general public interests; similarly, the law of variances is partly about preventing particular owners from getting special exceptions to the zoning law that are unwarranted. This chapter is also designed to illustrate a tension fundamental to land-use regulation: empowering communities to protect property rights through zoning can be used to exclude outsiders, discriminate against religious minorities, and burden free speech.

4. *Statutory interpretation.* Many of the topics in this chapter involve interpretation of ambiguous terms in zoning ordinances. What constitutes a prior nonconforming use? What are the standards for obtaining special exceptions and variances? As with statutory interpretation questions in earlier chapters, students must analyze the purposes behind zoning laws and must pay attention to the limits of those policies. Those policies generally protect competing interests that property owners have in either freedom from unwarranted regulation, reliance on prior law or immunity from unfair surprise. Thus, interpretation of the relevant statutory provision requires students to consider the competing policies behind the legislation and to determine how the line should be drawn between them. This issue partly concerns a question of legislative intent: How did the legislature want these competing interests reconciled? But it is also a question that either directly

embodies, or indirectly concerns, constitutional principles: What are the limits of the state's power to regulate property rights?

5. *Comparative institutional responses to land-use conflicts*. With this chapter situated in the arc of discussion about relations among neighbors, many of the cases can illustrate the advantages and disadvantages of zoning and similar regulatory regimes in comparison to nuisance and servitudes. For example, zoning can be comprehensive, rational, community-wide, and democratically accountable. On the other hand, zoning and related regulatory regimes can be over- or under-inclusive, exclusionary on the basis of socioeconomic class, race, religion, and other categories, and can favor property elites even within a given political system. How one evaluates the comparative advantages of legislative and regulatory approaches to resolving land-use conflicts reflects the faith that one can put in planning (and planners!), as well as the local political process. This chapter thus invites some reflection by the students on countermajoritarian concerns versus the reality of the potential dysfunction and parochialism of local governments, particularly suburban jurisdictions where zoning has had some its most exclusionary effects.

§1 Land Use Regulation: Origins, Authority, and Process 447
§1.1 The Roots and Structure of Zoning 447
§1.2 Zoning Authority and Validity 448
***Village of Euclid v. Ambler Realty Co.* (1926) 448**
§1.3 Other Land Use Regulatory Regimes 459
§1.4 Modernizing Zoning 460
§1.5 Common Patterns in Land Use Litigation 461

Village of Euclid v. Ambler Realty Co. is a case every lawyer involved in land use regulation should be familiar with and it contains the seeds of much contemporary zoning law and policy. *Euclid* was designed as a test case and the sweeping affirmation of the practice of comprehensive zoning by the Supreme Court—despite the as-applied reversal of Cambridge, Massachusetts' zoning in *Nectow v. City of Cambridge* (1928)—helped to usher in the development patterns for nearly century since. *Euclid* also reflects many of the original sins of zoning that continue to haunt local land use, including racial, ethnic, and socioeconomic exclusion, planning decisions that ignore regional context, and the dominance of land-use patterns that contribute to environmental harms, increasingly including climate change.

One way to approach the case is to use it to illustrate the basic patterns of "Euclidean" zoning in terms of height, use, and area regulation, and the cumulative nature of many use districts. With the basic regulatory regime laid out, it is possible to focus the class discussion on several themes: What were zoning officials in the village trying to achieve? How did the zoning plan follow or conflict with existing patterns of land use? What rights was Ambler Realty asserting? Did the Court rely on nuisance or was the Court validating a broader understanding of the police power in the land-use context? (It is hard to imagine that an apartment building would have been a nuisance under any common-law doctrine without some direct interference with the use and enjoyment of someone else's property, so is the invocation of *sic utere* appropriate?)

The question in **note 1** – "What harms, specifically, did the Court contemplate this separation of uses preventing?" – helps the students see that the purported harms on which the Court relied were quite different from nuisance-like conditions traditionally encompassed in doctrines based on a *sic utere* rationale. That does not, however, mean that the police power is not capacious enough to encompass other notions of harm, a theme that recurs if the course reaches *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), in Chapter 13, but it does illustrate some limitations of analogical reasoning here. The question can also prompt a discussion of multifamily housing – apartment buildings and the people who tend to occupy them – as a nuisance: Is that a legitimate way to think about density?

Euclid can also be used to discuss political-process and democratic-theory based rationales for deference in the context of local governments, which can naturally lead to a discussion of localism versus regionalism in land use regulation. It can be fruitful to ask students who was represented in the community in the decision to create the zoning regime and who was *not*? Are the normal rationales for deference to legislative judgment valid in light of the potentially exclusionary nature of zoning? What would it mean to take the *Euclid* proviso, as Ezra Rosser (in an article that came out after the Eighth Edition was complete – *The* Euclid *Proviso*, 97 WASH. L. REV. (forthcoming 2021)) evocatively labelled the nod in the case to regional concerns theoretically trumping local concerns?

Note 5. *Is zoning a better tool for this purpose than nuisance law? Than agreements between neighboring owners? What are the best arguments for distinguishing each of these approaches to controlling the uses of land? Are they necessarily mutually exclusive?*

These questions are meant to elicit a discussion of comparative institutional approaches to resolving land use conflicts, as discussed above. Students, depending on how you structure the course, may not have encountered servitudes at this point, so it might be necessary to explain just a little about how agreements between owners can bind subsequent owners.

Some arguments for distinguishing nuisance, zoning, and servitudes as land-use regulatory responses include:

- *Ex-ante versus ex-post approaches*: Is it better to wait for land-use conflicts to emerge before trying to resolve them, or is it more efficient and/or fairer to resolve such conflicts before they crystallize?
- *Rules and standards*: Nuisance is at its core a standards-based approach to land-use conflicts, whereas zoning is often (although not always) more rule-like in its approach.
- *Judicial competence*: Are courts more or less capable of evaluating comparative uses of land when they conflict than the neighbors themselves? Obviously, bargaining will have failed if neighbors end up in litigation, but should courts try to replicate what reasonable neighbors would have done had they been able to work out their differences?
- *Accountability and democratic process*: If done right, zoning allows a community to be involved in the process of managing land use. If done wrong, zoning can be exclusionary and discriminatory. Much zoning is a mix.

The second question in note 5 – "Property taxes are a primary source of revenue for most local governments, which can shape zoning incentives. Can you see how?" – can be used to illustrate the ways in which local governments have incentives to use their authority over land use to favor uses that contribute relatively more to the local budget and draw relatively less from that budget, all things being equal (which they rarely are). Faced with the choice between a multifamily building that is likely to draw many school children to a community and an office park that requires few services and generates new jobs, a zoning official focused on fiscal considerations might be inclined to favor the latter (perhaps a "light industrial") zone. Local politics are more complicated than this, and fiscal considerations can mask more troubling motivations, as the *Mount Laurel* decision covered later in the chapter illustrates. But fiscal considerations are often a part of the decision-making apparatus when local governments are exercising their regulatory authority.

The final question — "How should [the legacy of exclusion, racial and otherwise] shape not only challenges to zoning based in antidiscrimination law and other fundamental rights, see §4.2, below, but the general deference that courts grant to local and other officials in land use?" —

can prompt further discussion about fairness as well as risks of political-process failures both in terms of people not represented within local government decision-making because they are outsiders as well as the reality that local land use decisions tend to reflect William Fischel's homevoters, who tend to be relatively wealthier and more often less diverse, given racially differential rates of home ownership in the United States.

§2 Constraints on Zoning Authority to Protect Preexisting Property Rights 462
§2.1 Prior Nonconforming Uses 463
***Town of Belleville v. Parrillo's, Inc.* (1980) 463**
§2.2 Vested Rights 468
***Stone v. City of Wilton* (1983) 468**

This section is designed to link two closely related doctrines – prior non-conforming use and vested rights – that each seek to protect owners' reasonable expectations in the continued application of existing regulations.

One way to teach the materials in this section is to focus on the problems, which we have constructed to address particular projects which face a variety of zoning law questions, from prior nonconforming uses, to variances, to vested rights.

The question in **note 1** following *Parillo's* – "Early zoning codes generally assumed that disfavored incompatible uses would largely fade away over time, but that turned out not to be the case for many such anomalies. (Can you see why?)" – can elicit a discussion of what it means to be a legislatively protected monopoly, as many prior non-conforming uses end up being. Imagine a simple scenario in which you have one grocery store in a neighborhood that is mostly residential. If that neighborhood is zoned residential and other grocery stores are not allowed to enter the market as a result, the pre-existing store has a tremendous advantage. This is a primary reason why some owners fight so hard to preserve the designation of a given piece of property as a valid non-conforming use.

Note 2. *How should courts evaluate the extent to which a change to a nonconforming use is permissible?*

Among the considerations are, on the one hand, the owner's reasonable expectations that an existing use, usually a business, should be able to expand and grow just as other businesses are allowed to. Otherwise, the incentive to invest and maintain the business is reduced. Moreover, it can be argued, if a community already has one non-conforming use (for example, a restaurant in a residential neighborhood), they can hardly complain if that parcel is used for something distinct (for example, a disco). To the extent the new use raises concerns about traffic, noise, and the like, there may be other regulatory means to address them, rather than preventing all new uses. On the other hand, neighbors have expectations as well and the continuing protection for non-conforming uses is a concession from the uniformity of planning that should not be open-ended.

Problem. *In* Cumberland Farms v. Town of Groton, *719 A.2d 465 (Conn. 1998), land used as a gas station was rezoned for residential use. The gas station was allowed to continue operation as a prior nonconforming use. However, when the owner was required by federal environmental statutes to clean up pollution caused by leaking underground storage tanks on the property, the owner sought to open a little convenience store on the property along with the gas station to raise enough money to pay for the cleanup. Assume that the income from operation of the gas station is not sufficient to pay for the environmental cleanup but that the owner could sell the property at a very low price to someone who could clean up the property, demolish the gas station, and construct*

condominiums on the land. Such a sale would end the prior nonconforming use and clean up the property but the current owner would have lost his business and received very little in selling the land. The current owner cannot convert the property to condominiums himself because no bank would loan him the money for the project. The property has a viable economic use for another owner but the only economically viable use for the current owner is to open the convenience store and keep operating the gas station.

Is the current owner entitled to open a small convenience store on the gas station property under the prior nonconforming use doctrine?

This is a change in the nature of the business and a restrictive approach to this issue would find it to be outside the prior nonconforming use. On the other hand, gas stations have evolved to offer such services and it might be thought to sit within the traditional use, especially if it will help allow protection of neighboring property by cleaning up toxic waste.

Problem. *A licensed day care center operates on a parcel of property that is rezoned for residential use. The day care use is allowed to continue as a prior nonconforming use. The cost of insurance rises so dramatically that it may no longer be profitable to operate the day care center. The site is suitable for a single-family dwelling, but the structure is not; the cost of renovating the day care center to convert it to a single-family home is roughly equivalent to the cost of tearing it down and building an entirely new structure. The owner of the day care center wants to convert the property for use as classroom facilities for deaf high school students, who would take some classes at the center and other classes with hearing students at the high school. The building is suited to that use.*

a. Prior nonconforming use. Would this constitute an unlawful extension of a prior nonconforming use under the standards articulated in Belleville v. Parrillo*'s?*

First, the test for what constitutes a prior nonconforming use is that the owner must continue substantially the same kind and intensity of use to remain exempt from otherwise applicable zoning restrictions. Doubts are resolved against allowing the owner to alter the use. This doctrine protects owners who relied on pre-existing zoning laws (or the lack of them) in investing in real estate development. The goal is to protect this reliance interest by enabling the owner to continue the same use but not to expand or change the use, on the assumption that the owner's primary expectations will be protected if that use is allowed to continue. At the same time, the doctrine rests on the notion that an owner's expectation that she would be able to change the current use is less reasonable. If it were necessary to compensate all owners for any prospective change in land use regulations, the state would arguably be deprived of its police power to regulate property to promote the public welfare. In addition, the ultimate goal is to move the parcel from its prior nonconforming use to the use(s) allowed under the zoning law to achieve a rational and consistent plan for the community and the particular neighborhood in which the property is located. The prior use is defined narrowly to enable the owner to obtain a return on her investment while giving the owner an incentive, once a reasonable return on that investment has been received, to shift to the kind of use that is more compatible with the other uses in the neighborhood. The doctrine therefore protects vested rights (investment in reliance on prior zoning regulations) while encouraging development over time of a consistent neighborhood plan.

The daycare center operator would argue that conversion from a daycare center to a school for supplementary education for deaf teenagers would not constitute an unwarranted expansion of a prior nonconforming use. The facility will continue to be used for school purposes. From the standpoint of the effect of operation of the facility on the neighbors, on life in the community, and on property values, the change is likely to have little or no effect. There will be no increase in traffic, density of occupation, or noise. The policy underlying the prior nonconforming use doctrine

is to protect community interests in a neighborhood plan for consistent property use while protecting those who invested in reliance on prior law. Use of property for school purposes is consistent with usage in a residential neighborhood. There is therefore no great (or any?) harm to the public caused by allowing the school to continue in operation. On the other hand, because of the unexpected change in the cost of insurance, the profitability of the daycare center may be substantially reduced, and since the owner purchased the property and invested in it for commercial, profit-making purposes in reliance on prior law, the owner has a right to change the use in a marginal way that does not effectuate any greater or different burden on the rights of the neighbors in order to derive a reasonable return from her investment.

The town may respond that the new proposed use is a substantial change in both quality and intensity of use. The difference in type or quality of use comes from the fact that teenagers are different from pre-school children. Parents of pre-school kids are likely to drop them off, while some teenagers will have access to cars and will drive from school to the center. This may increase parking problems in the neighborhood. In addition, the timing of classes may be different. The daycare center operates during the day while the program for deaf students may operate after school hours, thereby prolonging the commercial use of the building into the evening hours. This problem of timing may be exacerbated if students hang out at the school and use it as a center for social life where they can get together. There is therefore some potential negative effect on the neighborhood of the change in use. At the same time, the purpose of the prior nonconforming use doctrine is to ensure that prior uses become converted over time to uses that are compatible with the zoning scheme. The goal is to remove eventually the prior nonconforming use. Refusing to allow the change will not illegitimately deprive the owner of her property rights since there is an alternative economically viable use for the property; since it is located in a residential neighborhood, the property can be used for a single-family house. Any doubts should be resolved against the change to protect the interests of the community in a uniform plan, as long as the owner has received a reasonable return on her investment and imposition of the zoning requirement will not deprive the property of economically viable use.

b. Vested rights. The owner gets the property rezoned for school purposes, begins plans to convert the building, hires and pays fees to an architect, signs a contract with a building contractor to renovate the day care center, and agrees with the school board to provide classes in sign language for the deaf high school students in the school district. The contracts with the developer and the school board are contingent on obtaining a building permit as required by the local zoning law. The owner applies for, but has not yet been granted, a building permit and has spent a total of $20,000. The neighbors organize opposition to the location of the project and successfully induce the city council to rescind its rezoning of the parcel, effectively returning the parcel to residential use. The owner of the parcel sues the city, claiming that the second rezoning interferes with her vested rights in the prior zoning classification. She argues that owners have vested rights to use property in accordance with existing zoning classifications if they invest substantial amounts of money (in addition to the purchase price of the parcel) in plans to build on the parcel in reasonable reliance on the existing classification. The city argues that no vested rights can arise until a building permit has actually issued, regardless of the sum the owner has spent in preparatory plans. Which rule should the court adopt and why?

The main argument for a rule of law that relies on issuance of the building permit as the dividing line for determining when rights have vested is that it is formally realizable. It prevents unnecessary litigation and puts property owners on clear notice of when they can rest assured that zoning law changes will not apply to them. In addition, it may be argued that the owner's reliance on existing law is not reasonable in the sense that the owner should be confident that no changes in the zoning law will apply to the parcel only when a building permit has been issued. Until that time,

any investment in a development project must take into account possible prospective changes in the law.

The main argument on the other side is that the purpose of vested rights doctrine is to prevent the state from taking property without just compensation. A central component of the test for determining this question is whether the application of the land use restriction interferes with reasonable investment-backed expectations. When an owner has invested substantially in reasonable reliance on existing land use regulations and taken significant steps to build a project, including signing contracts and making substantial expenditures, the state should not be able to apply new legal rules retroactively to this property owner. This standard is not inherently unpredictable; the requirement that building contracts be signed enhances its predictability, and there is likely to be sufficient agreement on what constitutes a substantial expenditure. Moreover, this test acknowledges that purchasing the land, without more, is not sufficient to establish vested rights. (This conclusion follows from *Euclid v. Ambler Realty*.).

§3 Administrative Zoning Flexibility and Rezoning 472

The materials in this section highlight different ways in which zoning introduces administrative flexibility over time or can be modified legislatively. Zoning is thus a dynamic regulatory system, responding to changing conditions and interests, however imperfectly.

§3.1 Variances 473
***Krummenacher v. Minnetonka* (2010) 473**
§3.2 Special Exceptions 479
§3.3 Rezoning and Challenges to Particularized Zoning Changes.....481

Krummenacher v. Minnetonka illustrates a distressingly common pattern in variance practice—neighbors who fight tooth and nail over what might seem to outsiders to be relatively banal conflicts. The case began in 2008, when a man named Beat Krummenacher sued the city of Minnetonka after the city granted a variance to Krummenacher's neighbor to allow her to remodel her garage. The neighbor, JoAnne Liebeler, was the former host of a PBS-TV remodeling show called "Hometime." Krummenacher complained that Liebeler's renovated garage would block his view, and he fought the case all the way to the Minnesota Supreme Court, even though the renovation project was completed in 2009.

The question in **note 2** – "How might Liebeler's variance application come out on remand if the practical difficulties standard is applied?" – is meant to illustrate that practical difficulties is nominally a much more forgiving standard than the one endorsed by the *Krummenacher* court (which was that "the property in question cannot be put to reasonable use if used under conditions allowed by the official controls"). However, even under a practical difficulties standard, it is not entirely clear that a garage expansion project like Leibeler's would necessarily qualify, and this can illustrate the law-on-the-books/law-in-action theme of this section.

§4 Land Use Regulations Burdening Fundamental Rights 484
§4.1 Equal Protection and Animus 484
***Village of Willowbrook v. Olech* (2000) 485**

The key point of this section is to get students to see that land use regulations, implicitly or explicitly, divide owners into categories – those burdened by the regulation and those not burdened. The equal protection analysis explores the state's reasons for defining categories one

way rather than another. You might revisit the Ninth Circuit's decision in *Flynn v. Holder* in Chapter 3 – on the constitutionality of the ban on compensation for human organs in the National Organ Transplant Act, as applied to bone marrow transplants – to discuss how the plaintiffs might have better framed their equal protection claim.

Olech takes this categorization logic to its limit by framing the claim in terms of a landowner complaining that she is being put into a singular (and singularly disfavored) category. The case is useful for discussing the concerns at work in the equal protection analysis. One way to approach the issue is to ask the students what kind of harm equal protection review is trying to ferret out. This is a difficult question, but the review seems designed to pick out situations in which the state is acting on the basis of invalid reasons for making distinctions – reasons rooted in malice or, perhaps, corruption. You might ask students what sorts of reasons the state should be able to rely on in crafting public policy. (This is a question that will arise in numerous contexts, including equal protection, due process, and the "public use" requirement for eminent domain.) Having the conversation in connection with the equal protection clause can help to draw connections later on between the concerns underlying equal protection analysis and the very similar concerns that seem to be at work in the due process context.

Problem. *A town's zoning ordinance requires setbacks of ten feet in a particular area of the town. The zoning board routinely grants variances from this restriction as long as construction is kept five feet away from the boundary and none of the abutting neighbors object. This practice violates the express terms of the zoning ordinance itself, as well as the state's zoning enabling act, both of which allow variances to be granted only if the owner can demonstrate extreme hardship. An owner applies for a variance to add a dining room onto her single-family home, seeking to build it so that it will be five feet from the boundary of her property. One of the four abutting neighbors objects, and the zoning board denies the variance. The owner sues the town, claiming that this deprives her of equal protection of the laws, citing* Village of Willowbrook v. Olech, *528 U.S. 562 (2000). The owner points out that two of her neighbors in the immediate neighborhood were granted variances to build structures that extended to five feet from the border of their properties. The zoning board defends the denial on the ground that it is rational to allow neighbors veto power over variances because such variances will affect their property more than that of anyone else. The owner contends that this effective delegation of discretion to the neighbors denies her equal protection of law. Who is right? What else might you need to know about the owner and her neighbors to evaluate this question?*

It seems appropriate to weigh actual objections of owners in the vicinity to prospective land uses, but it does not seem appropriate to delegate essentially legislative decisions to the neighbors when it is the town zoning board that is empowered and obligated to govern in the public interest.

This type of case also presents the issue of what it means to treat someone unequally. On one hand, the other variances would have been denied had any neighbors objected; on the other hand, it is not clear it is relevant that a neighbor objects in this case when one owner is being denied the right to do something other neighbors in the vicinity did. General land use planning considerations would seem to be the same in all instances here and there is an argument that the distinction is not reasonably related to legitimate public purposes. At the same time, refusing to relax the rules when neighbors object does seem rational in the sense that it allows owners to develop their land as long as no negative externalities emerge, but once a neighbor feels harmed by the development, then the general rule underlying the setback requirements has its real force.

§4.2 The Problem of Exclusionary Zoning and State Constitutional Rights 488
***Southern Burlington County, NAACP v. Township of Mount Laurel* (1975) 488**

Mount Laurel illustrates both the necessity of judicial oversight of the police power in the land use context, particularly for exclusionary suburban communities, as well as the institutional limitations that courts face in fulfilling this role. It can be helpful to tease out ways in which the Township of Mount Laurel used its land-use regulatory authority to construct a community that did not explicitly racially or socio-economically exclude, but instead created conditions that had those effects.

Mount Laurel, although it is an outlier doctrinally, can also illustrate that state constitutional law can provide grounds outside of federal constitutional and statutory law to remedy violations of fundamental rights in the regulation of property—indeed, one can conceive of the boundaries of state power in very different ways than how the United States Supreme Court approaches similar questions under federal constitutional law. Comparing *Mount Laurel*—on the nature of the interests involved as well as the scale of relevant decision-making—to *Euclid* can provide good fodder for discussion.

Note 1. *Does the limitation on exclusionary zoning imposed by the court in* Mount Laurel *infringe on property rights or does it protect them? Does it regulate the market for real property or does it constitute a form of deregulation?*

Oddly, many students conceptualize the holding in *Mount Laurel* as regulating property rights. Perhaps they do so because the decision constitutes judicial activism in the sense that the court is striking down certain zoning regulations as unconstitutional. To the extent those zoning regulations can be conceptualized as protecting property rights (by preventing nuisances or seemingly incompatible uses from being established next door), the decision takes away the property rights of the owners in the neighborhood who fear their property values will go down if multi-family housing is introduced into the neighborhood.

This view is odd because the effect of the *Mount Laurel* decision is to allow the developer who wishes to construct low-income housing to do so; it does not force any particular owner to devote land to such uses—nor does it require cities to build housing. Rather, it holds that certain zoning regulations that limit the freedom of property owners to develop their property are unenforceable restraints on the rights of property owners to use their property as they wish. The decision also effectively holds that poor persons, like rich persons, have the right to spend their dollars to pay for housing when housing providers are willing and able to provide such housing; exclusionary zoning laws effectively prevent such mutually advantageous—and profitable—real estate transactions from occurring. Thus, in a real sense, although the decision is activist (because it strikes down legislation), it is activist in a way that de-regulates the use of property by holding that certain laws restricting the use of property unconstitutionally infringe on the property rights of the developer and the rights of poor persons to contract with the developer to obtain housing.

Note 2. *Why didn't the court decide the case under the federal constitution or under the federal* Fair Housing Act*, 42 U.S.C. §3601* et seq.*, which prohibits discrimination in land use regulation by local governments?*

This is answered in the text of the casebook, but just to note that the question can lead to underscoring the role of state law in constraining the power of the state, no less than federal law.

Note 3. *How did the Supreme Court of New Jersey in* Mount Laurel *approach the balance between local autonomy and "the general public interest" in evaluating the scale at which authority over land use should be exercised?*

This returns to the discussion of localism and regionalism in *Euclid*. In that case, the U.S. Supreme Court endorsed local autonomy (although with a slight reservation). In *Mount Laurel*, by contrast, a critical foundation of the New Jersey Supreme Court's rationale was that in delegating its police power, the state was inherently bound to consider regional, and not just local, welfare. That question of scale when local governments are exercising delegated authority is not limited to land use—it comes up in education, taxation, policing, and other aspects of local law and policy—but is particularly striking in the zoning context, where debates about the scale of externalities (and the nature of local expertise) tend to favor a more localist vision. *Mount Laurel* is significant, then, in part because it takes a different view of the impact of local regulation, understanding housing markets as inherently regional in nature.

§4.3 Zoning and Intimate Association.....498
***Village of Belle Terre v. Boraas* (1974) 498**
***Moore v. City of East Cleveland* (1977).....501**

The arguments on both sides of the question of whether municipalities can distinguish between traditional families and nontraditional living arrangements are well presented in the various opinions in *Belle Terre* and *Moore.* Students like to discuss these issues because many of them live in groups with several roommates; they therefore have personal experience of what exclusion of such households would mean. You can also tie the Court's implicit use of a constitutional definition of "family" to bring the question of same-sex marriage into the discussion. Where should a court look to determine the "family" that will be protected from state intrusion under *Moore*?

Note 1. *Which rights did the parties challenging the single-family ordinance in* Belle Terre *invoke? Did the majority in* Belle Terre *apply heightened scrutiny in light of these asserted rights? Should it have?*

Here's what the Court says about the basis for the plaintiffs' challenge to the ordinance:

> The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society.

This is considerably broader than a claim that the ordinance violates substantive due process. Nevertheless, the Court cursorily concludes that the ordinance "involves no 'fundamental' right guaranteed by the Constitution." Applying an extremely deferential standard of review, it concludes that the ordinance is valid.

Note 2. *On what basis did the* Moore *Court distinguish* Belle Terre*? Does this distinction make sense to you? If constitutional protection for shared living turns on traditional conceptions of family, even broadly conceived, what kinds of families might that leave out?*

Does that suggest that the constitutionality of zoning that restricts who may live in certain neighborhoods to people related by blood, marriage, or adoption (as many such ordinances hold) should be evaluated solely or even primarily through a prism of "tradition"?

These questions focus attention on the Court's reasoning. *Moore* appears to hold that traditional families are protected by the privacy rights guaranteed by the United States Constitution. *Belle Terre* holds that nontraditional living arrangements are not so protected. At the same time, it is important to point out that even if nontraditional family relationships are not protected by privacy rights, the distinction between traditional and nontraditional families must be "rational" for the legislation to pass equal protection scrutiny. In other words, the distinction between traditional families and nontraditional families must be "rationally related to a legitimate government purpose" rather than resting on "irrational prejudice" against a particular group. *See City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), discussed in the Notes and Questions in the materials on equal protection. The Supreme Court in *Belle Terre* attempts to articulate legitimate government objectives of limiting density, traffic, noise, and preserving neighborhoods "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" and suggests (but does not sufficiently *argue)* that exclusion of groups of students is rationally related to this goal. The dissenting opinion argues, in contrast, that nontraditional households are not incompatible with family values and will not necessarily increase density or traffic. At the same time, the dissent suggests that other means exist to limit density and regulate traffic that do not discriminate against nontraditional households. Thus, the dissent's argument is based partly on the idea that privacy concerns are legitimately implicated in nontraditional family arrangements *and* that the "fit" between nontraditional households and greater density, noise and traffic is not sufficiently close to be anything other than an irrational prejudice.

§4.4 Aesthetic Zoning, Expression, and Discretion 508
***Anderson v. City of Issaquah* (1993) 508**

Problem. *If you were asked to rewrite the relevant provisions of Issaquah's design ordinance to meet the standards the* Anderson *court articulated, how would you do so? What kinds of substantive and procedural protections for owners going through the design review process would you add? What considerations would be important to preserve for the community?*

This is a great opportunity to help the students move beyond the individual dispute in *Anderson* and think about how they might develop a workable standard to preserve a community's design. (Some students might argue, reasonably, that design review is so fundamentally flawed that we should not have aesthetic zoning at all, but this question asks students to assume there is sufficient community interest in preserving aesthetics and then to help implement that community sentiment.)

Some considerations that might be relevant include:

- *Quantifiable standards*—what elements of design can be rendered in concrete, measurable terms?
- *Specific design elements*—some communities provide owners and developers with a template of design elements that conform to community standards, such as specific materials or colors, and then allow some range of freedom as long as those elements are used.

- *Community input*—there can be some benefit to an inclusive design process, and many large-scale developments employ techniques such as community charrettes. But community opposition can be stultifying and arbitrary.

§4.5 Freedom of Religion and Religious Land Uses 518
***Westchester Day School v. Village of Mamaroneck* (2007) 518**

Note 2. Westchester Day School *noted that Congress defined religious exercise broadly under §§2000cc-5(7) and 3(g), but nonetheless gave several examples of uses related to the religious school that would not have qualified, such as a gymnasium for students or a residence for the headmaster. Do you agree with this interpretation? Why does a given portion of a facility have to be directly used for religious education to constitute "religious exercise"? What if a church believes that part of its ministry includes social gatherings for its members and seeks to build a facility that is used for gatherings, but not worship?*

Many faiths include strictures relating to relieving suffering and alleviating poverty and, as a result, many religious institutions offer social services, such as soup kitchens, homeless shelters, and affordable housing. If a religious institution offers a social service or a service that looks like a commercial activity as part of its mission, is this the "exercise of religion"? See, e.g., Greater Bible Way Temple v. City of Jackson, *733 N.W.2d 734 (Mich. 2007) (proposed assisted living facility for elderly and disabled people claimed to be part of a church's mission was not considered religious exercise). Why might courts limit the scope of the kinds of services that constitute religious exercise?*

These questions get at some of the complications that can arise when courts are faced with deciding what is, and is not, religious exercise. For example, for Quakers, as with other faiths, service is a core element of the expression of faith. Is it appropriate for a court to say, then, that operating a soup kitchen is any less of a religious exercise than gathering in a house of worship (to hear a sermon, or, in the case of Quakers, to sit silently together)? On the other hand, there has to be some dividing line between some core of practice that obtains heightened protection from the ordinary exercise of local authority, or there would be a great risk that religious freedom could be overly invoked to undermine otherwise valid regulation. It is good for students to grapple with what can be a nearly impossible line to draw and contemplate why we might draw the line differently if it is Congress acting than if it is a court interpreting the first and fourteenth amendments.

Note 3. *In passing RLUIPA, Congress was responding to the Supreme Court's holding in* Smith *that the free exercise clause is not violated when a neutral and generally applicable regulatory law burdens an individual's religion. Does that suggest that even neutral and generally applicable zoning laws might create a substantial burden on religious exercise?*

This can help students focus on the Supreme Court's approach to religious neutrality as an arbiter of free exercise challenges. RLUIPA does suggest that even the most neutral law might create a substantial burden on religious exercise but that still does not answer whether it would be desirable to test every neutral law (which is to say every law that might impact religious exercise, even if that is not the intent of the law) against that standard.

Note 4. *But are traditional land use policy rationales such as the separation of incompatible uses, orderly development, and pedestrian and traffic safety "compelling"?*

It is not clear that most ordinary land use regulations can survive a "compelling" standard, as opposed to a standard of rationality. However, there may be some rationales, such as core health

and safety concerns, that could survive that standard. The discussion of the *Foursquare Gospel* decision in the next paragraph, however, illustrates that some courts have applied a fairly stringent compelling governmental interest standard, which, while preserving religious liberty, does significantly impinge local authority over traditional zoning matters.

If keeping large congregations from regularly gathering in the middle of an active industrial zone that is in the vicinity of hazardous wastes is not a "compelling governmental interest" under RLUIPA, would any of the kinds of separation of uses cited by the Supreme Court in Euclid v. Ambler Realty*, see §1.2, supra, qualify? Is this a justifiable limitation on local-government authority? How should courts decide which public purposes in land use regulation are "compelling"?*

This can prompt a return to questions of when and why deference to local legislators and local planning officials might be warranted and what it means to hold local governments to a much higher burden of justification than in the review of ordinary economic and social regulation. Arguably, there is a risk that religious land uses in some communities might face particular hostility, although that is a contextual question and the RLUIPA higher standard applies regardless of local conditions.

Problem 1. *A church allows homeless persons to sleep on its landing and front steps. The city seeks to prevent this on the ground that it provides shelters for the homeless where they will be safer than they would be sleeping outside. Some homeless persons refuse to go to the shelters either because the shelters are dangerous or because they value the freedom of being outside a facility. The church claims that it has a first amendment right to the free exercise of religion that allows it to grant sanctuary to the poor. See* Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (holding that there may be such a right). If the city had an ordinance requiring homeless shelters to obtain permits to operate and denied the church the power to allow people to sleep on its steps in violation of local anti-loitering ordinances, does the church have a right under RLUIPA to continue its practices?*

This is an opportunity for students to work through claims that might be raised under RLUIPA and review how a court might evaluate them. The threshold question is whether RLUIPA applies, and the question indicates that we're dealing with a church, so that should not be controversial, but can be with religious institutions that are not well recognized.

Under the substantial burden test, RLUIPA would prohibit the city from imposing zoning in a manner that "imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000cc(a)(1).

The first question is whether some or all of the proposed uses constitute "religious exercise." The question is deliberately vague about what the "facility" is and what the religious services are that might be conducted there. In *Westchester Day School,* the Second Circuit emphasized that each part of the proposed expansion would benefit religious education. What, then, should be done with a mixed-use facility? It seems appropriate to apply the statute to those portions of the facility that are genuinely being used for religious services, but the question of services is harder when it comes to the soup kitchen and the homeless shelter, as the casebook spells out.

Westchester Day School's use of the neutrality and rationality of the relevant restriction (and the use of similar tests by other circuits) seems odd, though. If the question is not the validity of the restriction but whether or not a restriction has a certain *effect* on a religious institution, then whether the restriction is arbitrary or perfectly rational would not seem to alter the burden (just the justification for imposing the burden).

If there is a substantial burden, then the final stage is to evaluate whether there is a compelling governmental interest for that burden. It might be possible to construct a compelling governmental interest here, but there are obviously countervailing interests from the perspective of the individuals who are seeking shelter.

Problem 2. *A city zoning law prohibits structures more than two stories tall in a residential subdivision otherwise composed entirely of single-family homes. A church seeks to renovate its facility to obtain more space. It plans to construct a seven-story tower to accommodate both its religious services and other activities, including a soup kitchen and a homeless shelter that will accommodate 30 people. Is the church entitled to do this under the terms of RLUIPA?*

Again, this raises a question of what constitutes religious exercise and also whether height restrictions in a residential neighborhood characterized by homes of no more than two stories might be justified for safety reasons, but churches traditionally were often the tallest structures in many residential neighborhoods.

Assuming some portion of the facility will be used for religious exercise, the question then becomes whether the failure to allow a seven-story building is a substantial burden even on those aspects of the proposal that genuinely constitute religious exercise. Under *Westchester Day School*, there must be "a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise," and the court also added the rationality of the regulatory limit as a factor in its analysis. Here, traditional land-use rationales (controlling density, the appropriate scale of contextual land use, compatibility of uses) seem to suggest that applying the height limit would not be arbitrary and might not be found to be a substantial burden, depending on the proportion of religious uses and the coercive effect of the restriction.

Other claims that might be raised here include discrimination and exclusion claims under §2000cc(b), and we would need to speculate on relevant comparators and impact on other assemblies to evaluate those claims.

Problem 3. *A religious organization seeks to build a Sikh temple on land zoned for residential purposes. The city refuses to grant a conditional use permit based on citizens' voiced fears that noise and traffic would interfere with the surrounding neighborhood. The organization seeks a second permit to build the facility on land zoned for agricultural purposes. Neighbors again complained, and the permit was denied. Another Sikh temple exists in the community. Has the city placed a "substantial burden" on the organization's "religious exercise"? As attorney for the Sikh organization, what questions would you ask your client to attempt to show a substantial burden? As attorney for the city, how would you respond to those claims?*

This question is based on the facts of *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), in which the court did find a substantial burden prohibited by RLUIPA because it held the facts of the denials suggested that no future proposal would be treated favorably in the district. One theme present in this question that lurks in the background of many RLUIPA claims is the question of motivation. In the free exercise context, the Supreme Court has made clear that seemingly neutral regulations that mask animus must undergo the most rigorous scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The standard the Court has articulated for non-neutral laws is the same as RLUIPA's but the burden is almost impossible to overcome in the case of a law that specifically targets a religious group.

In terms of what the attorney for the Sikh organization might try to discern would be evidence of local or official animus of any kind and comparator institutions that are treated more favorably. The city, by contrast, might point to the existence of another Sikh temple and highlight

the neutrality of the zoning rules that seek to mitigate the impact of large congregations in residential and agricultural areas.

§5 Environmental, Natural Resources, and Land Use Law.....528
§5.1 Owner Liability for Hazardous Wastes 528
§5.2 Environmental Impact Assessment 530
§5.3 Climate Change and Land Use Planning: Mitigation and Adaptation 532
§5.4 Protection of Other Natural Resources 533

Note on Environmental Impact Assessment. *What does the requirement for environmental impact assessment suggest about the potential shortcomings of the process through which real estate development otherwise takes place?*

This can spark a discussion about why it might make sense to ensure that decisionmakers have access to information about one particular set of potential impacts about development. It does suggest that there are reasons why that information—whether in the core areas of traditional physical environmental impacts, or economic, social and cultural impacts—is not already part of the decision-making apparatus that local government officials have before them. Why might that information be hard to obtain? Who has the incentive and the resources to generate that information?

The typical response by developers is that the environmental impact assessment is just a tool (or an excuse) to delay or ultimately block development that might be beneficial overall but have locally negative impacts. In this view, the necessity to generate, and then evaluate, the impacts of development unfairly tilt the playing field away from development because the benefits may be more diffuse.

Ultimately, students should recognize that development review is highly imperfect but that even the best environmental impact assessment won't necessarily render all of the salient information that decision makers need. At best, the process can identify the most significant potential harms that a development might pose and seek reasonable mitigation; if the project will be viable with that mitigation, that is some indication that it is worthwhile overall.

7. Servitudes: Rules Governing Contractual Restrictions on Land Use.....535

Themes

This chapter concerns agreements by landowners to allow others to use their land in limited ways (easements or affirmative servitudes) or to use their own land in certain ways (covenants or negative servitudes). The chapter fits into a general theme of different ways of regulating land use to avoid conflicts and coordinate uses: nuisance—ex post tort suits to address land use conflicts; zoning—ex ante governmental restrictions to coordinate land use and avoid restrictions; and servitudes—ex ante agreements between owners to coordinate land use and avoid conflicts.

Professors may choose to teach these immediately after nuisance, in order to move from resolution by tort, then to contract, and only then to governmental regulation, or they may choose to teach them after zoning, to gain appreciation for the bluntness of the zoning tool in creating communities. The materials on traditional rules for the creation of covenants are hard for students, and professors may choose to skip them and start with the materials on common interest communities. We have included the traditional rules in some detail, however, because despite the effort of the *Restatement Third on Property: Servitudes* to abolish them, most jurisdictions still appear to follow the traditional rules to some degree. In addition, they are still tested by the bar, so if students don't learn them now, they may have to learn them under higher stakes and more difficult conditions.

One overarching theme to emphasize at the beginning is that although servitudes move into the area of contract law, this is contract law with a difference, and that difference is *running with the land*. Individuals may always contract with each other to restrict their land use, and those contracts will be judged only by normal contract rules. But if they want to bind not only the individuals agreeing, but *future* owners of the land, they must create servitudes. The feature of running with the land raises the distinctive policy tensions that characterize servitude law: when is it fair to bind individuals to agreements or permit them to violate them; what notice is required before we do so; how do we interpret the scope of the agreement and who is subject to it; which agreements should be enforced because they maximize welfare by facilitating alienability and coordination of land use and which should not be permitted because they burden land with idiosyncratic conditions or undermine autonomy or equality in ways contrary to public policy.

There are thus policy tensions regarding servitudes along lines that should by now be familiar to the class. Creation and enforcement of servitudes may increase *alienability* of land by allowing parties to bargain with each other to maximize value by coordinating their interests in land; it may decrease alienability, however, if land becomes burdened with idiosyncratic conditions or conditions that are difficult to discover and bargain around. They may increase *security of investment* by contracting to create the kinds of land use arrangements that they desire; it may also decrease it if owners find that their land is burdened by restrictions that significantly undermine their value and that are more than they bargained for. Similarly, they may favor *liberty* and *autonomy* by allowing parties to make binding contracts with each other; they may also, however, decrease it if those contracts result in fundamental unanticipated restrictions on the lives of the people living on the land.

You could explain servitude law as an attempt to respond to these tensions. Procedural rules for creation of servitudes seek to ensure that parties intend to bind their land and do so in ways that will be clear to subsequent owners. Interpretive rules seek to favor the kinds of agreements we interpret most people desire or that will best serve societal interests, placing the burden on the parties to make clear if they seek to create an unexpected or socially less desirable result. Substantive rules about what kinds of servitudes can and cannot be created limit

enforceability of agreements that have been determined to reduce alienability or violate fundamental polices such as liberty and equality.

§1 Servitudes 535

This section outlines the basic concepts and vocabulary of servitudes law. We suggest you lecture through the vocabulary in some detail, illustrating the concepts with a diagram. Figure 1 on page 512 provides such a diagram; you can copy it or something similar on the board. We recommend that students try to draw maps of the property relationships described in the cases when maps are not provided. This is helpful in visualizing the interests each side may have in the dispute. It is helpful for you too to draw maps on the board in class so you can point to the particular parcels about which you are talking.

§2 Easements 537
§2.1 Definition and Background 537

This section outlines the history of easements and distinguishes them from leases and licenses. Rights of way and profits of prendre were both common and very specific in medieval England, including the right of estover, to gather fallen timber; the right of peccary, to fish; mast, to take fallen nuts; turbary, to cut sod; or my favorite, the right of foldage — the right to the manure left behind by animals pastured on the land.

A lease is a possessory interest, meaning that one can possess the land, rather than simply use it for defined purposes. A license is a permission to enter and use land that is not a property right. Although often described as "revocable at will," in a number of situations, particularly when a license is part of a valid contract or protected as a matter of estoppel, revocation is subject to a legal penalty. The real question in separating a license from an easement is whether the parties intended to create a permanent or temporary right, and whether regardless of the intent of the person granting permission, the circumstances are such that justice prevents revocation.

§2.2 Creation by Express Agreement 539

Because easements are interests in land, outside the exceptions discussed in §2.4, they are subject to Statutes of Frauds. Like the statutes provided here, they must be signed by the grantor; they need not be signed by the grantee. Some, like the New York statute, require the consideration to be in writing, and all must contain a sufficient description to tell what interest in what land is being transferred. To run with either the burdened or benefitted land, there must also be intent to run with that particular estate, and actual, inquiry, or constructive notice to the servient estate holder at the time of purchase. As discussed in §2.3, intent to run with the land may be express or implied.

§2.3 Interpretation of Ambiguous Easements 542
A. Appurtenant or In Gross 542
***Green v. Lupo* (1982) 542**

Green v. Lupo and *Cox v. Glenbrook* together present a nice unit examining interpretation, use, and transfer of easements, but if pressed for time you could illustrate the most important concepts with *Green v. Lupo* or *Cox v. Glenbrook* alone. The cases deal with two kinds of ambiguity: whether an easement is appurtenant or in gross (i.e., is there a benefitted parcel with which it runs, or does it benefit a particular individual or entity) and the extent to which the use of the easement can be changed or shared with others. The resolution of these ambiguities turns on

two factors: first, the presumed intent of the parties (pointing toward fairness concerns); and second, which resolution that will enhance productive use of land (pointing toward utilitarian concerns). Note that when the courts reach a decision regarding "intent," they often mean not specific intent but rather what the creators of the easement would have expected had they anticipated the (unexpected) current situation. In these cases, beliefs about the productive use of land often seem to influence determinations of intent as well. Even though social utility sometimes seems to dominate the interpretation questions, however, fairness concerns create a third question: whether the use, even if not per se outside the scope of the easement, nevertheless constitutes an undue burden on the servient estate holder.

Resolution of the ambiguities often depends on default interpretive rules. Students may argue that default rules don't matter. If the parties disagree with the default rule, all they have to do is make their agreement clear in the deed. However, the reality is that lawyers, and particularly those who transact without lawyers, often enter into agreements that are incomplete and ambiguous, and nothing the legal system does is going to change that. The default rules, therefore, will resolve many cases, and may do so in ways that don't reflect what the parties would have agreed to had they anticipated the conflict at issue.

Green v. Lupo covers a variety of issues, including (1) when easements run with the land (in gross v. appurtenant easements) and whether parol evidence (or evidence of surrounding circumstances) is admissible to determine whether an easement is in gross or appurtenant; (2) whether subdivision of the dominant estate (for use as a trailer park rather than just a single-family house) either exceeds the scope of the easement or overburdens it; and (3) whether particular uses of the easement exceed its scope or otherwise constitute nuisances with respect to the interests of the owner of the servient estate (here use by motorcycles for recreational use). All these issues are interpretation problems since they involve determining what rights each party has in the context of ambiguous language in the deed.

The Lupos enter into a real estate installment contract to buy land from the Greens. In exchange for an agreement to get a deed to a part of the property before the contract is paid off, they promise the Greens an easement over their land. To the Lupos' dismay, by the time they have paid off the property, the Greens have developed their remaining parcel into a mobile home park, whose residents all use it, including young hooligans doing motorcycle wheelies. The Lupos block off the easement, and the Greens sue.

If the easement is in gross, then it belongs only to the Greens and they cannot allow others to use it; if it is appurtenant, then it belongs to the land, and all lawful occupants of the land can use it so long as they do not overburden the easement.

Note 1. *Do you think that [allowing all occupants of the parcel to use the easement] was the Lupos' expectation when they agreed to transfer the easement? Why then does the court find that the easement is appurtenant?*

This was probably not their expectation—they should have realized that the Greens would not always live there, but probably expected that it would continue to be used as a single-family residence. The court, however, applies a "strong presumption" that where an easement would be more useful attached to a property, it will be found to attach to the land rather than just the individuals who negotiated it.

Note 2. *What in the express language of the agreement makes it ambiguous?*

It is granted to individuals, "Don Green and Florence Green," which might suggest that it is personal, but it is for "ingress and egress for road and utilities purposes," uses that benefit land rather than individuals, suggesting appurtenance. You can follow up with asking what they could

have done to make their intent clear. They could have added something like "as a personal rather than appurtenant easement," or a sentence that "this easement goes to them in their personal capacities rather than to them as owners of land." They might also have preserved the easement as appurtenant but prevented its use for the subdivision by specifying that it was "for ingress and egress for one single family residence."

Courts have argued that appurtenant easements are preferable because they limit the number of persons with easements over the land to the number of neighboring parcels. They also argue that because appurtenant easements are limited to owners of neighboring or nearby property while easements in gross can be owned by anyone, easements in gross create more uncertainty about land use rights than appurtenant easements. One can check with the neighbors to see if any appurtenant rights exist, but it is harder to check with the general public to find owners of easements in gross. Can you think of a counterargument to this reasoning?

A possible counterargument is that because appurtenant easements run with the land, they are likely to last a long time. Easements in gross, especially rights of way which are owned by neighbors, are likely to terminate when the property is sold because they are of no utility to someone who does not own the neighboring parcel. They therefore will free up the servient estate and increase its marketability. Further, the primary method of notice of easements today is searching title records, which will provide the identity of the easement holder.

Perhaps a better argument is that presuming appurtenance serves social utility because it increases the value of the benefited land and preserves that value across subsequent owners without additional transaction costs to renegotiate the deed. Also, it may serve the justified expectations of subsequent purchasers that they will be able to benefit from the utilities and rights of access of the prior owner. Moreover, as explained in *Cox v. Glenbrook*, perhaps individuals *should* expect that property will be divided. At the same time, this may place burdens on the servient estate holders that they didn't expect and didn't bargain for (can you imagine the dismay of the Lupos to finally pay off their land only to find they lived next to a trailer park with a motorcycle gang!). Despite this, because of the judgment regarding social utility and justified expectations, the court places the burden on servient estate holders to make absolutely clear that easements are personal rather than appurtenant.

This is somewhat mitigated by the rule that the dominant estate holder cannot use the easement in such a way as to constitute an "undue burden" on the servient estate. What does this mean? It's pretty fact- and court-specific, but at a minimum it means that use of easements cannot constitute a "dangerous nuisance". The court's holding that motorcycles can be prohibited altogether as a normal (if loud) means of ingress and egress shows that it doesn't prohibit uses that, even if annoying, can fairly deemed to be within the original bargain.

Problem. *Bruce and Martin own neighboring tracts of land. Bruce's parcel borders a natural lake, Lake Pescatarian, but Martin's does not. At Martin's request, Bruce creates a deed providing as follows:*

I, Bruce, on behalf of myself and my heirs and assigns, transfer to my friend and neighbor, Martin, the right to enter my land to fish at Lake Pescatarian.

Martin dies, and his land is inherited by his obnoxious son, Charlie. Charlie wants to continue fishing at the lake; Bruce does not want to let him. What are the alternative arguments supporting their positions? Who will succeed? How could Bruce have drafted the easement to avoid this ambiguity?

The easement clearly runs with the burdened land, because it is on behalf of Bruce's heirs and assigns; the question is whether it runs with the benefitted land, or only to Martin himself. In

favor of Charlie, like the easement in *Green v. Lupo*, this easement is more valuable attached to land. That suggests that it is appurtenant, and so should run to whoever owns the land.

However, it is made specifically in favor of Martin, which might suggest appurtenance. Although that didn't help the Lupos, what makes Bruce's case somewhat stronger than theirs? First, it is specifically on behalf of "my friend and neighbor, Martin," more forcefully suggesting that this is a personal transaction. Second, while the easement specifically states that it is on behalf of Bruce's "heirs and assigns," it makes no such statement regarding Martin's heirs and assigns. One could argue that since Bruce knew what to do to make the easement run with his land, the failure to make it run with Martin's land suggests intent that it not do so. Third, the nature of the use—recreational use of a lake—is more likely to be the kind granted personally rather than on behalf of land. Finally, no consideration is mentioned here, again suggesting that this was a personal rather than economic transaction.

All that said, the court may still find that the obnoxious Charlie may use the easement. Bruce might have avoided the ambiguity by specifically designating it as an easement in gross or otherwise making clear that it did not belong to future owners of the land. However, it is particularly in transactions based on personal relationships that one is unlikely to be careful about legal formalities.

B. Scope and Apportionment 546
***Cox v. Glenbrook Co*. (1962) 546**

In *Cox*, a bucolic family-oriented resort and golf course grants an easement to a neighboring farmer. After the farmer's death the property is sold, and then later sold for much more to Cox and Detrick, who propose to subdivide it into 40 to 60 parcels, all to use the easement over the land. The questions are (1) whether the occupants of the subdivided parcel can use the road under the easement itself; (2) whether Cox can widen the road; and (3) whether the use of the road by the occupants of the subdivided parcel will create an undue burden on the estate.

You might start by asking why the language of the easement makes it clear that this is an appurtenant estate that runs with the land. It is because the language refers to the "grantee, his heirs and assigns forever." Given that, why did the trial court hold it could only be used for ingress and egress by a single family on the parcel? Because the facts of the transaction and the relationship between the parties suggested that was all the parties intended to bargain for. Why doesn't the Nevada Supreme Court accept this? Because, unlike in *Green v. Lupo*, there is no ambiguity about the appurtenance so parole evidence is not permitted; appurtenance means use by all subsequent occupants unless clearly specified otherwise.

But the court also says they can't widen the road, and 40 to 60 families won't be able to comfortably use an unpaved single lane road—isn't this contradictory? Again, this is the default rule: parties should anticipate future subdivision of land, which will also serve social interests in equitable distribution and maximization of value, but generally also anticipate that the easement will not occupy more of their land than physically agreed to.

Just because the easement includes use by the subdivided parcel, moreover, does not mean that such use won't be an impermissible undue burden on the estate. The court holds that determining this question without evidence of the facts of actual use is premature. It is important to point out that the question of whether subdivision creates an unreasonable additional burden is usually treated as a factual rather than a legal question. In other words, if a jury is present, the judge may instruct the jury on what constitutes an unreasonable additional burden and then leave it to the jury to apply the legal standard of reasonableness to the facts of the case as established at trial. The court leaves determination of the undue burden question until after the property is developed and there is evidence about what traffic on the easement means for Glenbrook.

Students will divide on whether the use will constitute an undue burden. One way to analyze this is along social utility and fairness dimensions. Allowing the property as enhanced by the road to be used by many owners seems to maximize its value and increase equitable distribution. A counterargument is that the personhood value of the resort to the families that have gone there may outweigh the fungible value of the subdivided Cox property. Along fairness dimensions, however, the parties only bargained for a small road, which was granted for $10 out of friendship to farmer Quill; it may be unfair to allow this gesture of friendship 20 years later to morph into an intrusion of scores of cars onto the family resort.

You might ask what would be your advice as Cox's lawyer after receiving this decision. They ostensibly can use the easement for the subdivided property, but can't widen it, and it might turn out after development that use by the owners of the subdivision is an impermissible undue burden. Therefore, as the court says, "any further action on their part to develop their property in the manner proposed is subject to such contingency." In other words, they could go ahead and build sixty houses, only to find the occupants don't have appropriate access to their property. That's a risky gamble to take. It seems like a pretty compelling case for going back and negotiating with Glenbrook (or another neighboring landowner) some payment and/or mutually acceptable degree of use and subdivision. In fact, one might argue that the court deliberately created this need for a negotiated solution. If you go to google maps and look up Glenbrook Club, and go to aerial view, you will see it doesn't look like anything like 40-60 houses were built in what was the Cox-Detrick property, suggesting the decision resulted in less ambitious plans for the land.

Please note an error at end of note 2, **on page 552**, where we neglected to delete two sentences concerning *Henley v. Continental Cablevision*, a case that has been removed in the Eighth Edition. The case concerns whether a telephone company could license a cable company to use its easement, granted in 1922, allowing construction and maintenance of lines "for telephone and electric light purposes," to use the easement for cable lines. The court ruled for Continental Cablevision, because the easements were exclusive to the telephone company (meaning that the land owners could not also use them) and because cable was part of the natural evolution of telephone and other utility services.

Problem 1. *Should the defendant owners of the dominant estate in* Cox *have the right to widen the road to accommodate a subdivision of forty homes? Would this exceed the scope of the easement?*

(a) What arguments could you make for the plaintiff that the width of the road should be set at the historical width existing at the time of the original conveyance?

π can argue that there should be a general presumption that the width of the easement at the time of the conveyance is the best evidence of how wide the parties intended the easement to be. Allowing the road to be widened is almost certain to grant the owner of the dominant estate something the owner of the servient estate did not intend to sell.

(b) What arguments could you make for defendants that they have a right to widen the road to accommodate the subdivision of the dominant estate?

Δ can respond that it would be inconsistent for the owner of the servient estate to have anticipated that the dominant estate would be subdivided and to have simultaneously assumed that the road would not be widened. Given that it is extremely unlikely that the lots in the dominant estate would be marketable in the absence of an adequate access route, the owner of the servient estate must have, or should have, anticipated that the road would be widened to accommodate any resulting development on the interior parcel. The argument is similar to the argument for recognizing an easement by estoppel. If the owner of the servient estate sells an interior parcel, it should anticipate that it will be developed, and when someone invests in purchasing the dominant estate in reliance on an access route, that investor has the right to assume that the access will be

adequate to the anticipated development on the dominant estate. By selling the interior parcel, the grantor conveys the impression that it can be developed; to refuse to allow the road to be widened will renege on the implicit agreement between the parties and be inherently unfair.

Problem 2. *Assume now that the original easement was a two-lane road so there is no need to widen it. Would subdividing the dominant estate and building 40 homes constitute an unreasonable additional burden on the servient estate?*

(a) What arguments could you make for the plaintiff that the subdivision would exceed the scope of the original easement and constitute an unreasonable additional burden on the servient estate?

π will argue that the test should be whether the subdivision will substantially increase the burden on the servient estate. Subdivision and construction of 40 homes will obviously substantially decrease the utility of the servient estate for the purposes to which it had historically been devoted. Subdivision is therefore unlikely to have been within the contemplation of the grantor at the time the interior parcel was conveyed. If the owners of the dominant estate want to substantially increase the burden on the servient estate, they should compensate the owner of the servient estate for the loss this development will inflict on them. Just as the width of the road at the time of the original conveyance constitutes the best expression of the intended use of the road, the use of the dominant estate at the time of the conveyance constitutes the best expression of the intended scope of the easement. Because easements impinge on the retained property interests of the servient estate, they should be interpreted narrowly so as to better accommodate the interests of both estates.

(b) What arguments could you make for defendants that the subdivision would not constitute an unreasonable additional burden on the servient estate?

Δ will argue that the owner of the servient estate (π) should have anticipated that the interior parcel would be developed, just as π developed its own property. There is nothing surprising about subdivision of property and no unfair surprise to the owner of the servient estate. Owners have a right to develop their property and this includes subdivision. Allowing subdivision will promote social welfare by granting owners freedom to use their property for profitable purposes. If the owner of the servient estate wanted to restrict the use of the dominant estate, it should have included a covenant in the deed conveying the property providing that it would devoted only to single family or agricultural use. In the absence of such a clause, the presumption should be in favor of free use and development. This presumption not only promotes the alienability of property but encourages desirable investment in real estate development.

One prolific source of cases about scope and modification of easements is the status of land granted to railroads for tracks on lines that the railroads no longer use. *See Marvin M. Brandt Trust v. United States*, 134 S. Ct. 1257 (2014); *Preseault v. Interstate Commerce Comm'n*, 491 U.S. 1 (1990); *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir.1996); *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. App. 1999); *Lawson v. Washington*, 730 P.2d 1308 (Wash. 1986). Interpretive questions include whether the grants were of easements or fees to the land; whether easements merge with the fee of owners of the underlying land once the railroad ceases use; and whether the easements can be converted to be used for recreational "rails-to-trails" programs. Although the cases are hard to synthesize because many turn on the specific circumstances of different state laws and the particular grants, *see Swisher v. United States*, 189 F.R.D. 638, 641-42 (2012), you might provide useful examples for your students by showing them the language of the different grants in the cases and seeing whether those differences explain the different results. You can also use these cases to illustrate the concept of easement abandonment: What constitutes sufficiently clear evidence of intent to abandon? If you want to illustrate this issue

with a picture, almost all states now have trails created as a result of rails-to-trails conversion within them, and you can likely google a picture of one near you.

§2.4 Creation of Easements by Implication 557

Like rules for interpretation of easements created by express agreement, the rules for creation of easements by implication reflect determinations of (1) the presumed intent of the parties; and (2) maximization of productive use of land. Even more than for easements by express agreement, however, they also reflect determinations of (3) justified expectations of the person claiming the easement, regardless of and sometimes contrary to the intent of the servient estate holder. One tension in these materials, therefore, is whether (2) utilitarian concerns, and (3) the expectations of those claiming the easement, can trump (1) the intent of the servient estate holder. Another tension is between the role of formal versus informal agreement in creating certainty and predictability. One could argue that finding easements that are not reflected in the writing of the parties undermines certainty and predictability by undermining the ability of the written record to provide notice. However, when those easements reflect what parties or outside observers believed was the result of the deal, or protect long use of the properties, it may enhance certainty or predictability by formalizing the arrangements that individuals reasonably believed already existed.

It is useful to contrast the elements of the four implied easements. Easements by estoppel and prescription both involve situations in which a landowner, having allowed a non-owner to use her property, is treated as having waived her right to revoke the privilege of access. Prescription focuses on the length of use without permission as the triggering factor, while estoppel doctrine focuses on permission plus substantial investment, but both recognize that in some situations use of the property without formal legal authority can create expectations and investment that would be unjust to revoke. One might explain both sets of rules by efficiency principles as well; in both cases, the entitlement is granted to the party who is likely to value it more but who might be unable to purchase it. The rules assign ownership to this party and thus place the burden on the original owner to buy back the entitlement if she really values it more than the licensee/adverse user.

Easements by implication from prior use and necessity, by contrast, involve situations in which there is agreement between the parties to divide a parcel of land, but a question as to whether the owner of one of the severed parcels has an easement over the other. Easements by implication require that use existed and was apparent or known before severance; the use itself need only be "reasonably necessary" or important for enjoyment of the property. Easements by necessity do not require that the use have existed before severance, but do require that the easement is necessary to access the parcel. As with easements by estoppel and prescription, easements by implication and necessity turn on the reasonable expectations of the parties and when the burden should be on the alleged servient estate holder to make clear that the easement was not included in the deal. In some cases, moreover, courts will find easements even when the preponderance of the evidence suggests no intent to create an easement because of desire to maximize productive use of land.

A. Easements by Estoppel 557
***Lobato v. Taylor* (2002).....557**

Lobato v. Taylor is a great case, containing claims of easements by estoppel, prescription, and prior use, and recalling themes of property and sovereignty, discrimination, and common versus individually owned property. The case involves a huge tract of land granted by Mexico in 1844 with the desire to encourage settlement, but only actually settled after the Mexican-American War and the 1848 Treaty of Guadalupe Hidalgo transferring the territory to the United States. To comply with the settlement requirements under the grant, Carlos Beaubien invites farm families to

come live on the property, giving them individual vara strips and common rights in other land for grazing, recreation, timber, firewood, fish and game. These common rights are memorialized in the 1863 Beaubien grant. Over the years the land is repeatedly transferred and much of it is enclosed, but the families keep using their common rights in the "mountain tract." When Jack Taylor purchases the land in 1960, his deed states that it is subject to the "claims of the local people by prescription or otherwise." Nevertheless, Taylor blocks access to his land and brings a Torrens claim in federal court 200 miles away to declare the local families have no legal claims. In 1981, the families bring a state law claim, successfully asserting that the earlier decision is void for lack of notice, and the Colorado Supreme Court holds that they have easements by estoppel, prescription, and implication from prior use.

One might begin the discussion by asking why the Beaubien Grant does not itself create express easements. Because it does not include the "the [C]hristian and surnames of the . . . grantees," but simply grants the easements to the inhabitants of the plazas generally. Justice Rebecca Love Kourlis argues in dissent that this was a deliberate decision not to recognize communal property rights.

Note 2. *Why might Colorado have forbidden the communal land grant system? If Justice Kourlis was correct that the territory did forbid communal land grants, what effect should that have on the recognition of informally created easements today?*

One answer goes to the purpose of the Statute of Frauds in clarifying rights to prevent fraudulent claims and facilitate certainty and alienability. If the individual owners of a property aren't named, it may be more difficult to identify those with the right to use, exclude, or transfer the property. A response is that these goals should prevent recognition of easements that were relied upon and long used by the grantees.

One might also argue that the requirement was the product of a desire to undermine the claims of the many Mexican residents of land grants in the territory. Perhaps relevant to this suggestion, Carol Rose notes in *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711 (1986), that one of the sources of resistance to recognition of customary rights in common was the fear that customary communities could be alternative sources of legal authority that would undermine the authority of the state. Here, recognizing the rights of the Mexican settlers would not only hinder non-Mexican attempts to acquire and divide the land, but recognize the legal norms of a defeated people. If the desire to prevent this was part of the motivation for the individual-names requirement, it is even less justifiable to continue to enforce it today.

One question raised by the case, however, is whether easements by estoppel should in fact be perpetual. Even if the original settlers came to the area in reliance on the rights to use the open areas, that was 100 years before Jack Taylor bought the land. Wasn't any injustice created by that initial reliance rectified long ago? Indeed, some courts, rather than find permanent easements, will make a license irrevocable for a sufficient period of time to permit the licensees to recover the value of their investment in reliance on the permission. A potential response to this argument is that each of the subsequent owners invested in their land in reliance on those rights as well, so refusing to recognize the easement now would do injustice to them as well. An additional response is that the long recognition of the rights of the residents is itself a source of renewed reliance and investment on the strength of that reliance.

That brings us to easements by prescription. We cut out most of the opinion regarding adverse possession for fear of confusing students, but we explain it here so that you can answer your students' questions. (A version of the opinion with the easement by prescription section included is posted in the shared Dropbox folder, should you wish to assign that version instead.) The easement by prescription problem is that the residents were using the property in reliance on

the Beaubien grant and its recognition by later owners. One might think this is a permissive use prohibited by the "hostility" requirement for both adverse possession and easements by prescription. Many courts, however, along with the *Restatement (Third) on Property-Servitudes*, will find an easement by prescription when the use begins with permission under an "intended but imperfectly created servitude." *Restatement (Third)* §2.16(b); s*ee, e.g.*, *Reynolds v. Soffer*, 459 A.2d 1027, 1033 (Conn. 1983) ("The fact that the use began as a result of a grant, whether one by parol or one otherwise ineffective or invalid, instead of militating against the adverse character of the use only emphasizes it."); *see also Restatement (First) Property-Servitudes* §458 (use pursuant to an ineffective grant of permission can give rise to a prescriptive easement); William B. Stoebuck, *The Fiction of Presumed Grant*, 15 Kan. L. Rev. 17 (1966-1967) (explaining that the law of easements by prescription originally depended on fiction of presumed grant of easement). One way to justify the doctrine is that when one uses land in reliance on a property right to do so, as opposed to a mere license from the landowner, that use is in fact hostile to the rights of the landowner. This is similar to the color of title doctrine in adverse possession, in which the possessor has a failed deed to the land.

You might ask students why the court would limit the scope of the easement by prescription to water, grazing, and gathering rights, rather than also include fishing, hunting, and recreational rights. The answer seems to be that those are the only rights specified in the Beaubien Grant, but that explanation only works for the easement by estoppel, which depends on permission. Although a failed grant does not defeat an easement by prescription, it is not required to establish one. Here, as Justice Martinez's concurrence explains, the trial court found that the settlers and their successors had been fishing, hunting, and recreating on the land since the beginning. Justice Martinez argues that these rights were included in the Beaubien Grant, suggesting an easement by estoppel for those, but at a minimum the evidence supports an easement by prescription.

Note 3 discusses the various situations in which easements by estoppel are recognized: where an attempted easement does not comply with the statute of frauds or other technicalities; where even without evidence of agreement by the grantor, there is reasonable reliance on continuation of consent; and where the claimant relied on fraudulent representations about the continuation of permission. Setting aside Justice Kourlis' concern that the requirement of individual names was more than a technical formality, *Lobato v. Taylor* fits into the first of these. These are the easiest cases for easements by estoppel, but even here recognizing easements that do not comply with the Statute of Frauds may result in unfair surprise to those relying on the written record, or undermine alienability and investment by reducing certainty. In addition, because the evidence to support the easement often relies on testimony, which may be fraudulent or contested, litigation may be more frequent and costlier. Some jurisdictions, therefore, reject the doctrine of easement by estoppel entirely, or require evidence of fraud by the servient estate holder. As the materials suggest, however, knowingly permitting another to substantially invest in the land in ways dependent on the easement, may itself be a kind of fraud.

In Stoner v. Zucker*, 83 P. 808 (Cal. 1906), for example, plaintiff granted defendant a revocable license to enter plaintiff's property to construct a ditch for carrying water. Defendant constructed the ditch at the expense of $7,000 (about $180,000 in today's dollars). The court found that "it would countenance a fraud to allow the plaintiff to revoke permission to use the ditch."* Id. *at 809-10. In contrast,* Harber v. Jensen*, 97 P.3d 57 (Wyo. 2004) held that expenditures in reliance on unwritten permission extending over 70 years was not evidence of fraud where the owners (the children of the original licensees) did not seek express permission and the defendants did not know that the expenditures were being made. Can you distinguish these cases?*

The significant difference is that in *Harber* there was not sufficient reason for the defendants to anticipate that the plaintiffs would rely on the license, and, especially given their lack

of permission or presence when the license began to be used, they are not to blame for any reliance that does exist. The plaintiff in *Stoner*, however, explicitly granted permission knowing that the defendant would engage in a degree of investment reflecting an expectation that permission would continue.

Problem. *In 1860, Peter Feeley purchased a family burial plot in Mount Auburn Cemetery in Cambridge, Massachusetts. Under existing law, the purchase of a burial plot in a cemetery owned by another was an easement for burial of one's dead. The purchase agreement was not impressed with a seal, which was necessary to create a formal easement under the Statute of Frauds at the time. Peter Feeley buried a child in the plot in 1860, and his wife there in 1898. After Mr. Feeley's death in 1904, the superintendent of the cemetery opened Mrs. Feeley's grave to ascertain who was in there, and then, finding that the grave was not deep enough to bury Mr. Feeley as well, "flattened down" Mrs. Feeley's casket and bones to make room. The Feeleys' surviving children learned about this after they found a plate that the superintendent had removed from their mother's grave and left lying on the ground. They brought a trespass action against the superintendent of the cemetery. Because licenses cannot give rise to an action for trespass and cannot usually be inherited, to succeed they had to show that Mr. Feeley had a burial easement in the plot. What exceptions to the Statute of Frauds for easements could they assert? Should they succeed? (Facts, but not solution, taken from* Feeley v. Andrews*, 77 N.E. 766 (Mass. 1906)).*

The potential exceptions are easements by estoppel and easements by prescription. A problem with the prescription claim, even if we adopt the rule that use under a failed grant is adverse, is that the portion of the plot in which Mrs. Feeley was buried was only occupied beginning in 1898, and the trespass occurred in 1904, not long enough to satisfy the statute of limitations. One might argue that the burial of a child there in 1860 would suffice for a claim to the whole plot, but since easements by prescription are fixed by the existing nature of use, that argument might not succeed unless the child was buried in the same part of the plot. This is a great case, however, for an easement by estoppel. Here, there is an attempted grant of an easement which fails only because of a technicality. Although there is not investment of funds, burial of one's mother is certainly a change in position in reliance. Finally, given the likely emotional impact of the grave desecration, it would be unjust to deny an easement now. Sadly, the court did not discuss easements by estoppel and held that the Feeley children had no claim against the caretaker.

B. Easements Implied from Prior Use.....567
***Granite Properties Limited Partnership v. Manns* (1987) 567**

Granite Properties nicely illustrates the factors of "reasonably necessity" and implied intent in the test for easements implied from prior use. Granite Properties sells a parcel from the land it owns to the defendants Manns, retaining for itself parcels containing a shopping center and apartment complex. The apartment complex uses a driveway over the severed parcel to access its parking lot, while the shopping center uses another driveway for large trucks to deliver goods and turn around in back of the stores. Neither property would be landlocked without the driveways, but the parking lot would be inaccessible and deliveries to the shopping center would be "practically impossible." Both driveways were visible and seen by the Manns before purchasing the property, but after purchasing and conducting a survey showing the driveways to be on their property, they sought to block use.

The court notes that Granite Properties must show a higher degree of necessity because they were the grantors and originally owned the entire parcel. One might ask students to explain why this is so. One reason is that the grantor knows the property and the ways in which it is currently used and has more control in designating the parcels severed. Therefore the grantor

should be responsible for reserving an easement in herself if she knows it is necessary for enjoyment of the property. A grantee, however, has a better claim of unfair surprise either if the parcel does not include an existing use important for its enjoyment or is subject to an easement not included in the deed. For this reason, courts may impose a higher burden on grantors to establish easements implied from prior use, and some jurisdictions refuse to grant them except in cases of absolute necessity, where the property would otherwise be landlocked.

One might also take these cases as an occasion to mention the problem of legal malpractice. If it is the case that the client believed it was either retaining or getting an easement, and the lawyer fails to ensure that this is written in the deed granted to or received by the client, there is a possibility of a legal malpractice suit against the attorney. (The attorney has also arguably violated the ethical rules of the profession which require attorneys to act with minimum competence.) You could ask, "Why shouldn't we relegate the client to a malpractice suit against its lawyer? Isn't that the best way to avoid these problems in the future?" On one hand, requiring a formal writing and entitling the client to a malpractice action would give incentives to both the lawyer and the client to ensure that the deal is what they want. To the extent a malpractice suit would give the client damages but not an easement, and the client still wants an easement for access, the client can always proceed to bargain now with the neighbor for an easement. On the other hand, compensation from the lawyer does not solve the problem. After all, what the client wants is access, not money, and if the grantor's successor in interest refuses to sell an easement, we are left with a substantial injustice; the client has not gotten what it thought it was paying for and the true owner gets a windfall by freeing its property from the burden of an easement it should have known was imposed on its property.

Note 1. The *Restatement (Third)* no longer includes the eight-part test set forth in the *Restatement (First)* and mentioned in *Granite Properties.* Instead it has reduced the factors to whether the use was not merely temporary or casual, was apparent or known, and was reasonably necessary to enjoyment of the parcel. It has also added that easements for prior underground utilities qualify even though they are not apparent to the purchaser. Previously recognized by a number of jurisdictions, implied utility easements are justifiable on the grounds that the parties would assume that any utility easements would continue after purchase, and would only in unusual circumstances object to such continuance.

In Lobato v. Taylor*, the court finds an easement implied by prior use because the use for timber and grazing was necessary to support oneself on the land, so that when Carlos Beaubien divided the land into vara strips, Beaubien would already have been relying on the land for these purposes, and the settlers had reason to expect that the use would not terminate. As the attorney for Taylor, how could you challenge this finding?*

You could argue that because Beaubien was not residing on the land that was ultimately divided into vara strips, he was not using of one part of the parcel for the benefit of another. As the attorney for Lobato, however, you could respond that the settlers were already present before the land was divided into vara strips, and because surviving on the land required use of the open space, it was used for the benefit of the vara strips before severance.

Note 2. *What kinds of uses are sufficiently "necessary" to continue after severance as an easement by implication from prior use?* The term "necessary" often confuses students, so it is worth emphasizing that the doctrine does not usually require "necessity" or indeed anything like it when the claim is made by a grantee. The note tries to explain that the importance of a use is instead a factor in determining whether the parties would likely have intended for the use to continue after severance, and whether the burden should be on the servient estate holder to specify clearly that it was not.

B. Easements by Necessity.....574
***Finn v. Williams* (1941) 574**

Charles Williams divides his land and sells 40 acres to Bacon in 1895. In 1937, Bacon sells to the Finn brothers. The 40-acre parcel does not border a public right of way, but for many years the owners of the parcel had been using private roads with permission of adjoining landowners to access the highway. Those roads are now closed. Charles' widow Zilphia Williams, who has inherited the larger parcel, refuses to let the Finns go over her parcel to access the public highway, leaving them to carry their produce by hand to bring it to market. The court holds that it does not matter that the Finns had not used the servient estate to access the public road for many years after severance; when a parcel becomes landlocked as a result of severance, an easement by necessity arises and remains dormant until it is needed.

Quick Review: Between 1895 and 1939, the plaintiffs and their predecessors had accessed the road via other surrounding land. Could they claim an easement by prescription over the land? Why didn't they claim an easement by necessity over that land?

They can't claim an easement by prescription over the other land because these were "permissive means of ingress and egress," so lacked the requisite hostility. They can't claim an easement by necessity over those lands either because it was not severance from them that made their property landlocked. One additional question is whether they could claim an easement by estoppel. Perhaps they could show that they or Bacon only purchased the estate because of the permission by these owners to use the land. It seems more likely, however, that the permissive use arose after purchase, and so would not have the generated the requisite reliance.

Note 1. *Should an easement by necessity be granted to the buyer to prevent the buyer's land from becoming landlocked when it is clear that the grantor did not intend to grant such an easement over the grantor's retained land? What arguments can you make on both sides of this question?*

In favor of granting the easement despite the evidence of intent, one could argue that parties should not be able to make bargains so detrimental to use and distribution of land. In many cases, the law will limit the agreements that parties can make, whether for their own good or the good of society. Courts will not enforce agreements to restrain trade, to live in unsafe and unhealthy residences, or to rent or sell only to people of a particular race, religion, or nationality. In the same way, one could argue, the "demands of our society prevent any man-made efforts to hold land in perpetual idleness."

Arguments against granting an easement by necessity in the face of evidence of contrary intent include that the lack of access was likely reflected in the price for the land and it would be unjust to provide the buyer with more than she bargained or paid for. As perhaps was the case in *Finn v. Williams*, the purchase may also have reflected a judgment that access was available over the land of another; why should the grantor have the burden of that poor judgment rather than the grantee or the adjoining landowner who falsely created the impression that access was available over that land? As a matter of social welfare, moreover, the ability to sell the property without an easement, and the ability to purchase it with a price that reflected this, may actually have facilitated the sale and alienability of property.

Problem 1. *Adam owns property bordered to the east by a river, to the west and north by private property, and to the south by a public road. Along the river is a one lane public street. Adam divides the property into northern and southern parcels, selling the northern parcel to Barbara. After some years, increasingly violent storms begin causing regular flooding and destruction of the one lane street. The government decides to stop maintaining and rebuilding it,*

and soon the street is no more. Barbara's parcel is now landlocked. Can she assert an easement by necessity over Adam's land?

No. This is a basic problem, but often one that helps clear up confusion about the doctrine. The necessity must arise upon and because of the initial severance; here, the later necessity is not one that the parties would have any intent regarding during their initial agreement, and not one that Adam is responsible for curing.

Problem 2. *The doctrine of easement by necessity applies when land has no access to a public road. Should it apply when property is physically located along a public road but the cost of creating useable access to that road is prohibitively expensive?*

Limiting the doctrine to cases of absolute necessity may be justified by the presumed intent of the parties, because while individuals are unlikely to buy land they cannot access at all, they may make a judgment that very limited access is sufficient or that creating more convenient access is worth the expense. Furthermore, land that is accessible by expensive or limited means is not condemned to idleness in the way that truly landlocked land is. For example, in *Schwab v. Timmons*, 589 N.W.2d 1 (Wis. 1999), although it would be a prohibitively expensive to build a road over the bluff, the owners could build a staircase to access their beachfront home more cheaply and such access might be reasonable for vacation property. Given the concerns about changing agreed upon bargains, revoking an owners' right to exclude, and undermining efficacy of written records, perhaps limiting the doctrine in this way is appropriate.

The counterargument is that if it turns out that constructing access to a public way from one's own land is astronomically expensive, then the land is as landlocked as if it were physically surrounded by the land of strangers. If the reasons for regulating property to ensure that it does not become landlocked are valid reasons, perhaps they should similarly apply to this kind of case.

A further set of arguments comes from the difference between rules and standards. A practical necessity interpretation shifts from rule requiring absolute necessity to a standard. One could argue that as a standard, it will create less predictability ex ante, as parties will be less able to determine how courts will interpret their actions. As discussed in earlier chapters, however, a standard may be more effective in deterring behavior that will ultimately be unjust or inefficient, permitting courts to police such behavior, and allowing them to honestly articulate the reasons for their behavior.

In practice, most courts require absolute necessity, but a few require instead practical or great necessity, balancing the difficulty of access and the utility of the land. Even in these states, courts will refuse to grant easements where it appears that the access available is sufficient given the nature of the land, as the Colorado Supreme Court held in *Thompson v. Whinnery*, 895 P.2d 537 (Colo. 1995), finding that access by horseback was sufficient for rural property used for grazing and recreational purposes.

Problem 3. *Relatedly, what if the only access to the land is by water?* In Berge v. State, *915 A.2d 189 (Vt. 2006), the court held that the fact that plaintiff could access a public road via boat from his property did not defeat an easement by necessity. Although the test in Vermont was that there must be "strict necessity," the majority found that "since the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes."* Id. *at 192. Access by water did not allow a modern owner "reasonable enjoyment" of his land. The dissent argued that water access was reasonable for property such as the plaintiff's, which was used for seasonal outdoor recreation, and that the majority had forgotten that "[t]he public's interest in access to landlocked property must be balanced against the serious consequences inherent in granting one landowner*

an uncompensated interest in the property of a neighbor." Id. *at 196 (Reinhardt, J. dissenting). Who is right?*

Access by water traditionally defeated necessity, but the majority in *Berge* found that it was no longer reasonable to expect individuals to access their property by water, particularly given the dangers inherent in doing so. Vermont therefore joins a trend in the courts to hold that water access does not defeat necessity. Because this is relatively simple rule to apply and will conform to the expectations of most parties today, this seems a reasonable and limited expansion of the rule.

The *Berge* decision appears to broaden the standard of necessity, however, by stating that in general the access must be sufficient for "reasonable enjoyment" of the land, shifting toward something more like the practical necessity test discussed in note 2. Again, if the concern is truly maximizing productive use of land (and Vermont is one of the minority of jurisdictions suggesting that easements by necessity should be found for utilitarian purposes even when contrary to party intent), this seems a reasonable principle, but it increases the risk of imposing unexpected intrusions on landowners and undermining the predictability of written records.

§2.5 Modifying and Terminating Easements.....579

§3 Covenants.....579
§3.1 Definition and Background.....579

These materials rank with the rule against perpetuities as among the most difficult in the traditional property course. We encourage you in teaching the historical materials to deemphasize rules no longer of significant importance in the United States (such as the English simultaneous privity requirement, or the kinds of permissible negative easements) and instead to emphasize the development as a series of changing judgments about the balance between the risks of binding subsequent users of land against the need to permit coordination of land use by private agreement.

We have tried to make the various rules simpler by providing a chart on page 559 showing that there are only four elements for covenants to run with the land and how they may change for real covenants, equitable servitudes, and the *Restatement (Third)*. In simplified form, real covenants require: (1) writing; (2) intent; (3) horizontal and vertical privity; and (4) touch and concern. Equitable servitudes replace the privity requirement with notice, and the *Restatement (Third)* replaces privity with notice and touch and concern with a reasonableness test that includes both specific public policy concerns and a general requirement that there is a legitimate reason for having the agreement bind subsequent owners of land. Most courts appear to follow some but not all of the traditional rules, although many have created statutory exceptions for common interest developments.

§3.2 Creation of Covenants.....583
A. The Traditional Test.....583
Neponsit Property Owners' Ass'n v. Emigrant Indus. Savings Bank (1938).....583

In helping students to understand the traditional rules, it may be useful to explain the ways they might be thought to serve the policy concerns arising from having covenants bind not merely the contracting parties but also subsequent owners who did not explicitly agree to them.

The requirements that the original covenantors be in horizontal privity, either through the simultaneous privity test or the American instantaneous privity test, would tend to ensure that the covenant was noted in the core documents regarding ownership of the property, thus increasing notice to subsequent owners; that the covenant was reflected in the price of the property; and

perhaps that it in fact increased alienability, by permitting parties to alienate their land but still protect their interests. With respect to vertical privity, because it requires formal transfer between the successive owners of the land subject to the covenant, it is fair to assume that the transfer includes all the benefits and burdens of that title unless specified otherwise. Such formal transfer would also tend to ensure notice of covenants created by former owners. (One could of course argue that these concerns would be addressed more directly by notice and factors regarding presumed intent and the reasonableness of the covenant, and the equitable servitudes doctrine and the *Restatement (Third)* seek to do so.)

The touch and concern requirement similarly addresses concerns about alienability and undue burdens on land use. By requiring that both the burden and the benefit of the covenant be about land use and value, it seeks to ensure that this is the kind of agreement should bind land itself, rather than simply bind the agreeing parties. But because the touch and concern requirement became a vessel for all kinds of judicial policy determinations about agreements that should not be enforced for other reasons, the case law in this area became difficult to penetrate. The *Restatement (Third)* sought to hack through this tangle and facilitate the recognition of covenants by abolishing the touch and concern test, creating a presumption of validity, and creating a reasonableness test that incorporates all of these policies concerns. Few jurisdictions have adopted this position, however, and it is not clear that the goal of the drafters—facilitating coordination of land use but preventing idiosyncratic burdens on land—is better served by the multiplicity of factors included in the amended test.

Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank

Neponsit is a useful case for two main reasons. First, it actually grapples with privity and touch and concern, the most difficult concepts in covenant law, and so helps to illustrate and explain those concepts. Second, it does so out of an early effort to make sense of the historical shift from covenants being made and enforced among a few parties to covenants binding large developments and being enforced by a representative.

Stewart Sterk has a nice history of the case and the development in *Property Stories.* Like most early common interest developments, *Neponsit* was a high-end community; owners built their own homes but were party to common restrictions and amenities. Robert Deyer and his wife, Charlotte, purchased their home from the Realty Association in 1917. The Realty Association assigned its ability to enforce the covenants to the Neponsit Property Owners' Association, to which all property owners in Neponsit automatically became members. In 1935, Emigrant Savings Bank purchased the Deyer property at a foreclosure sale.

Among the many covenants the Deyers gave to Neponsit Reality was one to pay an annual charge of $4 (about $100 in today's dollars) to benefit public amenities of the community and for other public purposes. Sterk notes that the Deyers stopped paying the fees almost immediately, in 1920, and the Property Owners Association is seeking back fees against Emigrant Savings for that period. The owners association did not seem to have much need for the fees. The main property to be maintained with the fees—the beaches—had been transferred to and was maintained by the government. In addition, the obligations (along with the rest of the covenants) are supposed to "cease and determine" in a few years, in 1940. This raises the question of why they are bothering to raise the issue now if they were willing to let the fee slide for 15 years when they could have sued the original covenantor.

One could argue that this was an effort to get title to the property itself, and the complaint did include a request that the property be sold to pay the fees. But of course Emigrant Savings Bank could have easily paid the fees (which they claimed amounted to $340 with interest) to avoid the sale, and it is not clear that the Property Owners Association would have an interest having the house remain vacant and foreclosed pending another sale. Another possible explanation is that both

Neponsit and Emigrant Savings, which likely had mortgages in many properties in such developments, were interested in clarifying the law on this issue.

There are two legal issues: whether the Neponsit Property Owners Association is in privity with Neponsit Realty, and whether the obligation to pay touched and concerned the land. (Because the owners association is seeking back fees, this is an issue of damages in which privity was traditionally required.) Before getting into these, you might first ask students to run through the easy facts establishing the writing, intent to run, horizontal privity, and notice factors.

Then you can ask the students to articulate why vertical privity is a problem. The answer is that the Neponsit Property Owners Association doesn't own any property in its own name, so it did not acquire any property from Neponsit Realty, the beneficiary of the covenant. The beneficiary of an appurtenant covenant can't just transfer enforcement rights to a non-owner of land—that would both violate the purposes of vertical privity in limiting and providing notice of beneficiaries, and create a covenant in gross, which is forbidden under the traditional rules.

How does the court get around this? Because the "Owners Association" is exactly that: the representative of the owners, who are in vertical privity with Neponsit Realty. This is of more than technical significance: the court is sanctioning the creation of representative bodies to enforce covenants, which will permit practicable administration of covenants binding large numbers of owners.

That leads to the second question: Does the fee really touch and concern or benefit land, so that it is an agreement that should attach to land rather than to individuals? As the notes discuss, courts traditionally had trouble with agreements to pay money to an individual or entity because they seemed to fall in the realm of contract law rather than property law. As the court finds, however, fees to support amenities that benefit property owners in general do indeed benefit land and are a land-related burden of living there. This holding also overcomes an essential problem with common interest developments—to avoid free rider problems, there has to be a collective contribution to maintaining things that touch the landowners generally.

B. The Restatement (*Third*) and Its Influence.....593

The *Restatement (Third)* seeks to further enforceability of covenants by doing away with some of the technical requirements running with the land, seeking instead to enforce covenants so long as they represent reasonable agreements to coordinate land use and do not unfairly surprise or burden servient estate holders or undermine predictability. Few courts have adopted it in its entirety, although many have relaxed some of the traditional requirements.

Winn-Dixie v. Dolgencorp, 746 F.3d 1008 (11th Cir. 2014) usefully illustrates the different approaches states might take to vertical privity and interpretation questions, by analyzing both Mississippi and Florida with respect to whether Winn-Dixie's exclusive grocery restrictive covenant applied to competitors leasing space in the same shopping mall.

Problems

1. Writing.

a. *A developer creates a residential subdivision and offers lots within it for sale. The brochures for the subdivision describe it as a "premier residential community," to have "restrictive covenants to fulfill the purposes of the community." Neither the deeds nor the recorded subdivision map, however, refer to any restrictive covenants. The developer sells some of the lots, but is unable to sell more to people interested in them for residential purposes, and sells the remainder to a buyer who plans to build a big box store. Is there a writing sufficient to create a restrictive covenant on the land?*

Probably not. Although there are writings in the brochures, they do not comply with the Statute of Frauds because they are not signed by the grantor or include other legal formalities. There might be an argument that the statements in the literature should be enforced as a matter of estoppel; the counterargument is that buyers who purchase without any restrictive covenants do not reasonably rely on them.

b. *In 1872, a developer recorded a subdivision map showing proposed lots and streets and parks in a seaside vacation community on Martha's Vineyard in Massachusetts. The map included three parcels labeled "Prospect Park," "Webster Park," and "Plaza." These parcels were about five times the size of the proposed residential lots, and were irregularly shaped. The rest of the parcels in the subdivision were sold to individual homeowners; the deeds did not mention any rights with respect to the park parcels specifically, but all referred to the recorded subdivision map. More than 100 years later, the owners of the lots, the heirs of the original developer, sought to sell the undeveloped park parcels to buyers who wanted to build residences on them. Owners of other homes in the subdivision claim that the parcels are subject to an equitable servitude prohibiting development. Is there a sufficient writing to create a covenant preventing development? Compare* Reagan v. Brissey, *844 N.E.2d 672 (Mass. 2006) and* Agua Fria Save the Open Space Association v. Rowe, *255 P.3d 390 (N.M. 2011).*

Here, in contrast to Problem 1.a., the subdivision map incorporates the deeds by reference and complies with the Statute of Frauds. The question is whether that is enough to create a covenant. In *Reagan*, the court found that the names of the parcels together with their irregular shape were enough to create a servitude barring development. Like other courts to consider the issue, the court reached its holding in part because such a map was part of the inducement to buy, so it would be unjust and undermine reliance on agreements to permit development. In *Agua Fria*, in contrast, a jury found the developer did not induce buyers to purchase based on the designation of seven acres of open space as the "Country Club tract" designated on the subdivision maps and covenants declaring that it "may be used for a hotel and/or club house and commercial activities for profit." The *Agua Fria* appellate opinion did not review the jury determination, however, so it is hard to determine the jury's rationale.

2. Intent to run. *AHC, Inc., a developer of low-income housing, sells a home to a couple with financing. The financing agreement includes a deed of trust from the couple providing that "[i]n the event of Grantor's death or in the event that Grantor elects to sell the property secured hereby at any time within thirty (30) years from the date of the Trust, AHC, Inc., its successors or assigns shall have the option to purchase the property at the Purchase Price as hereinafter defined . . . ." The couple later refinances the home with Option One Mortgage, and defaults on the refinanced loan. Option One initiates a foreclosure sale on the property, at which an investment company purchases the home. Does the option to purchase run to subsequent owners like the investment company? What does the language suggest? Why might a developer of low-income housing include such an option?* Beeren & Barry Investments, L.L.C. v. AHC, Inc.*, 671 S.E.2d 147 (Va. 2009), discusses this problem.*

The language refers only to the "Grantor" rather than any successors or assigns. The stated conditions—the death of the Grantor or the election by the Grantor to sell—are also ones that attach to individuals rather than to land. The option also does not appear to be appurtenant, as there is no mention of land owned by AHC that is benefitted. *Beeren & Barry* resolved the dispute against AHC for these reasons. One might argue, however, the intent of AHC, which is to ensure that property provided to low-income owners for a subsidized price is not resold at market prices, and that the developer can maintain its stock of land dedicated to affordable housing. Permitting foreclosure and sale to an investment company undermines these purposes, so foreclosure as a result of the Grantor's choice to refinance should be interpreted as an election to sell. Nevertheless, forcing a sale at a below market price to AHC is already a significant restriction on alienability and

expectations; one could argue that this restriction is justified against the Grantor because it is clearly specified in the deed and justified by the original purchase price. Extending this restriction without clear indication in the deed creating the option would unfairly undermine expectations and autonomy of the owners.

3. Horizontal privity.

a. A *sells land to* B*; the deed specifies that the land can only be used for residential purposes. Is there simultaneous horizontal privity (the old English test)? Is there instantaneous horizontal privity (the common American test)?*

There is not simultaneous privity because *A* transferred her entire interest to *B.* There is horizontal privity because the restriction was created by the parties during a transfer of the property affected.

b. A *and* B *are neighbors;* A *plans to install solar panels and wants to make sure* B *does not build to block them.* B *agrees to enter into a covenant restricting her from building so as to obstruct the flow of sunlight to the solar panels. Is there horizontal privity under the common American test? Assume that* C *purchases* B*'s land knowing of the covenant. May* A *enforce the covenant against* C*? Under traditional rules, what remedies may* A *seek?*

There is not horizontal privity because *A* and *B* already own their land. They could have created horizontal privity by transferring their property to a strawman and then transferring it back with the covenants, but they did not do so. Nevertheless, *A* may enforce the covenant against *C* through injunctive relief because *C* had notice of the covenant. The lack of privity would prevent *A* from seeking damages under the traditional rules.

4. Vertical privity. A *sells land to* B *with a covenant that* B *may not block the flow of a natural stream from* B*'s land to* A*'s land. Is there vertical privity in the following situations? With or without vertical privity, should the covenant be enforceable by or against the subsequent owner of the land?*

a. A *sells his land to* C.

Yes, this is the classic vertical privity relationship.

b. B*'s land is foreclosed and sold at a foreclosure sale to* D.

Yes, this was a deliberate transfer of *B's* title to *D.* It would also be unfair for *A* to lose the value of the covenant because of *B's* inability to pay off her obligations.

c. B *leases her land to* E.

This would not satisfy strict vertical privity because *B* retains an interest in the land, but would satisfy relaxed vertical privity. Even without vertical privity, it would undermine the value of the covenant if the water could be impeded by lessees of the land. But again the question here is whether any damages can be sought against the tenant, or only against the lessor. The answer will likely turn on whether the lessee had notice of the restriction.

d. B *loses her land by adverse possession to* F.

No, *B* has not formally transferred her title to *F*, and this might not qualify even as an equitable servitude unless *F* had notice. Most courts would nevertheless enforce the burden of covenant against an adverse possessor because *F* did not do anything to extinguish *A's* interests (assuming *F* did not block the flow of water for the statutory period). The *Restatement (Third)* specifically provides that both the benefit and burden flow to adverse possessors.

e. A *dies and* G *inherits his land.*

Yes, there is a formal transfer of title from *A* to *G*, and there is no reason that *B* should be excused from the burden of the covenant simply because the original covenantee dies.

5. Notice. O *sells a residential lot to* A *within a subdivision. The deed, like all other deeds in the subdivision, provides that* A *can only paint the home in certain approved "southwestern" shades: sand, adobe, cactus, and sandia. The deed is recorded.* B *later purchases the home, without any actual knowledge of the restriction. She paints the property hunter green. What different arguments can you make that she has legal notice of the restriction?*

B clearly has constructive notice because the deed is recorded. There may also be an argument that she has inquiry notice. Purchasing a property within a subdivision in which all of the houses are painted according to a particular color scheme could lead a person to question whether these are the only permissible colors. The counterargument is that this is a trendy color scheme that a reasonable purchaser might believe was chosen by the developer to market the property without intending to restrict future owners in their color choices. Given the frequency of covenants regarding uniform exterior appearance in subdivisions, however, one could argue that purchasers should be on notice that uniformity may be required.

6. Touch and concern. *Do the following covenants touch and concern the burdened land? Do they touch and concern some benefited land (i.e., are these restrictions appurtenant or in gross)? Would they be upheld under* Restatement (Third) *public policy analysis?*

a. *The covenants for a condominium development provide that unit owners may not have dogs. How would the analysis change for a restriction preventing cats?*

The anti-dog and anti-cat covenants clearly touch and concern the burdened land by restricting use of the property. The anti-dog covenant also touches and concerns the benefitted land in several ways. Dogs may leave behind them quite tangible "touches" on common areas such as sidewalks, lawns, and even other people's lawns. A no-dog restriction may also increase the desirability of land for some by preventing barking and assuaging concerns of those who are afraid of dogs and don't want to encounter them on their walks.

Whether the benefit of a cat restriction touches and concerns the land is a more difficult question, because cats tend to be quiet and many do not go outside. One can make an argument that even supposed indoor cats may sometimes go outside and kill birds, poop, and spread allergens. Perhaps a stronger argument is that the tendency of many cats to leave indelible pee odors in the homes they inhabit will reduce the resale value of those properties and, because the resale value of all units will be affected by the prices obtained for others, a blanket restriction on cats might increase the value of the property as a whole.

Of course, these benefits have trade-offs—many people value a property much more highly if pets are permitted. But the question is not whether the benefits are more significant than the burdens overall—so long as there are some off-setting benefits to land from the servitude, the touch and concern requirement is satisfied.

As discussed in the dissent in *Nahrstadt*, § 5.1, there are policy arguments that pet ownership is sufficiently valuable and important to identity interests that cats may not be prohibited without a specific showing that they affect other landowners. The *Restatement (Third)*, however, begins from a presumption that both fairness and efficiency will generally be facilitated by permitting parties to agree on the package of benefits and burdens valuable to them. It is therefore unlikely to invalidate an anti-cat covenant where some connection to the use and enjoyment of land can be shown.

b. *The deed for a historic house provides that the owners must always hang a portrait of the original owner.*

Professor Berger actually had a student whose house was subject to this requirement. While one can argue that as a restriction on land use, this touches and concerns the burdened land, there is almost no way to argue that it touches and concerns some benefitted land, because the portrait is inside and not likely to be visible to other landowners. This looks more like an

idiosyncratic requirement to satisfy the personal preferences of a former owner, and therefore the kind that could be enforced between the agreeing parties, but not against the land itself. One possible set of facts that would change the analysis is one in which the property is part of a historic district frequently subject to interior tours, so that the portrait would increase the historic nature of the district as a whole.

Because of the idiosyncratic nature of the restriction, this would likely be found unreasonable under the *Restatement (Third)*. Nevertheless, it might be upheld given the *Restatement*'s strong presumption of enforceability because the requirement might be argued to serve a purpose by encouraging alienation by a seller with a personal attachment to the property and because it is not a significant restriction on the use or enjoyment of the current owners.

c. *An owner of two supermarkets two miles apart sells one with the covenant that the land may never be used for supermarket purposes.*

These are the facts of *Davidson Brothers v. Katz & Sons*, 643 A.2d 642 (Super. Ct. App. Div. 1994), on remand from 579 A.2d 288 (N.J. 1990), printed in §5.1. Although students may think that a covenant cannot benefit land two miles away, the facts of *Davidson Brothers* show that the market was significantly impacted by the presence of another grocery store within two miles, and one can imagine many other businesses for which this would be the case. Some courts traditionally held that such anti-competitive covenants did not touch and concern the land, but this was an inappropriate use of the touch and concern test to address concerns that are more appropriately handled by the prohibition on unreasonable restraints on trade.

The *Restatement (Third)*'s reasonableness test specifically prohibits unreasonable restraints on trade, but here simply restricting the use of one parcel within a two-mile radius does not do so. In the *Davidson Brothers* decision itself, the New Jersey Superior Court found that the covenant was unreasonable because of its effect in prohibiting use of a location ideally suited for a supermarket in what was otherwise an urban food desert. The New Jersey Supreme Court, however, had placed the burden on the enforcer to show that the covenant did not violate the public interest. The *Restatement (Third)*'s presumption of validity might create a different result, or at least result in a finding that the covenant was enforceable by damages if not by injunctive relief.

d. *The covenants upon sale of an oil refinery provide that the grantee "shall never, directly or indirectly, attempt to compel Grantor to clean up, remove or take remedial action or any other response with respect to any of the buried sludge sites, the waste pile site, the Active Hazardous Waste Storage Sites, the underground liquid petroleum and petroleum vapors (including, without limitation, any leaching therefrom or contamination of the air, ground or the ground water thereunder or any effects related thereto), or any and all waste water treatment ponds or treatment systems on or in the vicinity of said premises or seek damages therefor[e]. This covenant shall run with the land and shall bind Grantee's successors, assigns and all other subsequent owners of the property." See* El Paso Refinery, LP v. TRMI, *302 F.3d 343 (5th Cir. 2002). The court found that Texas law did not necessarily require that a covenant benefit land in order to run (i.e., that covenants in gross were permissible) but that it must touch and concern the burdened land. Does the covenant touch and concern the burdened land?*

This is a tricky one, and you might tackle it yourself rather than asking a student to do so. The covenant is not about use of the burdened land—the covenant does not prevent cleaning up the site, but rather restricts who may be required to pay for cleaning up the site. For this reason both *El Paso Refinery* and *Calabrese v. McHugh*, 170 F. Supp. 2d 243 (D. Conn. 2001) held that a covenant not to sue for environmental remediation did not touch and concern the land. In contrast, *1515-1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp*, 43 P.3d 1233 (Wash. 2002) (en banc), upheld a covenant exculpating the city from liability for soil movement under townhouses for which the city had granted building permits. The court found that the covenant

touched and concerned the land because it concerned the "occupation and enjoyment of land." Again, however, because the covenant did not affect how the plaintiffs used their land, but only whom they could sue if things went wrong, it is not clear how the court got to that conclusion.

A different situation would be presented if the covenant not to sue affected a lawsuit for prospective relief. A covenant not to bring a suit to enjoin a nuisance, for example, would clearly burden the land by potentially permitting a nuisance to continue.

Susan French discusses these cases in *Can Covenants Not to Sue, Covenants against Competition and Spite Covenants Run with Land? Comparing Results under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 Real Prop. Prob. & Tr. J. 267 (2003), arguing that the *Restatement (Third)* would permit these covenants to run, and this result furthers public policy goals. She argues that these covenants would be reasonable because they facilitate the sale and development of land which parties might otherwise fear transferring because of concerns about liability. In favor of Professor French's argument, the economic idleness of brownfields like those in *El Paso* and *Calabrese* is a major policy problem. The covenants, moreover, were surely reflected in the price of the property, so that voiding the covenant now would create a windfall for the successors. A counterargument is that restrictions like these may effectively prevent remediation by the entity liable for contamination. In *El Paso*, for example, the contaminator transferred the property to a subsidiary which promptly went bankrupt; it was the purchaser at the bankruptcy sale who sought contribution for remediation. In a case like *Lakeview*, moreover, does it really serve societal interests to make it easier to develop land with a substantial risk of becoming unstable and uninhabitable because of unstable soil?

C. Remedies.....597

Although traditional covenant law determined what remedies were available by whether the agreement was a real covenant or an equitable servitude, the policy justifications for different remedies reflects the same concerns discussed in Chapter 6, *Nuisance*. Can the court accurately determine damages and will they adequately compensate for the harms suffered by the plaintiff? With respect to injunctive relief, do we want to give one party the power to veto an activity, forcing the other to bargain if they want to go forward? Further, will an injunction requiring affirmative action by a party be unenforceable and therefore fail to create meaningful relief? For example, in cases like *Shalimar Association v. D.O.C. Enterprises., Inc.*, 688 P.2d 682 (Ariz. Ct. App. 1984) and *Oceanside Community Associates v. Oceanside Land Co.*, 195 Cal. Rptr. 14 (Ct. App. 1983), will an owner who is not interested in operating a golf course to effectively maintain one if ordered to do so? How often do you think the grass would be mowed or the water hazards cleaned?

§4 Covenants in Residential Subdivisions, Condominiums and Other Multiple Owner Developments.....600
§4.1 Implied Reciprocal Negative Servitudes in Residential Subdivisions.....600
***Evans v. Pollock* (1925).....601**

These materials reintroduce the question of formality versus informality that was central to the doctrines of easement by estoppel, by implication, and by prescription. To what extent should owners be bound by oral promises or statements and to what extent should those promises be binding on subsequent owners of their land? The policy of protecting the buyers who rely on those promises conflicts with the policy of protecting the interests of those who rely on the recording system and their own deeds to determine whether any restrictions exist on their land.

The difficult question is when owners of parcels not subject to written covenants should know of and be bound by common covenants. The test is described as requiring "evidence of intent

to create a common scheme," but the concern is not with the subjective intent of the developer, but with whether the objective evidence of such intent is sufficient to create reasonable reliance on such a scheme and notice to purchasers whose land is not bound. In *Evans*, the court holds that there is a common scheme binding all of the lakefront parcels within a subdivision, but not within the undivided hilltop parcel. The implicit finding is that the uniform covenants on 29 out of 31 lakefront parcels, along with the right of the owners of the parcels to collectively amend the covenants, should have provided constructive notice to a subsequent purchaser of that reliance. The hilltop parcel, however, which was not subdivided on the recorded plat, did not border the lake, and whose owners had no rights to vote on covenant amendments, did not create either sufficient notice or reliance.

The notes discuss the different factors and approaches that have been used in determining whether a common scheme binds unrestricted parcels of land. Early decisions appear relatively generous in finding a common scheme, exemplified by *Sanborn v. McClean* finding a common scheme where the restriction was present in only 58 of 91 parcels in the subdivision. Perhaps because developers today generally file a plat describing the development and its covenants before selling the parcel, recent decisions are less likely to find a common scheme.

Problem 1. *A developer sells 45 of 50 lots in a subdivision, with grantee covenants restricting uses to single-family homes. The developer orally assures the buyers that all the lots will be restricted. The developer, however, has trouble selling the last five lots located on the edge of the development. A buyer offers to purchase three of the lots if they can be combined and an apartment building constructed with 25 apartments. The price is lower than the developer hoped to get for the three properties, but no other buyers seem ready to purchase the lots for use as single-family homes at prices that would allow the developer to make a profit. Then another buyer comes along who offers an extremely high price for the last two lots so long as no covenant is included in the deed; this buyer wants to build a gas station. Several of the owners of the restricted lots sue the owners of the lots that are to be developed as an apartment building and a gas station.*

a. Can they enforce the restrictions against these owners under current law? Should they be able to do so?

They should if the jurisdiction recognizes the doctrine of implied reciprocal negative servitudes. Like *Evans v. Pollock*, this is a classic case: all the initial lots sold include uniform covenants, but the last few are not so restricted. These covenants are part of the inducement to the buyers to purchase the parcels. They are also in writing and it seems that the later buyer had notice of them. In this situation it would be unfair to permit the developer to violate the reasonable reliance the prior grantees placed in the common restrictions simply because the business plan was not quite as profitable as expected; further, permitting this would discourage investment by undermining security of title. While there is concern about unfairness to the later buyers who (unlike the developer) did not profit from the inducement to the prior grantees, there is sufficient evidence of the existence of the common scheme and the reliance of the prior grantees that they assumed the risk of a purchase made with the intent to undermine that reliance.

b. Now suppose the developer intended all along to sell the last five lots as unrestricted lots, and the buyers can prove that the developer intended to defraud them at the time of purchase, rather than merely changing her mind when the market went soft. Does this change your analysis?

This illustrates that the issue is not the subjective intent of the developer, but rather the objective evidence of intent and reasonable reliance of the grantees. The fact that the developer intended to defraud the grantees all along is not necessary, but creates an even more compelling case for imposing implied servitudes on the last remaining parcels.

§4.2 Common Interest Developments and Property Owners Associations.....608

We have chosen to refer to common interest developments rather than common interest "communities" because while the term community reflects the aspirations and reality of some of these developments, many are as atomized as any other residential area. Similarly, the term "homeowners association" does not reflect the reality that the members of these associations are the property owners; they may include developers or landlords who do not live there, and exclude tenants who make these residences their "homes." The phrase "property owners associations" also clearly includes the governing bodies of both detached residence and condominium developments.

These questions of terminology raise some of the themes of these materials: To what extent are these developments really common interest communities, reflecting shared goals, interests, and sacrifices of people in true communities, and to what extent are they developments where the common interest is solely the desire to maintain property values? What powers should property owners have to regulate the actions of other owners and what are their limitations? Should they be judged by the standards applied to governments, to those applied to private contracts between individuals, or by some other standard reflecting the unique nature of this important and growing form of residential housing? You can go to the website of the Community Associations Institute for publications and information supporting common interest developments. For another (decidedly less professional) perspective, the reddit group F**kHOA and similar sites catalog disputes between individual owners and their associations.

§4.3 Relationship Between Unit Owners and Developers.....612
***Appel v. Presley Cos.* (1991).....612**

Questions frequently arise regarding the power of developers to amend covenants and make and enforce decisions regarding the management of common interest developments after units have been purchased. Developers make substantial investments in their developments and are interested in those investments. They therefore frequently give themselves significant power to amend covenants and otherwise affect owner association decisions even after they become minority property owners; they also may create transfer fees or management contracts that permit them to recover profits even after they no longer own units. Once units are sold, however, unit purchasers rely on the promises that have been made to them, and have autonomy interests in managing the developments themselves. These materials address these tensions.

In *Appel v. Presley Cos.*, 806 P.2d 1054 (N.M. 1991), the court upholds a covenant giving the developer tremendous power to amend covenants, but imposes a requirement that the power be exercised in a "reasonable manner so as not to destroy a general scheme or plan of development." The *Restatement (Third)* adopts a slightly different test preventing "material change" in the character or burdens of the development without notice to purchasers in the covenants themselves. As *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012), shows, however, some courts reject such tests, choosing instead to strictly enforce a developers' contractual power to amend the covenants.

Problem 1. *A famous architect develops a subdivision of 50 homes with an unusual design for the houses. The design is popular and the properties are sold for high prices. The developer recorded a declaration before the first home was sold which contained restrictive covenants preventing any external changes to the structures or landscaping without consent of the architectural review commission. The developer was identified by name in the declaration as the*

sole member of the architectural review commission. Every deed referred to the declaration.

(a) Five years after the last home was sold, a homeowner sought to change the color of her house and to add a sunroom. The architect refused to allow the change, although none of the neighbors objected to the changes. The owner sues the architect claiming that the covenant granting the architect continued control of the architectural review commission after the last unit was sold is unenforceable. The architect claims that the design of the houses is akin to a work of art, that she has a right to artistic control of the houses, and that the plaintiff voluntarily consented to this arrangement. Some of the neighbors support the architect's position to maintain the value of their homes. Who should win? Would your answer change if the problem arose 50 years after the last house was sold? What if the architect wrote a will leaving her right of enforcement to her daughter at her death? Can the daughter enforce the covenant?

The issue here is whether the benefit of a covenant can be held in gross by the developer of a subdivision. Traditional law, as well as the *Restatement (Third)*, suggest that the developer should have no such power. The developer's interest is incompatible with fee simple ownership; a sale of property should include a compulsory term that covenants are not enforceable by persons who do not reciprocally benefit in their use of land in the neighborhood. The counterargument is that such retained control may be beneficial; leaving architectural control in the hands of the "expert" developer may get better results and prevent such decisions from turning into political questions in the neighborhood in a way that may exacerbate tensions and pit neighbor against neighbor. In addition, the argument in favor of free contract suggests that some owners may wish to live in uniform areas with a standard appearance of houses; preventing this arrangement interferes with the ability of owners to develop the kind of property interests and community life that best promotes their welfare. For a notable example of a common interest developments maintaining a distinctive architectural vision see Lafayette Park in Detroit, designed by Mies Van der Rohe, *see* http://www.miessociety.org/legacy/projects/lafayette-park/, which is listed on the National Register of Historic Places and remains a stable and beautiful enclave of affordable middle and professional homes despite Detroit's woes.

(b) Now suppose the declaration grants the architect complete control of interior design, including furniture. A resident is paralyzed in an automobile accident and wants to change the furniture and the kitchen to make them wheelchair accessible. The architect refuses to agree to the change. No owner in the neighborhood objects to her proposed changes. The homeowner argues that the benefit of the covenant cannot be held in gross. Who should win? Is there another basis to invalidate the covenant? Should it be enforced?

This issue is intended to sharpen the question and suggest that intrusion inside the home may invade privacy interests that should be left to the owner's discretion rather than the discretion of a neighborhood association or even an absentee developer. Moreover, given the terms of the question, enforcement of the covenant would be exclusionary and might even violate the Fair Housing Act as disability discrimination. The counterargument is that some architects, such as Frank Lloyd Wright, have tried to control the interior appearance of buildings, including furniture, and that a group of homeowners should be able to choose to live in a community based on such an artistic vision.

Problem 2. *On September 23, 2012, New York became the 37th state to ban private transfer fees. The law finds that private transfer fees violate the public policy of the state by "impairing the marketability and transferability of real property and by constituting an unreasonable restraint on alienation." N.Y. Real Prop. § 471. However, the law declares that the ban on enforcement of such fees "shall not apply to a private transfer fee obligation recorded or entered into prior to the effective date of this section. This section shall not be deemed to require*

that a private transfer fee obligation recorded, filed or entered into in this state before the effective date of this section is presumed valid and enforceable. It is the public policy of this state that no private transfer fee obligation shall be valid or enforceable whenever entered into, recorded or filed." Id. *at § 473.*

The law resonates with an early New York case, De Peyster v. Michael, *6 N.Y. 467 (1852), which invalidated a requirement that the owner provide the original lessor of the land one quarter of the purchase price upon every sale. The court held that the requirement was an invalid restraint on alienation prohibited by New York's rejection of feudalism:*

> *If the continuance of the estate can be made to depend on the payment of a tenth, or a sixth, or a fourth part of the value of the land at every sale, it may be made to depend on the payment of nine-tenths, or the whole of the sale money. It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation.*
>
> *Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs the tenure became extinct and the land reverted to the lord. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence.*
>
> *[A]fter a careful examination of the grounds on which these restraints on alienations in fee were originally sustained in England; of the change in the law there by statute nearly 600 years ago; of the mode in which that change was wrought; and finding that the same change has taken place here by our own statutes, we cannot entertain a doubt that the condition to pay sale money on leases in fee, is repugnant to the estate granted, and therefore void in law*

Id. *at 496-98, 505. A developer seeks to enforce a one percent private transfer fee to the developer included in a covenant signed and recorded long before the New York statute was enacted. What arguments can you make for the developer? For the owner?*

The developer could argue that the law specifically excludes transfer fees such as this one, and this reflects legislative intent not to retroactively effect existing obligations. A retroactive amendment would unfairly create a windfall for purchasers who agreed to the fees and likely paid a lower price reflecting them, would also unfairly deprive the developer of part of the funds to recoup investment in the project, and would perhaps raise constitutional questions regarding unconstitutional impairment of contract rights. More generally, the developer could argue, permitting such retroactive revocations would discourage investment by creating a less secure business environment.

The owner could argue that although the statute did not make this transfer fee illegal, it was already illegal under New York law. The statute provides clear support for this proposition by declaring that "*This section shall not be deemed to require that a private transfer fee obligation recorded, filed or entered into in this state before the effective date of this section is presumed valid and enforceable. It is the public policy of this state that no private transfer fee obligation shall be valid or enforceable whenever entered into, recorded or filed."* The owner could also use *DePeyster*, which states that fees on transfer of property are void as restraints on alienation and a relic of feudalism, as support for this property.

The New York Legislature clearly appears to be trying to give ammunition to owners in cases such as this. But if that was the case, the developer might respond, why did the legislature so clearly make the ban prospective only? It was likely trying to avoid constitutional challenges

and appease opponents of the statute, but given that this was previously a common practice, shouldn't we follow the established principle of respect for contracts? A counter response is that an equally established principle is that contracts that violate public policy are void; particularly given *DePeyster*'s 1852 invalidation of a similar contract under the well-established prohibition on unreasonable restrain on alienation, a developer should have been on notice that such a contract might not survive scrutiny.

§5 Substantive Limitations on Creation and Enforcement of Covenants 619
§5.1 Review for Reasonableness and Public Policy Violations 619
A. Covenants 619
***Davidson Brothers, Inc. v. D. Katz & Sons, Inc.* (1994).....620**
***Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.* (1994).....625**

Sections A and B raise reasonableness review in two different, but related, contexts, regarding covenants themselves and regarding rules and regulations created under covenants. These are all great cases, likely to get discussion going in class, and raise the legal parameters of some of the common disputes between owners and property owners associations. Because teaching all four cases will take more than one class session, you may want to teach either A or B, or some subset of the cases in each section.

Davidson Brothers and *Nahrstadt* are two 1994 cases that take very different approaches to the review of restrictive covenants.

In *Davidson Brothers*, the owner of a supermarket in New Brunswick purchases another supermarket two miles away, then sells the first property with a covenant that it could not be used for supermarket purposes. Seeking to restore supermarket access to downtown New Brunswick, the city purchases the property and leases it to C-Town for one dollar a year on condition that C-Town maintain a supermarket there. Davidson Brothers sues to enforce the covenant, first seeking an injunction, but then, after selling its other supermarket, seeking damages for lost profits from the competition. The New Jersey Supreme Court created a new test for reviewing covenants that maintains the historic presumption against validity of covenants, but expressly adds reasonableness, restraint of trade, and public policy tests to the traditional touch and concern test. On remand, the trial court found that the covenant could not be enforced under the New Jersey Supreme Court's eight factor test for review of covenants. The materials present the Appellate Division's review and affirmance of the trial court.

Quick Review: If the covenant was analyzed under traditional tests, would it pass? Was there notice? Privity? Intent to run? Did it touch and concern the burdened land? Did it touch and concern or benefit other land? Could Davidson Brothers get an injunction and/or damages against the New Brunswick Authority? Against C-Town?

Starting the discussion with this question provides a helpful review and context for the decision. The answer is yes—it was in writing, states that it "shall be attached to and running with the lands," it was created during an exchange of the parcel between Davidson Brothers and Katz & Sons, creating horizontal privity, the New Brunswick Authority purchased from Katz & Sons, creating vertical privity, and the covenant touches and concerns both parcels by restricting uses on one and adding to the volume of the grocery business at the other. (This kind of anti-competitive covenant is one that some courts historically rejected under the touch and concern; the facts of the case provide a nice example of why that was a misuse of the doctrine. You might generate discussion of this by asking why courts historically found that anti-competitive covenants like this did not touch and concern the land—the answer, because they didn't like them for other reasons.) Davidson could therefore get damages from the New Brunswick Authority under the traditional

test. C-Town is only leasing from the authority, and so would not be liable for damages unless the court applies relaxed vertical privity. With respect to injunctive relief, it is likely that the Authority knew of the restriction, although that is not stated in the opinion. A further possible question is whether Davidson Brothers could get relief against Katz & Sons. They couldn't under covenant doctrine because Katz & Sons appears to have sold the land but might if traditional contract doctrine provided a cause of action.

The facts of the case, of course, generate interesting discussion of whether the court should have enforced the covenant or not, particularly if you prime the pump by asking questions that support Davidson Brothers' case or start by asking a student to make the best argument possible that the covenant should be enforced. Here, Davidson Brothers discovered that they could not operate both grocery stores profitably. It was committed to a long-term lease for the Elizabeth property (20 years with options for two five-year renewals according to the New Jersey Supreme Court opinion, 579 A.2d 288) and chose to resolve the conflict by selling the first store. But who is most likely to want to buy a property already equipped to be a supermarket? Another supermarket! Because this would defeat the purpose of the sale, it sold to Katz & Sons with the covenant, likely for less than it could have obtained from a purchaser interested in running a supermarket. It claims that the opening of C-Town reduced its profits by $1.5 million and that it sold its interest in Elizabeth for another $500,000 less than it otherwise could have. Denying it the benefit of the covenant it negotiated and relied upon is unfair and undermines the security of contracts and investment.

The response is that it is not unfair to refuse to enforce contracts with significant negative impacts on society and that doing so in fact overall enhances social welfare. Davidson's actions created a food desert, denying women with young children an accessible place to buy healthy food at reasonable prices. (Students may suggest that they could just take the bus, which is true, but you could ask how many of them have small children and would want to haul them on a lengthy bus ride for daily grocery shopping.)

The response to this argument is the one raised in note 2: even if the public interest is better served by permitting the supermarket to operate, Davidson Brothers should get damages for their losses. The facts suggest that this was a reasonable attempt to coordinate conflicting land uses; it is not Davidson Brothers' fault, but rather the fault of broader market forces that no one is willing to equip another property to be a supermarket in downtown New Brunswick. In effect, the city is creating a supermarket on the cheap by condemning Davidson Brother's covenant rights without paying it for the loss. The response to that is that if Davidson Brothers anticipated the harms its actions would cause to the city (which is not established by the opinion) it is not justified in demanding damages when the city seeks to undo those harms.

A possible risk of undermining a covenant in the public interest is that it will even further discourage businesses in the city. If businesses fear that their agreements will be invalidated because the city deems them not in the public interest, they may be more reluctant to invest there. There are, however, a couple of wrinkles in the facts here that make the violation of the covenant look less unexpected for Davidson Brothers. First, New Jersey had previously refused to enforce anti-competitive covenants at all under the touch and concern doctrine. Second, the trial court apparently wasn't convinced by Davidson Brothers evidence that it lost money as the result of the violation of the covenant.

Nahrstedt presents a stark contrast to Davidson Brothers, and a much lighter set of facts. According to an article about the case, Nahrstedt was a classic crazy cat lady.

Natore[1] (pronounced Nature) A. Nahrstedt, 47, said she has spent $50,000 in legal

[1] Natore's given name was Carol.

> fees in her vain attempt to keep her three cats, Boo-Boo, Dockers and Tulip . . . . "They are like my children . . . . They give me unconditional love, and I would rather have them than a husband or boyfriend at this point." One of her cats is 17 years old. She dotes on them, giving them birthday cakes and making a special turkey for them on Thanksgiving and Christmas."

Maura Dolan, *Court Upholds Right to Ban Pets in Condos*, Los Angeles Times, Sept. 3, 1994. It also presents the impact of statutes on covenant enforcement. Under California's Davis-Stirling Common Interest Development Act, "covenants and restrictions in the declaration [of a common interest development] shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." Nahrstedt's cats, however, are alleged to be noiseless indoor cats; because the complaint was dismissed, this allegation must be accepted as true on appeal. Nevertheless, the court holds, it is not unreasonable to enforce the covenant against her because the test is whether the covenant is unreasonable as applied to the development as a whole rather than in the particular case, and the burden is on the challenger to establish that they are unreasonable for the development as a whole. To be unreasonable, moreover, a restriction must be "arbitrary or in violation of public policy or some fundamental constitutional right." Note, however, that the California Legislature reversed the result in *Nahrstedt*, showing the power of the cat lobby.

Nahrstedt claims she was not aware of the restriction in purchasing her unit. It might seem unreasonable for her not to have checked, but it is also an illustration that describing unit owners as choosing the restrictions in the CC&Rs is not entirely accurate. If any of your students live in common interest developments, you might ask whether they know everything in the CC&Rs (answers vary). You might also have them focus on the language of the covenant at issue: "No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit," with an exception for domestic fish and birds. Ask them whether a unit owner can keep a bear. How about a skunk? That's clearly not the intent of the drafters, but it's pretty clearly allowed by the language. By defining animals in this restrictive way, and even creating a special exception for birds and fish, the statute seems to permit animals not excluded. The poor drafting both gives your students practice in reading statute-like language, and illustrates that these covenants are often not carefully or expertly drafted.

Nahrstedt appears to be influenced by the *Hidden Harbour* case from Florida, which holds that although Board-created rules and interpretations should be evaluated under a reasonableness standard, restrictions in CC&Rs should be "clothed with a very strong presumption of validity" and upheld even if they "exhibit some degree of unreasonableness." The *Nahrstedt* court holds that CC&Rs "be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of the affected land that far outweighs any benefit." This evaluation does not consider whether a restriction is unreasonable in a particular case, but only whether it is unreasonable in all cases. Under this standard, it is irrelevant that Nahrstedt's cats are noiseless and don't go outside—because a no cat restriction is reasonable in the abstract, at least for some cats in some situations, it is enforceable.

The court justifies this standard because of the special nature of the condominium setting, which it describes as a more affordable form of housing whose popularity rests in part on combining private ownership with subjection to the will of the community reflected in the CC&Rs. A strong presumption of enforcement promotes "stability and predictability" by allowing unit owners to rely on the promises in the CC&Rs, and reducing liability for legal fees to defend the association.

One question is whether enforcement of covenants, so long as they are not "wholly arbitrary" in fact promotes stability and predictability. As Lee Anne Fennell explores in *Contracting Communities*, CC&Rs are not actively chosen by the unit owners, but drafted by developers and accepted in buying a unit. The popularity of condominiums comes in part because

they are more affordable, suggesting that buyers may have little choice other than to accept them. Unit owners may also pay little attention to the contents of CC&Rs, or even (as for Natore Nahrstedt) not be aware of them at all. Perhaps it would better promote owner expectations to give more weight to individual choice within private units.

Another question is whether this resolution is consistent with the California statute. The Davis-Sterling Common Interest Development Act provides that CC&Rs "shall be enforceable equitable servitudes, unless unreasonable." Ask whether "reasonable" means not to be "wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of the affected land that far outweighs any benefit." That sounds like a standard for irrationality, rather than the standard for unreasonableness your students will be familiar with from nuisance law or torts. It certainly seems inconsistent with a standard like that from *Hidden Harbour* that "some degree of unreasonableness" is permitted for CC&Rs. (Somewhat more support for the court's opinion comes from a part of the opinion we excluded for length. The statute was adopted from an earlier statute providing that CC&Rs for condominiums would be enforceable "where reasonable." The change to "unless unreasonable," the legislative history indicates, was intended to place the burden of challenging the restriction on the unit owner.)

Note 1. *As the court described, [in* Davidson Brothers*] courts had previously engaged in "illogical and contorted applications of the 'touch and concern' rules . . . because courts have been pressed to twist the rules of 'touch and concern' in order to achieve a result that comports with public policy and a free market."* Id. *The New Jersey test seeks to make those public policy concerns explicit.*

In contrast, the California test cloaks all covenants with a strong presumption of validity. Although the opinion construed a California statute, as the Nahrstedt *court noted, a number of other courts adopted a similar test as a matter of common law.*

Which test is better? Which better guarantees the stability and enforceability of agreements? Which better serves the public interest? Are there differences between commercial covenants and covenants governing common interest developments that justify the differences? How would the covenant in Davidson *fare under the* Nahrstedt *test?*

Which test is better is subject to debate. On the one hand, while purporting to create a test that better "comports with public policy and the free market," the New Jersey test subjects agreements to a wide-ranging review and risk of unenforceability that, one could argue, is antithetical to the free market and perhaps to other public interests. On the other hand, the California test creates a presumption of validity so strong that it may sanction quite significant intrusions on personal autonomy and public interests without meaningful review or justification. Although both the *Davidson Brothers* and *Nahrstedt* test refer to violations of public policy, the covenant in *Davidson Brothers* would likely be upheld under the *Nahrstedt* test given its extreme deference to covenants. Of course, the *Nahrstedt* test and rationale are specifically about common interest developments. Like *Nahrstedt*, courts often justify minimal review by citing reliance on such covenants by purchasers in common interest developments, but it is not clear there should be greater deference in this context. In two-party commercial covenants, both sides likely know of and understand the covenant, so they can negotiate about the covenant restrictions and language, and the covenant is tailored to their concerns and reflected in the price for the property. Purchasers in common interest developments, in contrast, frequently do not read or understand the many covenants to which they agree in purchasing (Nahrstedt claimed she did not); they have no power to negotiate different covenants; and while they implicitly rely on the covenants to maintain the character of the community, some argue that these covenants are likely more restrictive than optimal for residents' interests. *See* Lee Anne Fennell, *Contracting Communities*, 2004 U. Ill. L.

Rev. 829. Given the fact that common interest developments dominate middle-income owner-occupied housing, moreover, owners have little choice but to accept such covenants.

Note 2. *How would the supermarket covenant in* Davidson *fare under the* Restatement (Third) *test? How would* Nahrstedt*'s no pets covenant fare?*

The result for the *Davidson Bros.* covenant is not clear, because the *Restatement (Third)* does broadly incorporate public policy concerns and weighs the impact of the servitude on the public interest. Nevertheless, the *Restatement (Third)*, unlike the New Jersey Supreme Court, starts from a presumption of the validity of covenants. The commentary, moreover, states that "[t]he policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes." At a minimum, we believe, the *Restatement (Third)* would require enforcement of the covenant by damages. The *Nahrstedt* covenant would likely be upheld under the *Restatement (Third)* test as well given the frequency of similar no pets restrictions, albeit perhaps with somewhat more scrutiny than afforded by the California Supreme Court.

Note 3. *Further questions arise when covenants are amended or imposed after the owner purchases a unit. Could a no pets covenant be enforced against an owner with pets who purchased before it was in effect? Could a new no sex offenders covenant be enforced to prevent an existing owner from having her son move in with her? What about a no smoking covenant against an existing owner who is a smoker? What are the competing arguments?*

When covenants are amended post-purchase, the arguments supporting deference because of reliance by existing owners are greatly weakened, because those covenants have been changed and now undermine the initial reliance of some owners. At the same time, the purchasers usually also agreed to the terms for modification of the covenants; preventing such modification would therefore undermine the agreements to which they consented and upon which others relied. Refusing to permit amendments voted on by a supermajority of unit owners also permits a small minority to hold the community hostage and refuse to allow it to change to accommodate changing needs or concerns.

Balancing these concerns, courts will generally enforce amended covenants, but may refuse to enforce those which undermine a material right that the owners reasonably relied upon. The *Restatement (Third) § 6.10*, in provisions similar to those of the *Uniform Common Interest Ownership Act*, requires unanimous approval for enforcement of amendments that "prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units" unless they "harm or unreasonably interfere with the reasonable use and enjoyment of other property in the community." Each of the prohibitions described in the problem would be subject to the unanimous vote requirement; the question is whether they are exempted under the "harm or unreasonably interfere" exception.

The *Restatement* cites a new no-pets restriction as an example of an amendment requiring unanimous approval; given the slight interference with enjoyment by other residents that pets cause and the importance of pet provisions to pet owners looking for housing, this seems a correct decision. Smoking has become unpopular and there is a risk of some transmission of second hand smoke from within units. Is this enough, however, to permit removing that right from a property owner who purchased when smoking was permitted? The sex offender restriction is even more debatable. On the one hand, preventing an owner from giving shelter to her own son seems a fundamental interference with autonomy and property rights. On the other, many states have done something similar by prohibiting sex offenders from residing within 1,000 feet of schools, child care facilities, or playgrounds. Although the Georgia Supreme Court held that it constituted a taking to require a registered sex offender to move after a day care opened near his home, *Mann v. Georgia*

Department of Corrections, 653 S.E.2d 740 (Ga. 2007), such laws have withstood other constitutional challenges. Under the *Restatement* and *Uniform Common Interest Ownership Act* tests, however, unless it can be shown that this particular sex offender is at a meaningful risk of reoffending (and many laws define sex offender broadly to include individuals who pose no greater risk of recidivism than the average convict) there may not be an ability to show that occupancy poses "harm or unreasonable interference with the reasonable use and enjoyment of other property," and so may be subject to the unanimous consent rule.

Problem 1. *A 2008 Arizona statute provides that all covenants are "valid and enforceable" so long as they do not violate any statutes or prior covenants, and the owners of the property consented. Ariz. Rev. Stat. §33-440. Can enforcement of a covenant be challenged on the grounds that it is unreasonable or violates public policy?*

Unlike the Davis-Stirling Act considered in *Nahrstedt*, the statute does not provide an exception for "unreasonable" covenants. One might argue that it was the legislature's intent to permit enforcement of all covenants meeting its requirements; the specific exception for violation of statutes might be interpreted to exclude other exceptions, including common law reasonableness requirements. The counterargument is that the legislature likely did not intend to sanction covenants that are truly unreasonable, and instead intended to do away with the common law restrictions on covenants, such as the privity and touch and concern requirements.

Problem 2. *What would violate the Nahrstedt test? Natore Nahrstedt declared that her cats Boo Boo, Dockers, and Tulip "were like my children." Imagine that the covenant had actually prohibited children, and Natore had moved in only to discover her children could not live with her. Would the covenant be unreasonable under the Nahrstedt test?*[2] *What if the covenant prohibited watching television in one's home?*

If a community could prove it would be distinctively harmed by the presence of children, because it is a senior living facility, or perhaps a refuge for all the sex offenders who cannot live anywhere else, such a restriction might be upheld; otherwise, a no children covenant would likely be unreasonable even under the *Nahrstedt* test. Residing with one's children is an important aspect of autonomy and personhood; as a matter of public policy, if communities are allowed to bar residence with children, it may limit the housing available to such children, resulting in harm to future generations. The counterargument is that if the covenant existed when the owner purchased her property, it was included in her agreements upon purchasing. The community should not be forced to revoke its basic restrictions because she now regrets her bargain.

One could argue that an anti-television covenant restricts behavior within the home that is unlikely to bother anyone, and that watching TV is what many of us expect to be able to do in our homes. The counterargument is that there is no public policy in favor of watching TV (even less than for cat ownership), and a development might reasonably wish to create a community whose members read books or engaged in other activities. As long as it was in the agreed-to restrictions, this would probably be upheld under the *Nahrstedt* test.

Problem 3. *In* Mulligan v. Panther Valley Property Owners Association*, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001), a homeowners association in a gated residential community of more than 2,000 homes (including single-family homes, townhouses, and condominium units) voted*

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[2] Restrictions on children violate the Fair Housing Act, 42 U.S.C. §§3604, 3607(b), except in senior housing. The question here is whether it violates the general test for covenants.

to amend applicable covenants to prohibit occupancy of any unit by a registered sex offender. Is the covenant unreasonable under the Davidson test?

One could argue that given the size of this development and the dominance of common interest developments among housing options in New Jersey, permitting restrictions like this could relegate sex offenders to a small segment of available housing, perhaps leaving the population in that housing particularly vulnerable. In addition, thus restricting residence would undermine rehabilitation for this population, making re-offense more, not less, likely. These arguments, however, do not have the weight of those applied in *Davidson Bros.*, in which the facts regarding the unavailability of supermarkets and the impact on the population of New Brunswick were clear. Because the desire to prevent residence by sex offenders is understandable and not arbitrary, even under the *Davidson Bros.* test the covenant is likely to be upheld. In *Mulligan*, the court considered the potential public policy arguments against such covenants but found that the plaintiff had not sufficiently established the facts to support these potential policy impacts, and so upheld the trial court's dismissal of the case. Interestingly, the court cited *Nahrstadt*, but not *Davidson*, in its analysis.

Problem 4. *When developers sell homes with rights to use commonly-owned areas, such as a lake, recreational area or road, there is normally a declaration creating a homeowners association with the power to impose assessments on owners to recover the costs of maintenance of those areas. If a developer fails to create such an association or the declaration does not initially give the association the power to tax owners to pay for maintenance of common areas or common easements, can the home owners whose properties are appurtenant to the common areas or easements vote to create a homeowners association and/or impose assessments on owners who do not agree? Compare* Weatherby Lake Improvement Co. v. Sherman*, 611 S.W.2d 326 (Mo. Ct. App. 1980)(power to create a homeowners association to manage and maintain a commonly-owned lake) and* Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003) (association has power to add new declaration provisions including provisions requiring membership in the homeowners association and authorizing, for the first time, mandatory assessments to maintain common areas) with Wendover Road Property Owners Ass'n v. Kornicks, 502 N.E.2d 226 (Ohio Ct. App. 1985) (owners cannot compel participation in the cost of improvements to commonly-owned easements in the absence of a declaration creating a homeowners association with the power to impose such assessments).*

It would seem to be a gross invasion of property rights to subject a fee simple owner of land to regulation by a homeowners association against her will unless she impliedly agreed to be so bound when she purchased the property initially. When the homeowners own property in common, the usual remedy if they cannot agree on management issues is partition. However, commonly owned property in a subdivision is likely to involve roads, recreational facilities, or other services and the property is usually found exempt from partition, either because of express language denying the availability of partition or by implication from the nature of the arrangement. In the absence of a partition remedy, there is no way to obtain reasonable management of the common resource without something like a homeowners association that can appoint management and tax members for upkeep. Thus, many courts find it implied in the existence of commonly owned property that an association may be created.

The *Restatement (Third)* provides that owners of a majority of lots "may create an association for the purpose of managing the common property." *Restatement (Third) of Property (Servitudes)* § 6.3 (2000). *See Evergreen Highlands Ass'n v. West,* 73 P.3d 1 (Colo. 2003) (adopting this rule). The *Restatement (Third)* goes so far as to authorize a court to create an association even if the declaration forbids it if this is necessary to manage common property. "The judicial power to authorize creation of an association is that of a court of equity with its attendant flexibility and

discretion to fashion remedies to correct mistakes and oversights and to protect the public interest." *Restatement (Third) of Property (Servitudes)* § 6.3 & cmt. a (2000). The idea that there is an implied power to create an association can be justified on the ground that it provides the best mechanism for managing common property.

Problem 5. *A covenant limiting property to residential use and barring any commercial use is interpreted to preclude operation of a family daycare center. Given the need for affordable, convenient daycare, does this covenant violate public policy? See Terrien v. Zwit, 648 N.W.2d 602 (Mich. 2002) (holding that it does not violate public policy, reversing lower court rulings to the contrary).*

Many courts are likely to assume that childcare can be provided at enough locations that denying the ability to do this in a particular subdivision is not offensive to public policy. At the same time, the ability to get to such childcare providers may depend on distances, especially when transportation is expensive when one is on a limited budget. The childcare center also is a type of business that may seem to be more compatible with residential uses than other types of businesses. On the other hand, it would violate a restriction on residential uses to operate a school and the daycare center is either close to being a school or actually is one. This type of problem is interesting because the public need for affordable childcare is enormous but it does not necessarily have to be in a particular neighborhood. But the facts of the local setting may matter here if the consequences of enforcement of the covenant have significant externalities on poor families in the vicinity that otherwise are denied availability of childcare which is, after all, a prerequisite for parents being able to work outside the home.

B. Rules and Bylaws 636
Apple Valley Gardens Association, Inc. v. MacHutta (2009) **636**
Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC (2018) **641**

Apple Valley Gardens Association, Inc. v. MacHutta and *Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC* concern challenges to rules and bylaws in common interest developments. They reveal the extent to which today judicial review of such bylaws is importantly governed by statute. They also both deal in different ways with tensions between developers and subsequent purchasers regarding development governance.

In these cases, as in most such cases, there are at least three possible challenges to the bylaws. First, that state statutes prohibit such bylaws, either because the statutes require any such restriction to be in the initial or subsequently enacted CC&Rs or because they prohibits the restriction altogether. Second, that the development's CC&Rs authorize challenged activity, so that the restriction may only be enacted by amendment to the CC&Rs. Third, that the restriction violates common law, because it is unreasonable or otherwise violates public policy.

Apple Valley concerns a bylaw prohibiting leases by unit owners, except for to the immediate family of the owner. The MacHuttas, the original creators of the development, refuse to comply with the bylaw and the Association sues to enforce it. The first question is whether Wisconsin law requires leasing restrictions to be included in the CC&Rs. The relevant statute provides that the original declaration much include a "statement of the purposes for which the building and each of the units are intended and restricted as to use." The court holds that this does not mean that all restrictions must be placed in the declaration, particularly because another part of the statute provides that Boards may enact bylaws "including any restriction of requirement respecting the use and maintenance of the units and the common elements."

The court then considers whether leasing is authorized by the condominium declaration.

As discussed in the notes, CC&Rs are often described as the "constitution" of the development, and interpreted broadly to permit development governance. Like a constitution, however, CC&Rs may create rights that the bylaws cannot undermine. The CC&Rs here anticipate that owners will lease their units, providing that leases do not relieve unit owners of their obligations. The majority holds that this does not create an implied right to rent, particularly in light of another provision authorizing the Association to make reasonable rules regarding the use of units.

The dissent disagrees, relying in part on the significant challenge this creates for unit owners and the violation of some owners' settled expectations. Throughout the twenty-year history of the development, some owners had leased their units, and those with multiple units will have to sell under the new rule. The rule also imposes hardships on those who must temporarily leave the area. Given this significant change, the dissent would require the restriction to be added only by an amendment to the declaration, which, as with constitutional change, is more difficult than enactment of bylaws. Note, however, that under Wisconsin law, bylaws may be enacted only by a supermajority vote of 67% of the Association's members, which is similar to the higher bar required for declaration amendments in many states.

As discussed in the notes and in §5.4, restrictions on leasing are also restrictions on alienation, disfavored by the common law because they undermine one of the important aspects of real property. The court does not discuss this explicitly, but you can discuss it with your students. Why would a condominium prevent leasing, when it is such a restriction on economic use of units? Perhaps because owners typically take better care of property than renters, because they have a greater long-term interest in it. Also, owners tend to reside in their units for longer periods, contributing to a stable community. They also are relatively older and wealthier. This leads to questions, however, as to whether leasing restrictions in fact discriminate against residents who are more likely to be younger, poorer, and non-white. Apple Valley's exception permitting leasing to relatives of the owner, for example, ensures that such leases will not significantly change the racial makeup of the development. Should the Wisconsin court have considered this concern? Section 5.4, note 5, discusses *Villas West II of Willowridge v. McGlothin*, 841 N.E.2d 584 (Ind. Ct. App. 2006), which rejected a disparate impact challenge to a similar leasing restriction, but remanded for consideration of whether the restriction was motivated by intentional discrimination.

Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC (2018) involves a more distinctive bylaws challenge, concerning requirements to sue on behalf of the condo. Serious construction defects have been discovered in the condo, and the owners want to sue the developers for over $2 million required to repair the defects. The problem is that the declaration, created by the developers, significantly restricts their ability to sue. It requires written consent of 80% of unit owners to sue, after the complaint and the assessment to pay for legal fees and costs have been circulated. This would be a tough standard to meet in any circumstance, but it is impossible to meet here, because the developers still own more than 20% of the units.

The trustees argue that the restriction is prohibited by Massachusetts statutes. Because the statutes explicitly authorize the condo board of trustees to sue on behalf of the unit owners, they argue, restrictions on this power are prohibited. They further argue that because the statutes require unit owner consent in several situations, the bylaws may not impose further consent requirements. In discussing the statute with your students, you can discuss the scope and limitations of the *expressio unius est exclusio alterius* (to express one impliedly excludes the others) rule of statutes of construction, The court rejects these arguments, holding the statute is intended to create a flexible framework, providing a floor, not a ceiling, for condo governance.

The court agrees, however, that this restriction violates public policy. By making it incredibly difficult to sue on behalf of the condo (and impossible where the developers still own significant units), the bylaw prevents suits to enforce the implied warranty of habitability for residences.

Although the situation is distinctive, the case also raises a general problem for condo developments. For any major repairs, unit owners have to agree on the problem and on individual assessments to pay for it. This appears to have been one cause of the June 2021 collapse of the Surfside Condominium in Florida, in which almost 100 people died. An engineer had reported "major structural damage" in 2018, but the condo spent three years getting agreement on the repairs and the assessments ($80,000 to $200,000 per unit owner) to pay for it. *See* Mike Baker, Anjali Singhvi & Patricia Mazzei, *Engineer Warned of 'Major Structural Damage' at Florida Condo Complex*, NY Times (June 26, 2021, updated Sept. 21, 2021, https://www.nytimes.com/2021/06/26/us/miami-building-collapse-investigation.html

Note 2. Standard of review. *Are there other differences between the corporate setting and the property owner's association that influence your judgment [about whether a reasonableness standard or the business judgment rule is more appropriate]?*

The business judgment rule was created in the context of actions for damages against the corporation; most cases challenging board rules seek primarily injunctive relief. It was formed in the context of expert corporate boards and directors charged with making complex business decisions, and balancing risks and profits. In the common interest development context, in contrast, the decision makers are volunteers with little training or expertise. As Justice Kaye states in *Levandusky*, however, the costs of litigation might be even harder to manage for such a volunteer board. In practice, review under even the reasonableness standard is extremely deferential, approaching the deference created by the business judgment rule.

Note 3. *In 2006, Congress passed the* Freedom to Display the American Flag Act, *4 U.S.C. §5 note (Pub. L. No. 109-243, 120 Stat. 572 (2006)), which guarantees the right to fly the American flag on one's property, regardless of any condominium or homeowners association rule or covenant to the contrary. The statute appears to respond directly to the Lamp case and oddly does not confer a similar entitlement on tenants. Cf. Ark. Code §14-1-203 (granting a right to fly the American flag, but this right does not extend to residential tenants in buildings with fewer than 12 units). Imagine that a unit owner is prevented from flying the Puerto Rican flag—may she challenge the statute as impermissible content discrimination?*

The statute clearly prefers one form of content (the American flag) over another (all other flags), so it would seem that a compelling interest is necessary to justify it. It may be difficult to find a proper vehicle in which to bring this claim. The statute does not prohibit anyone from flying their flags—it is the common interest development that does that. But the development is not a state actor, and so is not subject to constitutional scrutiny. The development, meanwhile, may not like permitting individuals to fly American flags, but it is not because it wishes to allow them to fly other sorts of flags—it wants no flags at all; suing Congress (which is of course a state actor), regarding the selective nature of the statute would not serve its interests at all.

Problem 1. *A professional violinist purchases a condominium unit. Her neighbors complain that her practicing her instrument disturbs them. The violinist agrees not to play before 10 a.m. or after 7 p.m., but her neighbors are not satisfied. The condominium association passes a rule prohibiting all owners from playing musical instruments in their apartments. Is the rule reasonable and enforceable?*

On one hand, a general limit on noise levels appears eminently reasonable. The association could clearly require owners not to play stereos so loudly that they bother the neighbors. On the other hand, if the insulation between units is sufficiently thin that this rule would prohibit owners from *ever* playing records in their unit, there is a good argument that this interferes too much with

the property use rights of individual owners. After all, this is not a monastery where the residents have taken a vow of silence. If the association attempts to prevent the playing of *any* musical instrument at *any* time, this is likely to be thought to go too far in inhibiting free use of one's own apartment.

But if the insulation *is* so thin that noise travels easily between units, this may give all the more reason to require individual owners to look out for their neighbor's interest in quiet enjoyment of their property. If an individual owner wishes to use her property in a way that does substantially interfere with the neighbor's interests, perhaps she should bear the burden of this interference by paying to soundproof her own apartment and then obtaining an exemption from the general rule. This result would place an added burden on her but because of the bad construction and the fact that sound travels so easily between units, that is arguably where the burden should lie. She should use her property so as not to interfere with the property rights of her neighbors; if she is unwilling to pay the price of this, then her use causes more harm than good and exceeds her own rights.

Problem 2. *A homeowner in California installs a clothesline in her back yard to air dry her laundry. The by-laws of the association applicable to her property prohibit this, presumably for esthetic reasons and because hanging laundry outdoors is thought to lower property values. The owner argues that she is an environmentalist who is trying to save energy by not using her clothes dryer. She also feels an obligation to do so because of the rolling blackouts experienced by California in recent memory. Is the by-law reasonable? Should a court enforce it?*

The association would argue that the covenant is reasonable because the æsthetic appearance of property may well affect its market value substantially. Moreover, the owner agreed to be bound by such a restriction. There is no unfair surprise and the neighbors have reliance interests.

The owner would argue that the restraint is unreasonable because it goes beyond æsthetics; it controls her ability to perform a basic function of drying clothes. Moreover, there is a public interest in saving energy; this interest is substantial and arguably outweighs any property interest held by the association or the neighbors.

Problem 3. *A co-op board in a building at 180 West End Ave, in New York City, banned all smoking inside the apartments by new owners. The rule allowed existing owners to smoke but put new owners on notice that they would not be free to smoke inside their own apartments. Is the ban reasonable? Would it be reasonable if it were applied to existing owners as well as new buyers?*

This problem replays the issue raised in the nuisance materials as to whether second hand smoke constitutes a nuisance in an apartment building. Here the issue is a little more complicated since the ban applies whether or not there is any proof of infiltration of smoke from one apartment to another. The interests in being free of the smoke are very strong (both comfort and health) but it is also true that many people in the U.S. do smoke and if they cannot do it in their homes, where can they do it? Many associations now are banning smoking in their units, and Utah specifically authorizes such bans in its Condominium Ownership Act. Utah Code Ann. § 57-8-16(7)(b)). Such restrictions are likely to be upheld as applied to new owners, but given the addictiveness of nicotine are less likely to be enforced against existing owners. Still, recent statutory and judicial determinations that second hand smoke can be a "nuisance" may permit developments to apply new restrictions even against existing owners. *See* Cara L. Thomas, *Butt Out! Controlling Environmental Tobacco Smoke in Condominiums*, 22 Prob. & Prop. 11 (May/June 2008).

§5.2 Constitutional Limitations 648
***Shelley v. Kraemer* (1948) 648**

State action doctrine is complicated, and the Court has retreated from the more expansive state action doctrine that led to *Shelley v. Kraemer*. Nevertheless, we believe it is important to teach *Shelley v. Kraemer* in an introductory property course for several reasons. First, the state action issue further illustrates the conflict between the interests of property owners in freedom and security. When owners argue for freedom to use their property as they see fit, and freedom to make whatever contracts they want with respect to their property, they suggest that all they want is for the state to leave them alone; they want to be free to engage in acts that concern themselves alone. However, liberty rights or rights of freedom of action are ordinarily *limited by* rights that others have to security (think about nuisance law); in addition, they are often, but not always, *accompanied by* rights to call on the aid of state officials to control the conduct of others (think about the right to call the police for help in excluding trespassers and the right to have courts enforce restrictive covenants). The argument for allowing owners to create restrictive covenants is not just an argument to allow property owners to use their property as they see fit; it is an argument that the state should *enforce* those agreements in order to protect owners' rights in creating a particular kind of market.

Second, *Shelley* reiterates the message of chapter 1: Although property owners have strong legitimate interests in privacy and freedom of association in their own homes, once they open their property to others, they have placed it in the public world of the marketplace, and their property is therefore subject to regulation to ensure that access to the market is available to all citizens on nondiscriminatory terms. Once property is put up for sale, it enters the public world of the real estate market from which participants cannot be arbitrarily excluded.

Third, the case along with the history of racially restrictive covenants, powerfully shows the intertwined relationship of state and private action in shaping property, along with the sometimes exclusive and discriminatory effects of that relationship. Carol Rose, *Property Stories: Shelley v. Kraemer*, in Property Stories (G. Korngold ed. 2005), provides a wonderful history of this, as well as of the state action issues in the case.

One can start the discussion by asking whether contractual agreements generally are subject to constitutional review. (If they have not had constitutional law, and sometimes even if they have, students may not know the answer.) Usually not, because contracts between private parties do not constitute state action. So what creates state action here? One possible answer from the opinion is that it is judicial enforcement of the contract. But lots of contracts, which might raise constitutional concerns if state action were involved, are enforced without constitutional scrutiny. You will eventually get to the key fact of running with the land: this restriction is being enforced against a willing buyer from a willing purchaser, which involves the state beyond the simple enforcement of a private agreement to a determination that some agreements are useful enough to attach to the land itself. As the notes discuss, this is not the only reason to find state action here, and it is not one that has been focused on in later cases, but it is the one derived from the (admittedly vague) language of the opinion itself.

Quick Review. *Does the covenant here meet the common law requirements? Is there horizontal privity? Vertical privity? Intent to run? Is there notice? Does it touch and concern the plaintiff's' land? Does it touch and concern the defendants' land? What do we have to assume to find that the covenant touches and concerns the land here?*

This question is more than review, it helps to set up discussion regarding the meaning and role of these covenants. There is no horizontal privity because the covenant was between neighbors, but the plaintiffs are seeking injunctive relief. There was vertical privity. There was constructive notice, because the covenant was recorded, but this notice contradicted the impression one would gather from inspecting the property and perhaps the record. Seven out of the nine owners of the parcels on their block refused to sign, and four of the properties were occupied by Black

Americans at the time the Shelleys purchased. At trial, Mrs. Shelley would testify, "I could see other people on the street, that's why I bought it." In fact, the black realtor working for the Shelleys conducted the transaction through a straw so that the race of the purchaser would not be obvious. If the notice element is intended to ensure that enforcement is equitable, it may not be present here. And what of touch and concern? As the court says, the restriction does not apply to any use of the property—the Shelleys are using it as a residence, just like all the families around them. Instead it restricts only the race of the user—should that be enough to satisfy the touch and concern test? On the benefit side, while one could find that racial restrictions increase the value of land, this endorses the discrimination that creates that value. In this case, moreover, where the neighboring properties are already integrated, the case for any increased value is even weaker. Indeed, because the touch and concern test is a proxy for the substantive question of whether a restriction should run with the land, rather than the private parties who agreed to it, one could argue that finding such a covenant runs with the land effectively creates an official sanction for discrimination.

Problem 1. *Is the argument for state action in the following cases stronger or weaker than in Shelley v. Kraemer? Should the court find state action in these cases?*

a. Neighbors covenant with each other not to allow their properties to be occupied by non-Caucasians. Defendant breaches the covenant; plaintiff seeks damages for the breach. See Barrows v. Jackson, 346 U.S. 249 (1953) (discussing the issue).

The case is weaker, because here the plaintiff is seeking contract damages against the party contracting. Nevertheless, the Court held that the suit must be dismissed. Permitting damages against the seller would indirectly ensure compliance with racially restrictive covenants that the Court had already held were unconstitutional.

b. Black Americans seek to dine at a restaurant that has a whites-only policy and refuse, when asked, to leave. The owner calls the police to remove them as trespassers. See generally Christopher W. Schmidt, The Sit-Ins and the State Action Doctrine*, 18 Wm. & Mary Bill Rts. J. 767 (2010).*

The case is stronger in some ways and weaker in others. On the one hand, the Black Americans are directly infringing on the right of the owner to exclude, unlike the Shelleys who were simply living in the property they owned. If one tries to enter a private party being held by a racist, there is no state action when police respond to complaints of trespass. There is something different, however, about removing individuals from a public place open to all. Indeed, as discussed in Chapter 1, pp. 25-26, before the Civil War common carriers such as diners could not refuse to serve anyone absent good cause. While the right to exclude was well established by the time of the sit-ins of the 1950s and 1960s, the involvement of the police in openly enforcing policies of segregation of public places might seem a powerful case of state action. As Christopher Schmidt describes, the Supreme Court repeatedly ducked opportunities to decide this question, until it was finally mooted by Title II of the *Civil Rights Act* prohibiting discrimination in places of public accommodation.

c. An individual makes a substantial donation to a charity upon the agreement that it will be used for Jewish education. The organization decides instead to use the donation for general education. The donor sues to enforce the agreement.

This is a weaker case, constituting enforcement of a private agreement by one party to the agreement against another. Nevertheless, one could argue that the state's active role enforcing charitable trusts, not only through the courts but through the administration of state attorneys general, and rewarding them and donations to them with tax exemptions and donations, creates

state action here. The question of state action in discriminatory trusts is dealt with somewhat more fully in Chapter 10, § 4.3.

d. A condo owners association enacts a rule providing that the common gathering room of the association cannot be used to conduct religious services. They file to collect fines against a group of owners who violate the rule.

On the one hand, the owners did not directly agree to the rule here; on the other, they did agree to covenants that arguably gave the association power to create such a rule. Note that the Supreme Court has not decided whether a prohibition on religious services in public places violates the First Amendment even when enacted by the state, although it has held that a prohibition on religious activity is impermissible discrimination against religion.

§5.3 The *Fair Housing Act*.....659

The federal *Fair Housing Act* is discussed more extensively in Chapter 12, but it is an important complement to *Shelley* by highlighting statutory remedies to address discrimination, as well as issues that the statute does not effectively address.

§5.4 Restraints on Alienation.....660
***Northwest Real Estate Co. v. Serio* (1929).....661**

Courts place central importance on alienability of land in formulating real property doctrines in almost every context. Alienability constitutes a central theme of property law because both property rights and contracts concerning real property use and transfer arguably must be limited to protect the rights of others and to preserve a market system that ensures that property is widely available and can be used to satisfy current needs. Some scholars have suggested that, contrary to traditional law, restraints on alienation should generally be enforceable on the ground that this approach would better preserve freedom of contract and that transaction costs which might inhibit removal of such restraints are likely to be small. See, e.g., Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. Cal. L. Rev. 1353 (1982). On the other hand, most property scholars still seem to agree that restraints on alienation should be enforced only in narrow circumstances, on the ground that they are likely in many instances to prevent legitimate and beneficial uses of property. They believe that transaction costs to override restrictive covenants are likely to be higher than Professor Epstein supposes.

The problem of restraints on alienability highlights a recurrent conflict between privacy and free association interests and public interests in preserving a vigorous, free and open market for access to real property. In various ways, it highlights conflicts of interest between rights of security (rights to enforce restraints on alienation to protect one's own property interests) and rights of freedom of action (rights of property owners to use their own property as they see fit).

Northwest Real Estate v. Serio illustrates (1) the formalistic argument that restraints on alienation are "repugnant to the fee"; (2) a per se rule that such restraints are unenforceable in all circumstances regardless of their purpose or effects; and (3) the potential use of restraints on alienation for discriminatory purposes. It also allows consideration of the specific case of "grantor consent clauses" under which a developer or original grantor attempts wrongfully to retain control over the use or occupancy of a particular area; this practice comes a little too close to feudal practices for most judges and is prohibited partly for this reason.

Text box: *Alienation or Discrimination?* Serio *arose in a period of intense racial and ethnic segregation as builders developed the outskirts of Baltimore. Charles Serio, who owned a*

fruit stand near the development, was Italian American, although his complaint noted that his wife "was of purest Nordic stock." George Morris, the developer of the 170-acre subdivision at issue in Serio, was later widely criticized for excluding Jews from his development, and defended himself by saying he was not himself anti-Semitic, but only excluded Jews for "business reasons." Eric M. Daniel, Northwest Real Estate Company v. Serio: The Invasion of a Northwest Baltimore Suburb (unpublished paper, 2010). Should developers be able to exclude individuals consistent with their senses of the prospective buyers' "aversions"?

Like *Shelley v. Kraemer*, the question touches on the reality that discriminating may sometimes serve economic interests. Is this a permissible justification for exclusion? Discrimination is no less discrimination because it is motivated not by personal animus but hope of economic gain. It may indeed be more invidious, as commercial actors engage in exclusion in hopes of gaining the custom of the fraction of a group that desires such segregation, thereby ignoring the wishes of the potentially larger fraction that is indifferent to it. Further, permitting exclusion may be self-perpetuating, by leading people to associate higher value properties with ones that don't include people of certain races or ethnicities.

Note 2. *The dissenting opinion in* Serio *provides a policy argument in favor of enforcing covenants that give developers the power to consent to all future sales. The analysis in the majority opinion is based on the formalistic "repugnancy" thesis. Assume that the court would not imply a duty to act reasonably but would interpret the covenant to give the grantor full discretion to grant or withhold consent to any sale. Can you provide a better, policy-based justification for upholding such a provision than that given by the majority opinion in Serio of Justice Urner? How would the dissenting judge respond to these new arguments?*

(a) *π argues that the restraint is unenforceable.* As a matter of social justice, the policy against restraints on alienation ensures that property owners have the freedom to control their own property, rather than having property controlled by grantors who have long ago ceased to possess the land. It therefore protects the autonomy and liberty of individuals in society by granting them control of the resources they own. Enforcement of the restraint, in contrast, would allow landowners to control large areas long after they have otherwise sold it and relinquished control over particular parcels. Grantor consent clauses may concentrate power in the hands of large landowners. They are inconsistent with a free market system under which property ownership is widely dispersed and control of property is vested in individual owners rather than regional landlords.

Invalidation of grantor consent clauses is necessary to prevent the re-establishment of feudalism. The shift from feudalism to capitalism was intended to shift power downward from a small number of lords to local possessors of land. Enforcing grantor consent clauses approaches feudalism by taking power away from current owners of individual parcels and concentrating power in the hands of a large landowner. It therefore would interfere with individual liberty and autonomy by decreasing the sphere of autonomy available to property owners.

If the restraint on alienation is used as a cover for discrimination, it should be unenforceable as a matter of public policy. Because it may be difficult to prove discriminatory motivation, it may be preferable to have a per se rule that restraints on alienation are unenforceable. This rule may prohibit non-discriminatory as well as discriminatory arrangements, but may nonetheless be justified in order to prevent the segmentation of the real estate market.

Finally, enforcing grantor consent clauses will also decrease social welfare by preventing property from being transferred to its most highly valued use. Transaction costs may prevent all those "benefited" by a restraint on alienation from agreeing with those who are burdened to agree to waive it. Allowing the free alienability of property ensures that property is available for current needs and current purposes.

(b) Δ *will argue that the grantor consent clause is enforceable.* As the dissenting judge argued, owners have legitimate interests in ensuring that their neighbors will use the property in a manner compatible with the neighborhood. If there are common areas maintained by fees paid by property owners, the interest in ensuring that neighbors will pay those fees is substantial. The grantor consent clause may be a more flexible way to achieve the goals otherwise obtained by restrictive covenants. For example, rather than limiting the property to residential uses, the owners may prefer to give discretion to a single party to determine whether a particular nonresidential use, such as a law office or a dentist's office, is compatible with the neighborhood. If the covenant is applied in a discriminatory manner, the grantor can always be sanctioned for this directly. The fact that the covenant *may* be used in a discriminatory manner does not mean that it should be invalidated in any circumstances. Only discriminatorily motivated denials of consent should be sanctioned.

Enforcement of the covenant may promote social utility by granting homeowners greater assurance that neighboring property will be developed and used in a manner that is compatible with their use of their own property. It may therefore promote real estate investment by granting greater security to the prospective homeowners. The grantor has no incentive to exclude people unreasonably because doing so will arguably decrease the fair market value of the property.

Notes 3-5. Limitations on Leasing. Because they are not complete restrictions on alienation, courts rarely strike restrictions on leasing down for unit owners who purchased after the restriction was in place. Although these cases rarely discuss restrictions on alienation directly, the importance of alienability in property law may explain why both courts and statutes often limit new restrictions on alienation. Total restrictions on leasing also present discrimination concerns, as discussed in Note 5.

Restrictions on short-term rentals, however, may present different policy balance. Short-term vacationers often treat a unit differently than long-term residents do, because they may be less concerned with the norms of the development, and more likely to be drunk and noisy. Where a unit is exclusively devoted to short-term rentals, one could argue that it is devoted to commercial use rather than single-family residential use. They do, however, technically "reside" in the unit, and do the same things there (sleep, eat, recreate) just as a longer-term renter would. Should the principle of restricting restraints on alienation limit the ability of developments to prevent unit owners from engaging in such short-term rentals, or should developments have authority to prevent owners from turning their units into unregulated hotels?

Note 6. *Restraints on alienation are generally allowed when the holder of the property interest is a charity. Can you imagine what policies underlie this exception to the rule against unreasonable restraints on alienation?*

Because the profit motive is so powerful, owners of charitable property—especially if they are not the original owners and have inherited the property from someone else—may be tempted to sell the land to a user who will convert the property for use for noncharitable purposes. In order to help promote charitable activities, restraints on alienation are enforceable if the grantor's purpose is to preserve a charitable enterprise. The property is treated as if it is held in trust for a specific purpose. However, in order to ensure that the property can be devoted to other purposes if circumstances change, charities are generally subject to equitable reform to accomplish their original purposes or to remove restraints on the use of the property when those purposes can no longer be achieved or are unreasonable.

§5.5 Anticompetitive Covenants 666

You may want to caution students that antitrust law is complicated and they can take an entire course in it. The principles behind antitrust law are helpful in further understanding the dilemmas involved in deciding whether to enforce restrictive covenants in deeds. Antitrust law, in this context, poses a dilemma between enforcing contracts that restrict competition and refusing to enforce such agreements to ensure that freedom of contract persists for others; paradoxically, the preservation of the "free" market may require *regulation* of the types of contracts people make to ensure that market participants *remain* free to contract in the future. Similarly, a free contract policy might support enforcing whatever contracts owners reach; on the other hand, enforcing restrictive covenants arguably interferes with freedom of contract by imposing obligations on subsequent purchasers of property without their voluntary assent. Similarly, a policy of protecting property rights might suggest that owners should be free to use their own property as they see fit, and therefore not be bound by promises made by others long ago just because those other promisors previously owned the same parcel; on the other hand, enforcement of restrictive covenants on subsequent owners may be the only way to protect the property rights of the owners of the dominant estates by granting them the security of knowing that the neighbors will not devote their property to incompatible uses.

Problem. *An entrepreneur seeking to open a deli leases property on the first floor of a large downtown office building. Seeking to protect her business, the entrepreneur convinces the landlord to include the following language in the lease: "Landlord covenants not to permit any other property in the building to be used for operation of a deli." The entrepreneur opens and begins operating a profitable deli. Later, a second entrepreneur rents space in the building and opens a sit-down restaurant. The restaurant does not harm the deli's business because it caters to a different clientele. However, after a year, the restaurant begins subletting some of its space to a cart that sells convenient, deli-style sandwiches at lunchtime. The deli's business suffers as people start buying from the cart. The deli owner sues the landlord, the restaurant, and the cart owner seeking to enforce the covenant. She argues that the cart is effectively a "deli" because it sells deli-style sandwiches. She also argues that she never would have invested so much money, time, and labor in the deli if she had known that the landlord was going to allow another tenant to breach the covenant. The defendants respond that there is no breach, since a cart is simply not a deli. They argue in the alternative that even if the cart is effectively a deli, enforcing such an anticompetitive covenant is void as against public policy, because the labor force downtown needs convenient places to eat and competition is desirable. Which side should win?*

The first issue is one of interpretation. Does "operation of a deli" prohibit any other restaurant from selling deli-style sandwiches? Plaintiff would argue that it does because the point of the restraint is to protect the beneficiary from competition of any kind. Allowing the cart to operate violates the express terms of the agreement and/or the defendant's implied obligations. It does not matter that the landlord is not operating a deli itself or that the tenant is subletting to a deli rather than operating a deli itself. The restrictive covenant runs with the land. Defendant would argue that it is not "operating a deli" because it is a sit-down restaurant and the cart is functionally different from an establishment that is set up to operate as a deli. It could argue that, if it is not clear whether its conduct violates the covenant, the court should err on the side of allowing the use because of both common law and statutory preference for competition.

The second issue is one of statutory policy. Is the restraint reasonable? Plaintiff would argue that the restraint induced it to locate there and thus increased competition among food service establishments in the vicinity. Alternatively, it would argue that location of a food service in that location helped induce other tenants to locate in the building, thus inducing new business to be created in competition with other businesses. Defendant might argue that noncompetition clauses are not necessary to induce food service establishments to be created or, alternatively, that such

agreements inhibit competition rather than help create competition (or that the negative effects on competition outweigh the positive effects).

The second issue is impossible to answer without greater factual information about the relevant market(s). This is important for students to recognize. In addition, it is important to note that the questions are related to each other because the policy of promoting competition might be a reason to interpret the clause broadly or narrowly. At the same time same, the courts are likely to focus on the intent of the parties to determine whether the use constitutes an invalid competing use.

§6 Modifying and Terminating Covenants 668
§6.1 Changed Conditions.....668
***El Di, Inc. v. Town of Bethany Beach* (1984).....668**

Students often misunderstand the changed conditions doctrine, both in class and in answers on examinations. It is *not* the case that any substantial change in conditions allows the servient estate to escape the burden of the covenant. Only changes that deprive the covenant of substantial benefit to the owner of the dominant estate count. Thus, a change in market conditions that substantially decreases the market value of property restricted to residential use *does not* entitle the owner to change to commercial use if the neighboring property will still benefit from the restriction to residential use. The only argument available under current common law doctrines available to the owner of the dominant estate here is the undue hardship doctrine. Again, students often fail to focus on the details of this doctrine. The undue hardship doctrine does not allow an owner to escape merely upon proof of great hardship; the hardship must be great *relative to the benefit.* This means the hardship must be great *and* the benefit must be small. (If there is *no* benefit, the changed conditions doctrine applies.)

The no benefit determination in *El Di* is debatable. It can be fun to ask students the different levels of consumption that may arise at a restaurant that requires brown-bagging versus one that does not. One is likely to bring one or at most two bottles of wine to a restaurant; one may keep drinking much longer if the restaurant will keep serving you after you have consumed what you thought at the beginning of the evening was a reasonable amount. One would also not go to an establishment with the primary intent of drinking if a brown-bagging requirement was in place. Still, the case raises the question of whether the power exists to enforce part of a set of covenants long after the beneficiary has waived enforcement of most of the covenants in the group.

§6.2 Relative Hardship 672

In Shalimar Association v. D.O.C. Enterprises, Inc., *688 P.2d 682 (Ariz. Ct. App. 1984), the court enforced an equitable servitude requiring an owner to continue operating a golf course against a complaint by the current owner that such a use was not profitable. The court rejected this argument. "A mere change in economic conditions rendering it unprofitable to continue the restrictive use is not alone sufficient to justify abrogating the restrictive covenant."* Id*. at 691. What might justify this result? What is the argument on the other side?*

The owner who cannot afford to comply with the covenant made a bad business investment and has the option of selling the property at a low price to someone who can profitably comply with the covenant. The counterargument is that such a covenant should not run with the land or, if it does, should be enforceable only by damages, if at all, if it is economically impracticable to comply with the covenant.

§6.3 Other Equitable Defenses.....675
§6.4 Statutes.....676
***Blakely v. Gorin* (1974).....676**

Blakely v. Gorin involves a petition under a state statute seeking relief from a nineteenth century covenant requiring them to leave an open passageway behind their property. The Ritz Carlton desires to build a bridge 12 stories high connecting its hotel to a planned hotel annex. The bridge will substantially decrease the light and air available to an eight-story apartment building containing 56 apartments. The question is whether the statute permits petitioners to violate the covenant simply by paying money damages.

Note 1. *The statute in* Blakeley *changed the common law by giving the court the option of damages rather than an injunction to enforce a covenant that was still of substantial benefit but violated the public interest. The majority found that the facts brought the court "almost ineluctably to the conclusion that there should be no specific performance." Do you agree that an injunction was inappropriate in this case? What are the arguments in favor and against granting an injunction?*

The court states that "the uncontradicted evidence was that a free standing tower is economically unfeasible presumably because of the small size of the parcel." If you go to bird's eye view of 2 Commonwealth Ave, Boston MA in Bing maps online (www.bing.com/maps) you will see the two towers of the Taj Boston (the current name of what used to be the Ritz Carlton) with the bridge between them built because the Ritz won this lawsuit. Looking from the Public Garden you see a tower that is as big as the Ritz Carlton was on the left. The idea that this parcel could not have been developed on its own (unattached to the left tower) is ludicrous. That being said, the judges were in the unenviable position of needing to interpret the statute. The legislature wanted them not to grant injunctive relief in the situations specified in the statute and they were bound to enforce that law whether they liked it or not. The standards in the statute are different from the common law and it is important for students to tie their arguments to the clauses in the statute.

The parcel certainly could have been developed without the bridge, but the fact that the bridge was useful to the hotel that owned the neighboring property – and that having an expanded hotel might have been useful for the city of Boston – is relevant in determining whether the covenant should be enforced only by damages. On the other side, the factual question of how much light and air the bridge would block was also of great significance and one that is empirical and thus not ascertainable from the opinion alone. The fact that the neighbors objected to the loss of the unobstructed alley is some evidence that they, at least, believed it would impact their properties and they, after all, owned the benefit of the covenant and had a right to enforce it.

At the same time, it is important to note that injunctions are always discretionary so that it was never the case that the covenant beneficiaries had a guaranteed expectation of specific enforcement of the covenant. On the other hand, since property is unique, injunctions are routinely granted to protect property rights, including the rights of covenant beneficiaries. An additional factor is that damages are likely to be measured by the decrease in the fair market value of the dominant estate caused by the construction of the bridge – an amount likely to be lower than the asking price of the dominant estate owners (the amount you would have to pay them to induce them to give up the benefit of the covenant). Thus, damages are likely to undercompensate the covenant

beneficiaries if their own valuation of the benefit of the covenant is what matters; the damages will not make them indifferent – they would rather have the benefit of the covenant than breach of the covenant plus payment of court-ordered damages. They feel worse off in the latter situation and thus this cannot be deemed a Pareto superior (efficient) move. At the same time, there are negative externalities created by the failure to develop the parcel and it may be the case that the city was better off as a whole letting this project go forward in this form, as long as one does not view the rights of the covenant beneficiaries as unfairly sacrificed for the good of the public. That, however, is the real issue in the case.

8. Concurrent, Family, and Entity Property 683

Themes

Chapter 8 brings together three forms of property ownership in which owners have rights to use and benefit from the same thing at the same time: concurrent ownership, largely concerning residential property; family property, and the shared rights that arise as a result of familial relationships; and entity property, in which rights to benefit from property are significantly divorced from control over that property. This chapter begins the section on Ownership in Common. The next chapter in this section, Chapter 9, concerns Present Estates and Future Interests, in which owners have rights to the same things but at different times; while Chapter 10 concerns Leaseholds, in which the landlord and tenant both share property rights over time (with the tenant having the present right of possession and the landlord having that right in the future) and divide rights in the present (with the tenant having the right to possession and the landlord having the right to rent). These are not the only forms of common property ownership, and many of the materials before and after this section touch on common or shared versus individual rights in property. In particular, we have placed this chapter after Chapter 7, Servitudes, because servitudes are significantly about dividing rights to use or control use of property.

The materials in this chapter touch on several themes:

(1) *Liberty v. security.* Many of the cases in this chapter concern conflicts between claims by individual co-owners to use or transfer their property as they wish and claims by other co-owners to preserve or maintain the property as it is. May a co-tenant lease, develop, sell, or mortgage her interest without the consent of the other tenants? May one spouse disinherit another spouse in a will? Do workers or communities have claims against corporate managers who close plants in violation of earlier representations?

(2) *Fiduciary duties among common owners.* Another theme concerns the obligations that co-owners owe each other. Joint tenants and tenants in common have a right to share rents earned from third parties if the co-owners join in the lease. Tenants by the entirety have the right not to have the property sold without consent of both spouses or through divorce proceedings. Directors of corporations have fiduciary duties to shareholders. On the other hand, there are limits to these fiduciary duties; joint tenants and tenants in common can usually alienate their interests without their co-owner's consent, and suits to enforce fiduciary responsibilities of corporate directors are limited by the business judgment rule.

(3) *Formal v. informal sources of property rights.* The materials address the conflict between formal contractual mechanisms and informal social or personal relationships as sources of property rights. Do particular property rights exist only within formal marital relations or are unmarried couples entitled to similar arrangements either during the relationship or when the relationship ends? Are there limits on enforceability on formal premarital agreements and restrictions on alienation between co-owners? When are individuals sharing property bound by the rights and obligations accompanying partnerships for economic purposes?

(4) *Regulation of property relationships.* Just as the estates system attempts to limit the types of bundles that can be created through such rules as the rule against creation of new estates and the rule against perpetuities, family law rules limit certain types of rights to "traditional" family relations, especially the marital relationship and the parent/child relationship. These rules may deny similar rights to persons who form what are viewed as nontraditional families. However, just as there are mechanisms for partly getting around these limitations in the estates system such as servitudes and trusts, there are mechanisms for recognizing certain types of property rights in nontraditional families, such as contract and constructive trust. Similarly, there are established forms for business relationships, and rights and obligations arising from them, such as corporations

and partnerships, but also new forms, such as limited liability partnerships. One question in both family and business law is the role of the state in dictating the permissible kinds of relationships.

§1 Varieties of Common Ownership....683
§2 Concurrent Tenancies....684
§2.1 Forms of Concurrent Tenancies....684
A. Tenancy in Common....684
B. Joint Tenancy....685
C. Tenancy by the Entirety....688

Concurrent ownership involves full sharing of the rights and responsibilities of ownership. Although concurrent ownership may be justly criticized as creating difficult problems of management and limits on the autonomy of co-owners, some forms of concurrent ownership are very common and perhaps increasing, as joint bank accounts remain common, most separate property states permit tenancies by the entirety, and tenancies in common are being used to create time-shares as a less regulated alternative to condominium ownership. Tenancy in common, joint tenancy, and tenancy by the entirety vary according to their mode of creation, whether co-tenants have a right of survivorship, whether co-tenants can unilaterally sever the co-tenancy, and whether co-tenants can unilaterally encumber their interest, such as by leasing or mortgaging it. The table below may help to make the distinctions clear for students, and the problems give them practice in seeing the impact of the rules, and interpreting ambiguous conveyances.

	Tenancy in Common	Joint Tenancy	Tenancy by the Entirety
Creation	Usually default, presumed whenever more than one person owns property at the same time	Usually specific, traditionally requires unity of time, title, interest, and possession	Only for married couples; for them, sometimes specific and sometimes default
Survivorship	No	Yes	Yes
Unilateral termination	Yes	Yes	No—only on divorce or death
Unilateral encumbrance	Yes	Yes, but courts vary on whether can encumber co-tenants' interest on survivorship	Varies, with most jurisdictions saying no.

Problem 1. A, *owner of Greenacre, executes and delivers a deed conveying Greenacre "jointly to myself and my wife* B.*" How will this conveyance be interpreted?*

Although the deed says "jointly," there are two problems with interpreting this conveyance as a joint tenancy with right of survivorship. First, there are not the four unities, because *A* acquired his interest before *B* did. Many jurisdictions today, however, are willing to waive the four unities if there is evidence of intent to create a joint tenancy. Second, the deed merely says "jointly," rather than "as joint tenants," or better still, "as joint tenants with right of survivorship." Therefore, this would ordinarily be interpreted to be a tenancy in common, under the default rule. However, because the property is to be owned by a husband and wife, and *A* makes this clear in the conveyance, some jurisdictions may interpret this to be a joint tenancy or even a tenancy by the entirety.

Problem 2. *A mother and son acquire a parcel of land as "tenants by the entirety." How should a court interpret this conveyance?*

The tenancy by the entirety is rigidly reserved to married couples, so this is unlikely to create one. It may therefore be interpreted as a tenancy in common under the usual default rule. However, because the intent to create something other than a tenancy in common is clear from the words of the deed, a court may interpret this as a joint tenancy with right of survivorship, which shares the right of survivorship with the tenancy by the entirety, even if it does not include the restrictions on unilateral action reserved for married couples. *Estate of Reigle*, 652 A.2d 853 (Pa. Super. 1995).

Problem 3. *An elderly father and his daughter from his first marriage open an account labeled a "joint bank account." The deposits in the account are most of the father's lifetime savings; the daughter does not contribute. During the father's life, the daughter draws from the account only to write checks for her father's rent, medical bills, and other expenses. When the father dies, $300,000 is left in the account. His will divides his estate equally among the daughter and his two children from his second marriage. The daughter claims that she is entitled to the proceeds of the account by right of survivorship. This would leave assets worth about $15,000 to be divided among the children under the will. What should the court do?*

This is a not uncommon problem in the interpretation of survivorship rights under joint bank accounts. On the one hand, the account is explicitly designated a "joint bank account," which in many jurisdictions creates a right of survivorship. It would not be unreasonable for a father to wish to provide a right of survivorship to his daughter, particularly if she was responsible for managing his expenses during his life. Most banks make it fairly easy to specify if no right of survivorship is intended; if this was the case, failure to do so suggests an intent to create a right of survivorship. On the other hand, his will indicated a desire to benefit his children equally; because the account contains most of his assets, providing the bank account to the daughter would contravene that intent. The lay person is unlikely to know that a joint bank account frequently implies a right of survivorship. The circumstances regarding the account, moreover, suggest that the daughter was designated a joint tenant merely to give her the right to draw on the bank account for the benefit of the other.

The facts here are ambiguous, and although a court might resolve it either way, we believe the better resolution here would be to divide the account equally among the children. Nevertheless, in *Estate of Ostlund v. Ostlund*, 918 A.2d 649 (N.J. Super. App. Div. 2007), the case the problem is based on, the court held that a right of survivorship should go to the joint tenant, applying New Jersey's *Multiple-Party Deposit Account Act*, which, like the *Uniform Probate Code § 6-212*, provides that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." N.J.S.A. 17:16I-5(a). The problem provides you with an opportunity to discuss why such a presumption might be created. It seems likely that it was intended to resolve most cases based on the formal language of the account rather than possibly fraudulent post-death testimony, prevent lengthy and contentious probate disputes, and incentivize parties to make their intentions clear before death. The downside of the rule is that if it does not reflect what most parties understand they are doing in creating "joint bank accounts," it may result in contravening the decedent's intent and unfairly disinheriting intended beneficiaries.

Problem 4. *What should be the default in cases of intestacy? More than half of Americans die without a will; this proportion is much larger for Black persons, Latinos, and for middle- to*

lower- income people of all races. When individuals die intestate, their property goes to their intestate heirs. This frequently means shared ownership. For example, if the decedent leaves multiple children and no spouse, or a spouse who is not a parent of the children, the property will be divided among them. Following the usual default rule, the estate descends to the intestate heirs as tenants in common. If those heirs also die intestate, the property is divided among yet more heirs and so on exponentially. In a few generations, the number of co-tenants in such "heirs property" may become so large that joint management of the property is impossible. Two much-discussed examples of this dynamic involve Black farmers and American Indians. [Discussion of decline of Black rural landownership and fractionation of allotted American Indian land.]

One way to prevent ownership by exponential numbers of heirs would be to make joint tenancy with the right of survivorship the default in cases of intestacy. What objections can you imagine to such a proposal?

The goal of the problem is largely to present the very real differences between joint tenancies and rights of survival and the difficulties of managing property owned by many parties. Like problem 3, moreover, the problem highlights the reality that default rules very often become the dominant rule given that most people do not put their intentions in writing.

The problem also, of course, provides an opportunity to examine the pros and cons of the proposal. The central objection to such a proposal is that it undermines the autonomy rights of the co-tenants by preventing them from determining who will receive their interests in common property after their deaths, whether their children or spouses. It may be argued that it also provides something of a windfall to the heirs who live longest, because they become sole owners of the property. As indicated by cases like *Tehnet v. Boswell*, moreover, joint tenancies may result in unfairness to third parties who contract for an interest in the land without realizing it is burdened by the right of survivorship.

The counterargument is that joint tenancy does not unduly limit autonomy in the heirs, who have full power to get the value of their interest free of the right of survivorship by selling their interest. In most jurisdictions now, moreover, joint tenants can convey to themselves as tenants in common, thereby retaining an interest in the land without the right of survivorship. Thus the only difference between the tenancy in common and the joint tenancy is what happens if the parties do not form and act on an intent: in the tenancy in common, it results in fractionation, which may result in loss or inutility of the estate; and in the joint tenancy, it results in consolidation. Third parties, moreover, will be given notice of the existence of other heirs from the probate documents that give the tenant with whom they are dealing ownership of the property; if they seek to contract unilaterally without consulting those heirs, they cannot complain of unfairness in the results.

§2.2 Sharing Rights and Responsibilities between Co-Owners.....690

Problem 1. A *and* B *own equal shares in an apartment as tenants in common.* B *lives in another state, but* A *lives in the apartment, whose rental value is $1,000 per month.* B *refuses to contribute to paying the mortgage, property taxes, and insurance on the apartment.* A *sues* B *for an accounting and contribution to these carrying costs.*

The formula for calculating answers to problems such as these is as follows:

(Carrying costs - rental value) x that owner's fractional share = contribution from tenant out of possession.

What result if the carrying costs are $500 per month?

Here, the formula would be (500 – 1000) x .5 = –250, so *B* does not owe *A* anything.

B would ordinarily be responsible for half of the carrying costs, or $250. But *A* is getting the rental value of the property. Because half of that rental value is *A*'s already because of the co-tenancy, *A* is responsible to *B* for only $500. $250 – $500 = –$250. *A* does not owe the $250 per

month to *B*, because one does not owe rent for one's own occupation of the premises, but cannot demand contribution from *B* for the carrying costs.

What result if these costs are $1,200 per month?

Here, the formula is (1200 – 1000) x.5 = 100. So *B* will owe *A* $100 per month, or half of the amount by which the carrying costs exceed the rental value of the property.

Problem 2. A *and* B *live in a house in which they own equal shares as joint tenants.* B *builds a third bathroom in the house at a cost of $10,000 and seeks contribution from* A. *What result?*

B is not entitled to contribution from *A*, because a third bathroom is an improvement rather than basic maintenance or repairs.

The property is later sold for $200,000. How should the proceeds be divided if the bathroom is estimated to enhance the value of the property by $15,000?

The non-improving owner here would receive Sales Price – Amount of Sales Price Due to Improvement x Fractional Interest, while the improving owner would receive that plus the Amount of Sales Price Due to the Improvement.

Here, we subtract the value from the bathroom from the total price, for $185,000. This amount is divided between the tenants, for $92,500. To *B*'s share of this would be added $15,000, so that she would get $107,500.

What if the bathroom only enhanced the value of the property by $8,000?

B would get $96,000 (half of 192,000, the value of the home minus the value of the bathroom) plus $8,000, for a total of $104,000. The problems show that both the risk and the benefit are placed on the co-tenant who chooses to unilaterally improve. If the improvement enhances the value of the property beyond its cost, the improving co-tenant reaps all the rewards; if the cost of the improvement is more than its benefit, she loses some of its cost. If the improvement was of benefit to that tenant during her possession, however, she gains that value as well. This may seem fair because it places the risk and benefits on the improving tenant, just as they would be for a sole tenant. But if the improvement enhances the value to the non-improving co-tenants during possession, they enjoy those benefits without sharing in the risks. In addition, the portion of the sales price due to the improvement is not obvious, and may be the subject of a dispute. This may discourage improvements, but it also encourages agreements about improvements to the property. Even greater concerns arise about work that may be construed as either maintenance or improvement, where conflict about contribution may result in failure to properly maintain a property.

Problem 2. *Should there be a presumption of ouster where parties own a home together after separation or divorce? Which approach is best? Which will most equitably protect both spouses' property interests? Which will do most to reduce conflicts between the parties?*

A typical premise of separation and divorce is that the parties to a marriage can no longer live together. A presumption of ouster may reflect this reality. It also may prevent conflicts by making it possible for one spouse to live elsewhere, and recognize that spouse's economic interest in the family home. Division of property in divorce may be a lengthy process, and it may seem unfair to allow only one spouse to benefit from a jointly owned family home during that time.

One objection is that it may be unfair for the spouse remaining in the home to compensate the leaving spouse for rent if the remaining spouse did not want the separation or divorce. In *Olivas v. Olivas*, for example, the husband left the home to live with his girlfriend. The court there held that rent should be denied because the husband was "not pushed out but pulled." Making rental payments turn on divorce, however, creates a complicated factual determination and a site for yet more conflicts between the parties. Avoiding litigation on which spouse is at greater fault in a

divorce is the reason that states no longer consider fault in property division. Why should rental payments before divorce recreate the fault dispute?

There are also problems with any default rule requiring rental payments to the leaving spouse. Property law already has ways of dealing with conflicts between co-owners—why should conflicts between married co-owners be treated differently? There are also marriage-specific reasons not to require rental payments. The spouse remaining in the home may be doing so because of lower income, or because that spouse is the primary caretaker for children from the marriage. Requiring that spouse to pay rent to the leaving spouse may create hardship, placing the economic burden of the break-up on the party least able to bear it.

Problem 4. *Does your answer change if one of the parties left by order of the court due to domestic violence? What are the arguments on both sides of this question?*

On the one hand, a spouse who is ordered to leave the house because of domestic violence is literally ousted from the property. On the other, it would seem quite unfair to require an abused spouse to pay rent to a spouse excluded because of abusive conduct.

But what if it is now the abused spouse who leaves, rather than the abuser? The batterer might argue that it was the choice of the abused spouse to leave, so ouster is not present. But leaving to avoid physical or emotional abuse seems like a good case for constructive ouster. Still, isn't there a disturbing lack of equity to grant the abused spouse rental payments after voluntary departure from the home if the abuser would be denied such payments after a court mandate to leave? Do the answers to these questions replicate the concerns about relying on determinations of "fault" discussed above, or does domestic violence negate that concern?

§2.2Unilateral Transfers of Rights in Common Property 694
A. Tenancy in Common.....694
***Carr v. Deking* (1988).....694**
B. Joint Tenancy 696
***Tenhet v. Boswell* (1976) 696**
C. Tenancy by the Entirety 701
Sawada v. Endo (1977).....701

Carr v. Deking, *Tenhet v. Boswell*, and *Sawada v. Endo* all involve questions of whether co-tenants can unilaterally encumber their interest in the shared property. The answers differ largely because of the nature of the three tenancies, but they raise common questions of the fiduciary responsibilities of the tenants acting unilaterally, the security interests of the tenants who did not participate in the transfer, and the rights of third parties who believe they have interests in the property, whether as in *Carr* and *Tehnet* by contract, or as in *Sawada*, by judgment lien.

Carr v. Deking concerns father and son tenants in common. The father, George Carr, leased the property for ten years to Richard Deking against the wishes of his son, Joel Carr. After the father's death, the son seeks to evict Deking from the land, and to receive his fractional share of the rent for the land. The court holds that a co-tenant is entitled to unilaterally lease his interest in the land. If the non-leasing co-tenant disagrees, he may seek partition, but may not terminate the lease. It also holds that Joel Carr may not receive a share of the rent without accepting the lease pending partition.

The right of co-tenants to unilaterally lease their interests creates obvious tensions. It is one thing to occupy a house or negotiate shared use with a co-tenant one knows, and another thing to do so with a stranger. But, because co-tenants have undivided rights to possess the entire property, they can lease that right as well. A number of other courts, however, have disagreed with

Carr v. Deking and held that because multiple tenants cannot farm the same parcel of land at the same time, co-tenants may void leases of an entire parcel of agricultural property. *Carr v. Deking* also appears to be in the minority in holding that a co-tenant may not receive their fractional share of the benefits of a lease without accepting the lease. Just as all co-tenants have a right to possess the property, so all co-tenants have a right to share in the profits from the property.

Tehnet v. Boswell also concerns the status of a lease entered into by one co-tenant after the death of the lessor. But while in *Carr v. Deking*, George Carr's interest went to his estate after his death, in a joint tenancy, the co-tenant's interest goes to the surviving co-tenants. The court first decides that a lease alone should not convert a joint tenancy into a tenancy in common, so that the survivorship right continues. That decided, the court holds that the lease ends with the death of the co-tenant that unilaterally entered into it.

Note 1. *Courts are divided on the question of whether leases sever joint tenancies. Justice Mosk argues in* Tenhet v. Boswell *that "a lease is not so inherently inconsistent with joint tenancy as to create a severance." Isn't this circular reasoning? How does it help to ask whether a lease is consistent or inconsistent with something that the court is being asked to define? What policies are relevant in answering the question whether a leasehold by one joint tenant destroys the right of survivorship of the other?*

It might be argued that joint tenants have no justified expectations in their right of survivorship since it is so highly contingent on events that may not happen. After all, it can be lost if one dies first or if one's co-owner sells her interest in the property. On one hand, allowing severance may increase the alienability of property, especially if the court holds that leases given by one joint tenant do not survive the death of the lessor; few people will rent property if they know their possessory rights will end as soon as their landlord dies. On the other hand, the right of survivorship may increase the alienability of the property by decreasing the number of owners from two to one. This makes it easier for the property to be bought and sold since a potential lessee or buyer does not have to worry about obtaining the consent of more than one person. Which rule better promotes the reasonable use of property? How should the courts balance the right of each tenant to transfer her interest (a right of freedom of action) against the right of the co-owner to her right of survivorship (a right of security against loss of her property interest)?

As the note states, both Justice Mosk's and Justice Barnes' inquiry into the "nature of the lease" are circular. Reliance on the four unities is similarly unhelpful because it is unclear why the four unities themselves are necessary (and courts often reject this requirement to further the presumed intent of the parties). As the note suggests, one can make justified expectations and promotion of alienability arguments both ways. Similarly, the autonomy interests of the leasing co-tenant are balanced against the security interests of the non-consenting co-tenant. The result reached in *Tehnet* may be a reasonable compromise between these, permitting one co-tenant to unilaterally lease his interest, but only up to the point of survivorship.

This does not resolve, however, the potential unfairness to the lessee, who bargained for a lease of 10 years and did not know of the joint tenancy. As Justice Mosk says, the lessee may not have had actual notice of the joint tenancy, but would have constructive notice from the title records. Students may not think that a reasonably prudent lessee would conduct a title search (they surely did not in renting their own apartments). But in long term leases such as this one, which are likely to be commercial rather than residential leases, title searches are common and are an expected measure. Nevertheless, given the relative uncommonness of joint tenancies, it is unclear that a lessee should be charged with lack of notice of such an arrangement. The possibility of unexpected restrictions such as this one, moreover, might increase uncertainty and transaction costs in lease arrangements, depressing the market for rental property as a whole. On the other hand, perhaps

that potential dampening is justified to avoid undermining the expectations of the co-tenant whose interests were encumbered without her consent.

Note 2. *Courts are also divided on the question of whether mortgages sever joint tenancies. Most states describe the borrower who grants the mortgage as the owner or title holder and the bank or lender who takes the mortgage as a "lienholder," with a right to possess the property only if the borrower defaults. In such states, courts typically hold that a mortgage by one tenant does not sever the joint tenancy. Foreclosure during the life of the tenant would sever the tenancy and create a tenancy in common between the non-borrowing tenant and the bank. If the borrowing tenant dies before foreclosure, however, the surviving co-tenant receives the entire property unburdened by the mortgage.*

A minority of states retain the older "title" theory, in which the lender takes title to the property, subject to an "equity of redemption" in the borrower who grants the mortgage. Some courts in title theory states consider a mortgage to be a transfer of ownership that has the effect of severing the joint tenancy, see Schaefer v. Peoples Heritage Savings Bank, *669 A.2d 185 (Me. 1996), although others do not.* Countrywide Home Loans, Inc. v. Reed, *725 S.E.2d 667 (N.C. Ct. App. 2012). There is no substantive difference between "lien" theory states and "title" theory states; the difference today is merely verbal. Assuming that the question of severance should not depend on such a flimsy argument, how should the case have been decided, and why?*

As with respect to leases, the questions are what result will adequately balance the justified expectations and autonomy of the co-tenants, promote the alienability of property, and protect the interests of third parties, and again one could resolve this problem either way. Making mortgages subject to the right of survivorship significantly impairs ability of co-tenants to mortgage their property, an important autonomy benefit of property ownership. Moreover, such mortgages may be necessary to gain finances for development and use of the property itself, suggesting that restricting their availability may reduce the productive use of the property as a whole. A mortgage, however, may create a significant burden that results in the loss of the property entirely; one could argue that a co-tenant who did not benefit from the mortgage should not be burdened with it without her consent. Further, the concern about fairness to the mortgagee bank is less significant than in the case of lessees because banks are expected to do title searches and otherwise inquire into the ownership of the property before entering into a loan secured by the property.

C. Tenancies by the Entirety 701
***Sawada v. Endo* (1977) 701**

Although once looked at as a relic of coverture, recognition of the tenancy by the entirety has grown since *Sawada v. Endo* was decided, and most non-community property states now recognize it. *Sawada* dramatically illustrates a central difference between the tenancy by the entirety and a joint tenancy with right of survivorship: in most states, neither the interest nor the survivorship right of one spouse can be attached to satisfy the debts incurred by that spouse alone. Pat Cain provides useful background on the case, the legal issue, and the various state approaches to the issue in *Two Sisters v. A Father and Two Sons: The Story of Sawada v. Endo,* Property Stories 99 (Gerald Korngold & Andrew Morris ed. 2009).

In 1968, Kokichi Endo strikes the Sawada sisters with his vehicle. In June 1969, Helen Sawada files a personal injury action against him. One month later, in July 1969, Kokichi and his wife Ume transfer ownership of their house in Oahu to their sons for nothing, but continue to live there without paying rent. On January 19, 1971, the court enters a judgment against Kokichi for $25,000. Ten days later, Ume dies. Had the property not been given to their sons, it would now belong to Kokichi because of his right of survivorship. Because Kokichi does not have enough

personal property to satisfy the judgment, the Sawadas seek to set aside the conveyance to the Endo sons, claiming that it was fraudulent.

The court does not decide whether the conveyance was fraudulent—it is pretty clear that it was. Rather, the question is whether even if the property was not conveyed to the sons, the Sawadas could have levied it to collect on the judgment. The court holds that because the accident had occurred during Ume's lifetime, both the property *and* Kokichi's right of survivorship were immune from claims by creditors of Kokichi's alone, so any fraud in the conveyance was irrelevant.

There are two major policy issues involved in the rule created by the court. The first, concerning the autonomy rights of spouses in the marriage, is discussed below. The court deals with the second, the rights of creditors of one spouse, by stating that creditors should have notice of the nature of the property before extending credit, and can protect themselves by ensuring that both spouses agree to either the debt or the potential attachment of the property. This is of course a poor response to the problem of the Sawadas, who had no notice or ability to choose who injured them. Perhaps a better response is that this is no different than being injured by someone without any property or insurance, and that the plight of the Sawadas does not justify putting an innocent spouse out of her home. This problem would ordinarily be dealt with by homestead laws, but Hawaii's exemption was only $2,750 at the time. It was increased to $20,000 in 1972, the year after the judgment in the case. Still, it is not clear why one spouse cannot attach his or her own right of survivorship; this, however, is only the approach in a distinct minority of states.

Note 2. (1) *The substantial majority of states follow the Sawada rule that creditors cannot reach property held in the form of tenancy by the entirety to satisfy debts of one spouse; even if the property is sold or the debtor spouse survives the non-debtor, the creditor has no claim on the estate.*

(2) *A smaller group of states, including Massachusetts, New Jersey, and New York, hold that creditors can attach the life interest of a tenant by the entirety. Creditors may not, however, defeat the non-debtor spouse's survivorship interest, and may not be able to demand partition of the property. See, e.g.,* Capital Finance Co. Delaware Valley, Inc. v. Asterbadi, *942 A.2d 21 (N.J. Super. App. Div. 2008).*

(3) *A few states, including Tennessee and Kentucky, hold that the creditor may only attach the debtor spouse's right of survivorship; the creditor only may possess the property if the debtor survives the non-debtor spouse. See* Robinson v. Trousdale County, *516 S.W.2d 626, 630-31 (Tenn. 1974);* Raybro Elec. Supplies, Inc. v. Barclay, *813 F. Supp. 1267 (W.D. Ky. 1992) (construing Kentucky law).*

Which approach better protects the rights of women to gender equality?

This is not an easy question. On one hand, the rule in the majority of states arguably protects the interests of both spouses in not losing their property because of the improvident actions of one of them. This grants women some security from their husbands' wrongdoing. On the other hand, the minority rule adopted is premised on the idea that, under prior law, the husband had full management powers of property held in tenancy by the entirety. The equalization of management power instituted by the *Married Women's Property Acts* should give wives the same rights husbands used to have, so that they need not obtain their spouses' consent before encumbering the family property. If women cannot offer their property as collateral for loans they take out, they are less free to manage and use their property; they have to first obtain the consent of their husbands. Thus, allowing creditors to attach the interest of a person whose interest is held as a tenant by the entirety is necessary to give husband and wives equal power over the property rather than holding them hostage to each other.

The first argument focuses on the right to security (not losing your property interest without your consent because of the improvident actions of your spouse), while the second focuses on rights of freedom of action (the right to borrow money and pledge one's own property as collateral without

first obtaining the spouse's consent). These arguments are, to some extent, gender neutral; the equality problem emerges because the question must be addressed in terms of the meaning of *Married Women's Property Acts*, which were intended to rectify the inequalities associated with the prior law which gave husbands sole management powers over tenancy by the entirety property.

One way to illustrate the different approaches is to ask students to imagine you have a spouse next to you. The first approach, before the *Married Women's Property Acts*, would be illustrated with the husband dragging the wife along without her will. The second approach, in which neither spouse can unilaterally encumber the property, would be illustrated by the couple trying to walk along lockstep arm in arm. The third, in which each can encumber his or her own interest, would be illustrated by each walking in completely different directions. Perhaps one's instinct about which of the latter two approaches best promotes gender equality is determined by whether one thinks that enforced partnership or full independent action for both spouses will be better for women. Does one, for example, think the paradigmatic concern is the abused wife seeking collateral to finance her education or begin her own business without her husband's consent, or is it the philandering husband encumbering the property to buy a condominium for his mistress?

Problem. *Can a tenancy by the entirety be created by contract? Individuals who do not wish to marry, or married couples who live in states that have abolished the tenancy of entirety, may want to ensure that property is not sold or encumbered without the consent of either party. Imagine, for example, two friends who wish to live together and share expenses as they age. They buy a house together as joint tenants. The deed is recorded with a separate document containing a covenant between the two in which each agrees not to bring an action for partition of the property so long as both live in the house. It also provides that partition should not be allowed before the parties have reached a comprehensive property settlement in the event they move out; that settlement can either be one they voluntarily agree to or one that is imposed by a court in the context of litigation. The covenant also states that neither party may encumber, mortgage, sell, or lease their undivided interests without the consent of the other and that neither one owns a property interest that can be attached by creditors unless both owners agree to the transaction. The friends are attempting to create the incidents of a tenancy by the entirety through a contract, even though they are not married.*

Are the covenants enforceable, including (a) the covenant limiting the right to partition, (b) the restraint on alienation, and (c) the attempt to limit the ability of creditors to reach the parties' individual interests? Or are they void, either because they constitute an attempt to create a new estate or because they constitute unreasonable restraints on alienation?

The answer is not clear. One might argue that this is an attempt to create a new estate, a tenancy by the entirety owned by a couple that is not legally married, and thus void. Agreements not to partition are presumptively invalid restraints on alienation. On the other hand, the agreement concerns a personal relationship between parties who are living together and not merely joint owners; moreover, the agreement not to partition will end if either of the parties moves out and therefore has a reasonable time limit built into it. This problem also raises complicated issues about whether common law rules or contract can enable unmarried couples to evade the rules limiting legal rights to married persons. Even though marriage is now available to same-sex couples, the law does not permit similar protections for individuals in non-sexual relationships. In *Burden v. United Kingdom* (Eur. Ct. Hum. Rights 2008), for example, two elderly sisters who had shared a home for 31 years argued that their inability to partake in the estate tax benefits for spouses discriminated against them on the basis of their relationship. The European Court of Human Rights rejected the claim, but it raises the question of why marriage, and not other similarly co-dependent relationships, are entitled to special protection.

The attempt to protect the property from creditors raises similar questions but is complicated by the fact that third parties are involved. Normally third parties are on notice of recorded documents affecting title. However, the question is whether the agreement between the parties is equivalent to a transfer of property rights which makes the joint tenant's interest not available to creditors. Is this agreement enforceable as a reasonable restraint on alienation or does it constitute an invalid attempt to evade the limitation which makes the tenancy by the entirety available only to married couples?

§2.4 Partition 707
Ark Land Co. v. Harper (2004) **..... 707**

A mining company acquires fractional shares in a historic family property in West Virginia and files suit for partition because it wishes to mine the land. The materials present the tension between the rights of co-tenants and between the goals of promoting alienability and preservation in a case with wonderfully rich facts. They also present the reality of many suits for partition, which are brought by those who obtain a fractional share from co-tenants out of possession specifically in order to demand partition and acquire the land for development. The majority orders partition in kind, preserving the homestead for the family co-tenants, rather than partition by sale, despite evidence that partition in kind would add several million dollars to the costs of mining the land. Although other cases have reached a similar result, this likely represents a minority position, as the economic effects of partition in kind versus partition by sale are typically of primary importance.

One could begin your teaching of the case by asking students to make arguments for Ark Land, which will be more challenging for them both because Ark Land loses the case (students tend to accept what a court says as correct) and because it is a less sympathetic party. First, Ark Land can argue that its use of the land will provide the greater benefit to society. Coal mining will provide energy to many people, and much needed jobs in an economically depressed part of the world. The other co-tenants are merely holdouts standing in the way of the most productive use of the land. Their use will leave the property largely economically idle, as no one lives there and it is only used on occasional family holidays. Even this use will be of less value as the property is surrounded by mines and the noise, dust, and removal of the landscape they cause. In addition, this use will be concentrated among a few co-tenants, rather than distributed to the wider number who would benefit from Ark Land's economic activity. As a general matter, moreover, permitting partition in kind in such cases would undermine the rights of the original co-tenants, by reducing their ability to sell their interests for their fair market value.

Then you could turn to the arguments in favor of partition in kind. First, although the dollar value of the property is higher if developed as a whole, it is hard to put a dollar value of preserving the identity interests in traditional family property such as this. The balance of the utilities therefore may favor partition in kind. If the utility is truly higher to Ark Land, moreover, it can offer the Caudill heirs some amount less than the several million dollars it claims it will incur through partition in kind and the heirs will accept it. With respect to distributive concerns, one could argue that although the jobs and income from coal may benefit many, Ark Land and its few executives will retain the lion's share of additional profits. In addition, retaining the property as a traditional homestead and gathering place will benefit a wide extended family, preserving familial links of great benefit to society and the individuals concerned. Furthermore, mountaintop removal mining of the kind Ark Land proposes may not in fact be all that beneficial to society, and may undermine the identity interests of many residents.

Finally, one could argue that neither the interests of Ark Land nor those of the selling co-tenants are deserving of protection in this case. As is often the case in sales of fractional interests of heirs' property, the sellers may not have invested to own to their shares and may not value them

because they no longer live near the land. Depriving them of a windfall that will undermine the identity interests of those who still live near the land does not raise significant fairness concerns. One could also argue that Ark Land is not a good faith actor here, as it purchased fractional interests in order to force a partition sale at which it could buy up the property for what will likely, as discussed in note 1, be much less than its fair market value.

§3 Family Property 714
§3.1 Marital Property: Historical Background 714
A. Coverture, Dower, and Curtsey 714
B. Married Women's Property Acts 714
C. Same-Sex Marriage 715
§3.2 Community Property and Separate Property 717
A. Separate Property 717
B. Community Property 718
C. Premarital Agreements 719
D. Homestead Laws 720
§3.3 Divorce: Equitable Distribution of Property 721
***North Carolina General Statutes* 722**
***Revised Code of Washington* 723**
§3.4 Child Support 728

The materials in this section emphasize the ways that property is and always has been substantially affected by familial relationships. Although the materials on child support are in Chapter 2, we include a reference to them here, and they could easily be taught here rather than at the beginning of the course. The materials included here also show the extreme gender inequality historically resulting from marriage as a matter of law, as well as the continuing inequality as a matter of fact despite efforts in both community and separate property states to address this inequality. They also show the significant property consequences of former inability of same sex couples to marry.

The North Carolina and Washington statutes on distribution of property provide students with experience in reading statutes and examples of different approaches to property distribution on divorce. You can use the hypothetical situations in the notes to examine the differences.

1. Property titled in the name of one spouse. *Brett and Blair file for divorce after 10 years of marriage. Brett is writing a novel, but has not sold it yet, and makes some money tutoring. Blair is an attorney at a large law firm earning a large salary. Between the two of them, their major assets are a joint bank account to which Blair has contributed 80% of the funds; a house titled in Blair's name alone; and a valuable painting that Brett inherited from Brett's mother. The parties acquired these assets and any funds they used to acquire them during the marriage. Are these separate or community/marital property? What provisions in the North Carolina and Washington statutes support your answers?*

The bank account and house are "marital property" in North Carolina and "community property" in Washington, because although Blair contributed most of the funds to the bank account and the house is titled in Blair's name, both were acquired during the marriage. The painting, however, is Brett's separate property, because it was inherited, rather than earned, by Brett.

2. Division of the family home. *Alex and Aubrey file for divorce after seven years of marriage. Their major asset is the home purchased with joint funds during the marriage. Alex has moved out and is renting an apartment nearby. Aubrey is living in the house with the couple's two children. Alex wants the property sold and the proceeds divided to support both parties in*

maintaining two households, while Aubrey wants sole title to the property. What should the court do? What provisions of the statutes speak to the question? What more would you want to know about Aubrey, Alex, and their children?

Both the North Carolina and Washington statutes provide that one factor in the distribution of property is the desirability of awarding the family home to a spouse to live in with their children. To decide this question, one would want to know how old the children are, whether they have any needs that would make moving particularly disruptive, and whether the children will live most of the time with Aubrey or if Aubrey and Alex will jointly divide physical custody. One would also want to know whether Aubrey can compensate Alex for the loss of the house, whether Aubrey can pay for the expenses of the home, and whether Alex makes enough to afford a suitable substitute residence without compensation.

3. Appreciation of separate property. *When Blake and Jordan were married, Blake owned an internet startup company. During the marriage, Blake sold the startup for $5 million and invested $4 million in a brokerage account in Blake's name. Blake pursued various other ventures, but none were successful. Jordan worked part-time as a physical therapist, and was the primary caretaker for the couple's two children. When Blake and Jordan filed for divorce after two decades of marriage, the account with the proceeds of the startup was worth $20 million, while the family home and other assets of the couple were worth $2 million.*

Are the proceeds from the sale of the startup separate or marital/community property? What about the appreciation on the investment? What language in the North Carolina and Washington statutes supports your answer? What is the range of distribution awards to Jordan under North Carolina law? What is the range under Washington law?

Under both statutes, the $20 million is considered separate property. Because Blake owned the internet startup on entering the marriage, it was separate property then. The North Carolina statute provides that "[p]roperty acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property." The Washington statute more simply provides that "the rents, issues and profits" of separate property are also separate property.

But the statutes would treat the $20 million very differently. Under the North Carolina statute, "There shall be an equal division by using net value of marital property . . . unless the court determines that an equal division is not equitable." Separate property is not considered in this division, except to the extent that the other spouse made a "direct contribution" to the increase in value of separate property. In North Carolina, only the $2 million would be divided with Jordan, and the $20 million is Blake's alone.

Under the Washington statute, however, "the court shall . . . make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors." This does not mean that the $20 million will be equally divided between Blake and Jordan. A court will consider the needs and earning potential of both spouses, as well as the fact that it derives from work Blake did before the marriage. But it does mean that the court can consider that one of the spouses has vast wealth in determining an equitable distribution.

The North Carolina and Washington statutes are not the only approaches to what property is subject to division and how it should be divided. For one extreme, Montana, a common law property state, provides that courts shall "equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired," Mont. Code § 40-4-202(1). For another, while California, a community property state, provides that except upon express agreement of the parties, a court shall "divide the community estate of the parties equally."

Cal. Fam. Code § 2550, with spouses retaining their separate property for themselves. What is the best approach?

Interestingly, the approach of Washington, a community property state, closely resembles that of Montana, a separate property state, which also allows for equitable apportionment of all assets whenever acquired. Similarly, North Carolina's rigid division between separate and marital property and preference for equal division resembles the approach of California, the most mechanical of the community property states.

One could argue that North Carolina and California more accurately reflect each spouse's individual property rights and autonomy. Spouses may be entitled to share in assets acquired by the labor of their spouses during the marriage, but they have no claim to property acquired by gift, or before the marriage.

One could respond that Washington and Montana's approaches allow for greater equity. Where one spouse is extremely wealthy, regardless of the source of the wealth, it seems inequitable not to consider that wealth in property division. Particularly if the other spouse has lower earning capacity or savings in part because of reliance on the other spouses' wealth, that should be considered in dividing property upon divorce.

4. Professional licenses and degrees. *Cameron and Cody were married while they were in college. After their marriage, Cameron went to medical school and Cody became a schoolteacher. During medical school, Cody's salary provided the sole support for the couple and most of the support during Cameron's residency. Shortly after being licensed to practice medicine, Cameron filed for divorce. Between them, the parties have few assets besides the medical license, which is estimated to increase Cameron's earning potential over a 30-year career by $10,000,000. Cody argues that the value of the license should be equitably divided between the parties.*

Is the value of the license marital property that can be distributed between the parties? Should it be? What does the North Carolina statute say about the issue? What are the arguments from the Washington statute?

Cody would be out of luck in North Carolina, whose statute expressly provides that "[a]ll professional licenses and business licenses which would terminate on transfer shall be considered separate property." North Carolina's statute does provide that courts should consider "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse" in dividing the marital property, but here Cody and Cameron have almost no marital property to divide. Washington's statute does not so provide, and one could argue that because a medical license is clearly not separate property (property owned before marriage or acquired by gift or inheritance after), it must be community property. But (as discussed in the excerpt from *O'Brien v. O'Brien*) that leaves the question of whether a license is property as all. Although a license cannot be transferred, it certainly can be used, and may bring great value to its holder. But because that value depends on future work by the holder, it may seem unjust to require a distribution of that value now. A counterargument is that where the efforts of the other spouse made it possible to acquire the license, and the spouses have few other assets, it may seem unfair to deny that spouse a share of those future earnings. No state now takes this approach, but states do consider each spouse's earning potential and contribution to that earning potential by the other spouse. These questions may hit home for your students: after all, they all expect to have a valuable professional license soon and may already be supported by a working partner.

§3.5 Unmarried Partners....728
***Wilbur v. DeLapp*....728**
***Tompkins v. Jackson*....731**

Marriage rates are at historic lows and rates of nonmarital cohabitation are at historic highs, but property law continues to be built around marriage. Although a few states provide significant

rights to division of property acquired during a nonmarital relationship, most states greatly limit rights to nonmarital property division, perhaps even more than they did in the 1980s. This issue returns to a number of familiar themes including (1) formal versus informal allocation of property; (2) allocation based on intent versus public policy; (3) express versus implied intent; (4) statutory interpretation; and (5) gender equality.

Wilbur v. DeLapp provides a classic set of facts for property distribution after a relationship. The parties have lived together for 18 years, with the man earning most of the income and the woman working largely as a homemaker and also contributing her separate property to acquire and maintain property titled in the man's name. When they separated, she was 63, possibly too old to begin earning a substantial income, and has no retirement account.

Here are some questions you can use to take students through the case. What considerations does the court use in determining whether to divide the property between the parties? The court states that intent of the parties is the "primary consideration" but that it also can use its "equitable powers to reach a fair result." What evidence is there of intent of the parties? The court finds implied intent from the couple's actions in contributing jointly to the property titled in the man's name, their plans to retire together, and his saying he would take care of her in her old age and making her the beneficiary on his retirement account before their separation. It orders that the value of the property—the home, the land, the trailer, the membership in the trailer park, and the pension account—be split between them. He gets the home and the land, she gets the trailer and membership, and he pays her the $16,000 to make up the difference in value.

Ask how you would challenge intent if you were representing Noel Lee DeLapp. First, as he argues, contrary intent can be implied by his titling the property in his name alone. Had they intended to share the property, it could have been titled in both of their names, or they could have married, creating community property rights. Second, all of the evidence concerns his intent to support her while they were in the relationship; it does not necessarily reflect his intent to support her if they broke up. Third, although she contributed her funds to the house, she also lived in it during the relationship. Why should she be entitled to more?

What are the counterarguments? First, a long-term relationship may be looked at as an implied partnership, in which both parties assume they are contributing to a joint project whose profits they intend to share. One would not, as Wilma Jean Wilbur did, spend all one's resources on property titled in the name of the other without that kind of implied understanding. Second, as a matter of equity, when one party gives up time and opportunities for salaried work in reliance on that partnership, it seems unfair to deny that party any support once the relationship ends. Third, this is how the courts would divide property after a long-term marital relationship; the policy concerns seem the same after a long-term nonmarital relationship.

Tompkins v. Jackson presents a very different take on nonmarital relationships. The court considers several legal arguments for distributing part of Curtis Jackson's (50 Cents') wealth to Shaniqua Jackson, his partner of 13 years, and rejects them all. You might take the students through the case by going through each of the legal doctrines, the argument for each, and why the court rejects them.

Note 2. *Why does the court hold that Ms. Tompkins has no property or contract claims against Mr. Jackson? Note that although the parties disagreed about the facts, because the case was decided on a summary judgment motion by Mr. Jackson, the court had to resolve conflicts in their testimony in favor of Ms. Tompkins.*

Breach of contract. Contract claims arise from enforceable agreements to exchange something of value for consideration. Ms. Tompkins argues that the parties agreed that in exchange

for her homemaking and domestic services and mental, emotional, and financial support, he would work hard to become a recording artist and share the profits with her. The court rejects this claim because it holds that services arising from love and affection in a relationship cannot form the consideration for a contract. Further, as a contract to be performed in more than one year, the contract must be in writing to comply with the Statute of Frauds. Although there is a writing from 2005, Jackson's email stating that Tompkins "can have the house" and he would have "them put it in her name," and that he would always take care of her, the court holds that this writing does not specify which of Jackson's two houses it refers to, or when the transfer was to occur.

Quantum meruit claims compensate those who provide goods or services to another with a good faith expectation of payment. Although many jurisdictions treat quantum meruit as an exception to statutes of frauds and other formal contractual requirements, New York does not. *Snyder v. Bronfman*, 921 N.E.2d 567 (N.Y. 2009). Therefore, the same objections that applied to Tompkins' breach of contract claims apply here.

Unjust enrichment. The court also dismisses Tompkins' unjust enrichment claims because it finds that Jackson was not unjustly enriched. Given the usual exchange of goods and services between domestic partners, it is not unjust to deny compensation. Further, Tompkins benefitted from financial support during the relationship, and will continue to benefit from the child support for her son with Jackson.

Joint venture. The court also dismisses the argument that Tompkins' assistance in establishing Rotten Apple records makes it a joint venture, because although she did provided money to buy equipment for the studio, she did not contribute specific skills or establish any control of the venture.

What are the responses to these holdings? First, if services provided out of love and affection cannot be the basis for an agreement to share property, nonmarital partners can never share property based on uncompensated caring work. Second, where a party has substantially changed position and performed all or part of her obligations under an oral contract, the doctrine of part performance may excuse the lack of a writing.

A deeper objection is that even absent an enforceable contract, public policy should require sharing of property between partners who have contributed to each other over a long relationship. This approach is taken by Oregon law, but apparently firmly rejected in New York. What justifies this rejection?

This gets into the general question raised by **note 4**. *Which property implications from nonmarital relationships best satisfy the reasonable expectations of the parties? Which best protect gender equality? Some judges and scholars argue that to treat cohabitation like marriage violates the expectations and autonomy of parties who choose not to marry. Further, they assert, holding that property must be divided on dissolution relies on older, gendered assumptions that wives were financially dependent on their husbands and could not support themselves. E.g., Naomi Cahn & June Carbone,* Blackstonian Marriage, Gender & Cohabitation, *51 Ariz. St. L.J. 1247 (2019). Others, in contrast, argue that when parties support each other in long-term cohabiting relationships, they reasonably expect to share the benefits gained during the relationship. Denying that shared support outside of marriage may even deny individuals autonomy by forcing them to marry in order to secure their rights. Finally, because one party in a relationship often bears a greater burden of work within the home; denying that party a share of the property acquired during the marriage continues an inequitable devaluation of that work and disadvantages those (still usually women) who do it. See, e.g., Courtney Joslin,* Autonomy in the Family, *66 UCLA L. Rev. 912, 965-67 (2019). Which arguments are most convincing to you and why?*

The note lays out the arguments and counterarguments, but you might get your students to articulate them more clearly if you ask them to step into the shoes of someone arguing for one position or another. Imagine that a bill is before the state legislature in New York adopt a statute providing that property acquired by either party to nonmarital "domestic partnership" will be equitably divided like property between married partners. What expectations and gender equality

arguments would they make if they were lobbyists for an organization opposing the bill? What if they were lobbying for it? (To avoid encouraging statements that will insult or offend parts of the class, you may want to tell them not to make arguments about the importance of marriage and the morality of nonmarital relationships. This would be a wise decision to make as a lobbyist in New York, where insulting either marital or nonmarital relationships or those that enter into them would alienate many lawmakers.) One issue that is not discussed in the notes is how should domestic partnerships be defined. Should it be limited to situations where parties live together most of the time? This would exclude parties that, like Tompkins and Jackson, often live apart for work or other reasons. What about relationships where parties have had sex with other people, or occasionally separated? Does that defeat the concept of domestic partnership, or does it reflect the reality that nonmarital relationships, just like marital ones, don't always look like those portrayed in *Leave it to Beaver*?

5. Income, race, and nonmarriage. *Although nonmarital cohabitation is common for all groups, marriage is increasingly a "marker of privilege." Marriage is much more common for higher income and college educated people. Four in 10 people cohabiting, moreover, report that their or their partners' financial instability is a significant reason they do not marry.* Marriage and Cohabitation, supra, *at 16, 35. While cohabitation rates are similar across racial and ethnic groups, marriage rates differ sharply.* Id. *at 16. Older analyses attributed differences in marriage rates to preferences and attitudes, but more recent research suggests that structural barriers to marriage are more important. For example, surveys show that Black Americans value marriage as highly as other groups, but that, particularly for low-income Black heterosexual couples, financial instability and other factors often keep marriage "out of reach." Robin A. Lenhardt,* Marriage As Black Citizenship?, *66 Hastings L.J. 1317, 1350 (2015). If nominally neutral rules about the property implications of nonmarital relationships have the potential for disparate impact on the basis of race, does that affect your view of those rules?*

How might income and race have impacted the judges' perceptions in Wilbur v. DeLapp *and* Tompkins v. Jackson*? For more background, the judge in* Wilbur v. DeLapp *is a white woman who later became Chief Judge of the Oregon Court of Appeals, and the judge in* Tompkins v. Jackson *is a Black woman who was later promoted to the New York Appellate Division. Do these identities matter in these decisions or your perception of them?*

There are convincing arguments for and against division of property arising from nonmarriage, but the facts about who gets to marry provides a powerful argument for greater recognition. The law regarding division of property after marriage seeks to support and create stability for spouses and children. But if marriage is less accessible to lower-income people and people of color, the law denies that support to those who need it most. This reality would also undercut arguments that awarding property at the dissolution of nonmarital relationships undermines autonomy, because it shows that not marrying is a product of circumstance rather than choice.

We were somewhat worried about putting *Tompkins v. Jackson* in the materials for fear that students and professors would use it as a vehicle for reciting racist tropes about Black nonmarriage and "culture." We summarized the facts at the beginning of the case not only because both because the recitation was quite long, but because it was so disdainful of both Jackson and Tompkins and their relationship that it might encourage those tropes. We noted Judge Edmead's race both to highlight that Black people do not just appear in the law as rap stars and their girlfriends, but also to highlight that race does not dictate one's opinion on nonmarital relationships.

§4 Entity Property.....742
***Berle & Means, The Modern Corporation and Private Property* (1932) 742**

The contrast between the Berle and Means and Butler excerpts stem partly from the different times in which they were writing (the Great Depression versus the "greed is good" 1980s), but also represent continuing differences in perspective on corporations and the public interest. Berle and Means argue that the division of ownership and control in corporations is so significant that we can no longer rely on the effects of ownership to motivate and inform owners as to the most efficient use of property. They further argue that the tremendous influence and reach of corporations (which has grown exponentially since they wrote) dictates a greater public role in managing them. Butler writes from the perspective that developed later, and which is still dominant in corporate theory, that corporations emerge to reduce the transaction costs that would otherwise exist in making the many on-going contracts to acquire sufficient goods and services to produce products on a large scale; they are therefore viewed as a "nexus of contracts," bringing goods, services, and space together through hierarchical decision making rather than contracts with different individual providers. This system requires the managers of the firm to both know what is in the best interests of the firm and act to achieve it. Butler argues in favor of the Efficient Markets Hypothesis, which in this context is taken to mean that although shareholders do not have sufficient incentives or power to understand and control what is happening at firms, they are incentivized to pay attention to what might affect stock prices and have the power to respond by investing in other assets or even removing their money from the market. Stock price, moreover, reflects efficient management. Managers, in turn, are incentivized to manage efficiently to maximize stock price and preserve funds to the corporation. Precisely because of the importance of corporations to the public interest, the law should leave them alone and give managers more freedom to manage corporations as they deem in the corporation's and their own interests.

Note 2. *As Berle and Means noted, how serious this divergence between principal and agent is "will depend on the degree to which the self-interest of those in control may run parallel to the interest of ownership." What might lead managers to have different interests than shareholders?*

The Efficient Markets Hypothesis does not respond to all divergence between manager and shareholder interests. Managers may be interested in short term increases in stock prices that will lead to promotions and larger bonuses, but may be antagonistic to stable value of corporate stocks. Their salaries are not formed solely of stocks; to the extent that part of them are, they have greater ability to predict and react to market changes than investors. (Insider trading laws, however, prohibit managers from trading based on non-public information.) In addition, managers may be prevented by corporate culture or even legal sanctions from correcting errors that if revealed would negatively affect the corporation. Shareholders, many of whom hold stocks without active management for retirement and long-term savings, may be hit harder by long term dips in stock prices, and less able to adjust investments to respond to market changes.

If these mechanisms fail, what other recourse do shareholders have?

In addition to attempting to enforce loyalty or create effective voice, there is in most circumstances exit (to use Albert Hirschman's framework for a moment), and this question can be used to get the students to think about the circumstances in which shareholders (owners) might choose each option. As noted above, efficient-markets perspectives tend to emphasize the value of exit, and for many investors, that will both be the best option to respond to agency problems and also something of a discipline for managers. But information costs can make it hard for investors to know when to exit and it can be reasonable for a variety of reasons to try to influence managerial behavior (if the leverage is available), rather than exit.

Note 3. *What might undermine the ability of shareholders to price the structure of corporate management accurately? When might it be better to regulate governance rather than rely on price mechanisms, which depend on shareholders who are dissatisfied with management being able to sell their shares?*

Shareholders have limited information about the workings of corporations; even to the extent that such information is available, their limited stake in the corporation and limited ability to control it would make it irrational to spend significant time acquiring such information. A counterargument is that most investment is made through large institutional investors such as pensions and mutual funds. Such institutional stock purchases are made by individuals in the business of understanding corporations and predicting stock prices; these purchases are so large that they do have the ability to shift the stock price. Still, some information is not available to even these investors. Moreover, as the subprime crisis made clear, their primary focus is on stock price, not the underlying value represented in the stock. Perhaps this suggests that governance controls are most necessary either where consumers are particularly vulnerable to information failures or where the consequences of managerial malfeasance are particularly severe (or both).

Note 5. *It is a traditional assumption of corporate law that managers are obligated to act on behalf of shareholders as the owners of the entity. But what obligations does management have to other stakeholders in the entity, such as employees, bondholders, or even the community in which the company does business?*

Professor Kent Greenfield has argued that employees should be represented on the board of directors, and that directors' fiduciary duties should extend to employees, not just shareholders. What consequences would an expanded view of corporate ownership hold? What are the best arguments in favor and against the traditional view of the obligations of management to shareholders as owners?

At a minimum, it would undermine the principle represented by cases like *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) and *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) that it is impermissible for corporate management to act to protect the interests of workers and the community generally unless those considerations further shareholder interests. It might also include protections for workers and perhaps other important community representatives similar to those that exist for shareholders, such as fiduciary responsibilities, rights to vote for directors, and perhaps worker or community representation on corporate boards.

There are several arguments against such measures. One is that shareholders are "owners" of the corporation in the way workers or communities are not. Another is that the existing contracts between workers and corporations are already efficient, in that workers choose to sell their labor to the corporation willing to pay them the most for the best conditions; intervening in corporate governance on behalf of workers would distort the contracts available to workers, undermining the market mechanism that produces efficient contracts and eventually reduce the choices of contracts available to workers. A final objection is that corporate management requires a great deal of expertise and efficiency to reach the best results; further interference with managerial discretion would lead to poorer results, and ultimately fewer benefits to both workers and the public interest. Worker governance, moreover, may be in conflict with the interests of the corporation, as workers will favor increased salaries and benefits even when those make corporations less competitive.

There are several responses and arguments in favor of such measures. The first is that it is not clear why holding a tiny fractional interest in the profits of a corporation is a greater investment or provides a greater ownership interest than committing one's livelihood to the corporation as an employee. Indeed, because many corporate workers have pensions vulnerable to corporate bankruptcy or other insolvency, workers have a vested ownership interest even as conventionally defined. The second is that the shareholder vulnerabilities and absence of control that justify

existing shareholder protections apply even more directly to the position of workers. While shareholders have a fraction of their net worth invested in corporations, workers are dependent for their entire income on their corporate employers, and while shareholders can relatively easily sell shares and invest elsewhere, it is much more difficult for workers to quit their jobs and find work elsewhere. Finally, workers and community members may actually be more interested in protecting the long-term health of the corporation than either shareholders or managers. Because shareholders may easily sell shares after realizing short term gains, they are less committed to the long-term health of corporations. High level managers, moreover, have more employment options than lower-level workers who have less ability to move and market their skills elsewhere, and may even be incentivized to engage in risky behavior producing large short-term gains. Ultimately, moreover, if we justify the power and discretion accorded corporations by their benefits to society, perhaps a greater segment of society should have a role in their governance.

9. Present Estates and Future Interests 755

Themes

The estates system is part of property law that many property teachers love and many students hate. Teachers (and a few students) love it because of its origin in the history of the movement from medieval to modern law and because of its tricky logic puzzles. Students often hate it because they find it technical and incomprehensible, and because it is laden with historical rules, some of which no longer have contemporary significance.

In some ways, however, the estates system is at the core of what makes property law different from contracts. A core principle of contract law is *freedom of contract*, subject to regulations designed to protect against fraud and fundamental unfairness. A core principle of property, on the other hand, has historically been the *promotion of alienability* – a goal achieved by consolidating property rights in the hands of the "owner" in order to facilitate changes in use and ownership as well as to achieve wide distribution of ownership and authority over land. Rather than giving individuals freedom to create whatever packages of property rights they wish, the traditional rules of the estates system limit the allowable packages. They do so not only to prevent the re-emergence of feudalism but to ensure that the market system works well.

The 2008 subprime crisis, which we address in depth in Chapter 11, is of continuing interest to students and is a useful way to show the contemporary significance of the ideas behind the estates system. Securitization of mortgages reshaped and divided property so thoroughly that individuals no longer had the incentive or ability to monitor the value of those divided packages. The bursting of the housing bubble revealed their lack of underlying value, leading to widespread failures in the banking and credit industries. Once the bubble burst, moreover, the structure of property rights in these securitized packages made the transaction costs of renegotiating mortgage loans to better reflect the value of the property extremely difficult. In short, the subprime crisis makes it easy to demonstrate the externalities that can be caused by unregulated packages of property rights.

However framed, the materials raise the following themes:

1. *Disaggregation v. consolidation.* On one hand, the rules in force allow property owners to take individual strands in the bundle of rights that accompanies fee simple ownership of property and to divide them among more than one party. In this way, the law promotes both freedom of contract and the freedom of property owners to control, not only the *right to use* their property, but the *right to transfer* it by deciding to transfer limited sticks in the bundle of property rights while keeping the other sticks for themselves or transfer to different grantees. On the other hand, the rules in force limit the kinds of disaggregated bundles of property rights that can be created, restricting them to certain familiar and useful forms.

2. *Combating social hierarchy and promoting individual autonomy.* Feudalism was partly premised on creating a hierarchical social structure in which individual property owners' powers over their property was limited by their obligations to those individuals higher up in the hierarchy from whom they held their property rights. The rules regulating the transfer of property and the creation of future interests are intended to ensure that power over property is shifted downward to actual possessors of property, allowing social space for freedom of movement and individual liberty. The rule against perpetuities, the abolition of fees tail, and the rule against unreasonable restraints on marriage, for example, intervene to free property from grantor restrictions deemed too far from the grantor's legitimate interests or too invasive of the autonomy of the possessor. At the same time, other rules, such as the prohibition on waste, limit the autonomy of present possessors to protect future possessors of property.

3. *Dispersal of access to property.* Concentrating power in present possessors also ensures widespread dispersal of access to property ownership. Many rules of the estates system are intended

to ensure that property remains available on the market for transfer to other users who might put that property to better use and also to ensure that *many* people can participate in the market by obtaining access to property. Rules promoting alienability not only decrease the power of grantors and their successors in interest to control the property of large numbers of persons, but increase the number of persons who can obtain access to and ownership of real property. By promoting widespread dispersal of property ownership and by concentrating powers over property in current owners, these rules arguably are intended to promote distributive justice. At the same time, as suggested by the history of the fee tail in the United States or enclosure in the England, removal of restrictions on property may facilitate its acquisition and consolidation in the hands of the most wealthy or powerful.

4. *Promoting productive use of property.* Dead people are not good judges of the most productive use of land; indeed, people contemplating their deaths may no longer be interested in promoting it. Protecting control of property by present possessors may ensure that it is put to the most valuable use as determined by those most interested in and best able to judge what the most valuable use is. At the same time, continuing restrictions may protect uses of high value but fewer short term returns on investment; the tension between development and preservation seen in Chapter 6 on nuisance appears again here.

5. *Antidiscrimination principles.* As in the area of servitudes, where racially restrictive covenants are illegal and unenforceable under multiple sources of law, the rules in force prevent, in at least some cases, the creation and enforcement of discriminatory conditions on property. At the same time, enforcement of discriminatory conditions is permitted in certain instances. As previously noted, the antidiscrimination materials shed light on the otherwise incomprehensible (or at least hard to comprehend) principles underlying the technical property rules associated with servitudes and the estates system. Antidiscrimination law, as applied to real property, suggests that the freedom to place conditions on grants of one's property may result in the denial of similar rights in others and may effectively create a social or racial caste system. For this reason, property rights must therefore be allocated, defined, and limited so as to prevent the wrongful exclusion of particular groups from the market, to prevent the creation of illegitimate social hierarchies or concentrations of power, and to ensure widespread access to the market on equal terms.

These considerations can shed light on the role played by the technical rules associated with the estates system, including the rule against unreasonable restraints on alienation and the rule against perpetuities. One fundamental purpose of these rules is to foster efficiency by ensuring that property is available to satisfy current needs. However, another purpose is to prevent the re-establishment of feudalism. The promotion of alienability as a central organizing concept of property law is partly derived from the historical struggle to shift power *downward* to the individual possessors and workers of the land. One goal of this struggle is to ensure widespread access to property, to foster the ability of all persons to exercise autonomy and liberty in participating in the market on equal terms, to prevent the recreation of illegitimate concentrations of power, and to ensure that resources are available for use to satisfy current social needs. Regulatory rules are needed to prevent private property systems from degenerating into centralized power structures. There is therefore a deep analogy between the principles underlying antidiscrimination law and the principles underlying the estates system.

At the same time, the rules favoring individual ownership and limiting restrictions on property do not always separate ownership of property from social status. As noted in the introduction to the book, as of 2020, the top 10% owned 70% of all wealth in this country, with the bottom 50% owning only 1%, a product of growing wealth inequality since the 1960s. It is at least arguable that policies enhancing alienability and control by present possessors contributed to this trend. At the same time, the current period is one in which the power of the dead hand to control

property is also increasing, further facilitating the concentration of wealth and the ability to protect it from taxation or creditor interests.

§1 Division of Ownership over Time 755
§2 Historical Background 757
§2.1 Medieval Roots 757
§2.2 Modern Technology 763

We changed the subtitle of this section from *From Feudalism to the Market* because that subtitle overemphasized the discontinuity between medieval and contemporary times, both obscuring the degree to which the development of the law reflects the push and pull between grantors and grantees and owners and state that continues to this day, as well as the degree of hierarchy reflected in our modern system. We suggest that you not focus on getting students to understand how the system worked, but instead on how owners sought to structure transactions to evade legal requirements, and the dance this created with courts and legislature. This overview also connects the origins of future interest law to the effort to reduce or avoid taxation, which is one of the primary functions of estate planning today.

The material on the Rule in Shelley's Case, the doctrine of worthier title, and fee tail is included in this section because it is largely (if not completely) of historical importance. A mnemonic to help remember the difference between the rule in Shelley's case and the doctrine of worthier title is that the latter has two Os in its name, and the future interest goes to *O*'s heirs. Trusts, also mentioned in this section, are of greater importance today than historically, but their relationship to the Statute of Uses is not. A new section in §3.5 discusses modern trusts in more detail.

The new §2.2 discusses the role of reproductive technology in inheritance and future interests. Although there's lots of interest in this subject, most cases do not involve future interests, but instead involve social security survivor's benefits. These cases generally turn on state statutes, which were not written to cover children conceived after the death of a biological parent. Some cases rely on the general intent of the statute and consider children conceived after death as the child of the decedent if that was the intent of the parent. More cases, however, apply a wooden textualism to hold that because the statutes do not cover children conceived after death, they should be construed to exclude them. The statutes that have been enacted tend to emphasize formal consent, requiring specific written consent to use genetic material post-death and conception within a few years. These statutes likely respond to concern about evidence of a decedent's wishes after death, but also may raise concern about undermining testator intent that is less formally expressed.

§3 The Contemporary Estates System 764
§3.1 Fee Simple Interests 765
A. Fee Simple Absolute 766
B. Defeasible Fees 766
§3.2 Life Estates 769
A. Reversions and Remainders 769
B. Contingent and Vested Remainders 770
C. Destructibility of Contingent Remainders 771

This section explains the components of the property interests which encompass the various estates. Students often find this material confusing and bizarre. Emphasize that they are

not alone—law students have hated this stuff for generations. You might also tell them that there are just a few central concepts creating distinctions between the estates: (1) potential duration: potentially forever (the fees simple), for life (the life estate), and any fixed period (the term of years); (2) whether it is defeasible, meaning that the present owner can lose it, and whether the loss is automatic or requires action by the future interest holder; (3) who holds the future interest (the grantor or a third party); and (4) the certainty of the future interest (whether it is vested or contingent). Unlike much of law school, mastering these conveyances is mostly a matter of rote memorization. The chart on page 755 is a helpful tool for doing this.

The materials do not emphasize (1) the distinction between springing or shifting executory interests or (2) the destructibility of contingent remainders, because the first is largely relevant only for understanding the second and the second is largely of only historical importance.

Professor Paula Franzese has created a mnemonic to remember the initials of the Fee Simple Determinable/Possibility of Reverter: Frank Sinatra Doesn't Prefer Orville Redenbacher. Imagine, for example, that Frank Sinatra has created the following conveyance: To Orville Redenbacher, so long as popcorn is never served on the premises. (Which is of course a fee simple determinable.) You can find this in Paula Franzese, A Short & Happy Guide to Property 6 (2011), but she also teaches this in the BarBri Bar Prep course, and famously was once accosted by a successful bar taker on a subway, who stared at her for a moment to place her, and then blurted out, "Frank Sinatra Doesn't Prefer Orville Redenbacher!"

We have created some additional mnemonics building on Franzese. Frankly, remembering these is probably just as much work as just remembering the names of the conveyances, and somewhat less useful, but they might at least inject a note of levity.

Fee Simple Subject to Condition Subsequent/Right of Entry: Frank Sinatra Sings to Comfort Some Rebellious Elephants. The imagined conveyance could be "Orville to Frank Sinatra, but if the elephants ever revolt, Orville may reenter."

Fee Simple Subject to Executory Limitation/Executory Interest: Frank Sinatra Sang to Every Lizard and Every Iguana. The imagined conveyance could be "Orville to Frank Sinatra so long as the reptiles are entertained, but if they get bored, then to Dean Martin."

It may be helpful to run through these problems as you are teaching the materials that relate to them.

Problem 1. *O* to *A* and her heirs. *What estate does* A *have? What result if* A *dies, leaving the property in her will to her friend* B*, and her heir* C *claims the property for himself? What if* A *sells the property to* D*, then dies leaving the property to* B *in her will?*

This is very basic, but students often miss it. *A* has a fee simple absolute. If *A* leaves the property to *B* in her will, *B* gets it and the heir *C* is out of luck. Similarly, if *A* sells to *D*, then dies leaving the property to *B* in her will, *B* is out of luck. A fee simple, in other words, is the power to determine what happens with the property in the future, whether by sale, devise, or inheritance.

Problem 2. *O* to *A* for life, then to *A*'s children. A *is alive and has one child,* C. *What estates do* A *and* C *have? If* A *sells the property to* B*, then dies, who owns the property?*

A has a life estate, *B* has a life estate per autre vie, and *C* has a vested remainder subject to open. If *A* sells the property to *B* then dies, *C* owns the property in fee simple (but has to share it with any other children of *A's* born by that point).

Problem 3. *O* to *A* so long as the property is used as a school. *What estates are created? What happens if the property stops being used as a school after* O *dies?*

A has a fee simple determinable and *O* has a possibility of reverter. If the property stops being used as a school after *O* dies, the property automatically goes to *O*'s heirs or devisees (or possibly assignees if possibilities of reverter are transferable).

Problem 4. *O* grants a strip of land to *A* "for use as a railroad, but if the property ever ceases to be used for railroad purposes, *O* may terminate the grant." *What does* A *have? What does* O *have? What result if the property was converted to a hiking trail in 1970 and* O*'s successors file a quiet title suit in 2000?*

A has a fee simple subject to condition subsequent, and *O* has a right of entry. Although the 30 years of use after conversion would normally give rise to adverse possession in *A* or its successors, because rights of entry do not vest automatically, the court in *Swaby v. Northern Hills Regional Railroad Authority*, 769 N.W.2d 798 (S.D. 2009), held that the statute of limitations had not yet begun to run. Some courts, however, will bar the future interest holder from exercising the right of entry after long delay as a matter of laches, or possibly under statutory limitations specific to future interests in the grantor.

Problem 5. *O* to *A* for life, then to *B* if she graduates from law school. *What does* A *have? What does* B *have? If* A *dies before* B *graduates from law school, who gets the property? What happens if* B *later does graduate?*

A has a life estate, and *B* has a contingent remainder. If remainders were still destructible, the property would revert to *O* if *B* had not graduated from law school by the time *A* died. With the destructibility of contingent remainders, if *A* dies before *B* graduates, the property reverts to *O*, and later springs to *B* after she graduates from law school.

§3.3 Interpretation of Ambiguous Conveyances 772
***Wood v. Board of County Commissioners of Fremont County* (1988) 772**
***Edwards v. Bradley* (1984) 775**

The cases in this section deal with situations in which courts view the conveyance as ambiguous, such that it is not clear what estate was created and whether or not a future interest was intended to be created at all. These cases demonstrate that two competing policies operate here. The first policy is to effectuate the intent of the grantor; this policy furthers the interest in granting owners of property power to control the transfer and disposition of their property by conditioning its transfer and dividing up particular interests in the property among several recipients. Different ways to resolve ambiguities include attempting to enforce the result the grantor probably intended (a subjective test) or the result most grantors would intend (an objective test). The second policy is to promote the alienability of property by aggregating interests in current possessors, thereby creating a presumption against the creation of future interests; this policy furthers the goals of decentralizing power over property by ensuring that power to control property resides in current possessors, thereby promoting both the autonomy of individual property owners and efficiency in allocation of resources. These policies may conflict in particular cases when one result accords with the probable intent of the grantor and a different result would promote the alienability interest. When the conveyance is ambiguous, courts sometimes must choose between these conflicting ways of resolving the ambiguity.

Quick Review: *How should the Woods have written the grant if they wanted to retake the property once it was no longer used as a hospital?*

They should have written the grant as either a fee simple determinable or fee simple subject to a condition subsequent, by adding either "so long as a County Hospital is maintained on the premises, after which it will revert to the grantor" or "on condition that a County Hospital is maintained on the premises; and if the condition is violated the grantor may reenter." While technically the possibility of reverter would not need to be specified in the first grant, because enforcing it would require a court to invalidate a charitable gift, it is likely best to be as clear as possible.

Note 4. *The Virginia Supreme Court resolved what it saw as an ambiguity in the conveyance partly by reference to the fact that the property was subject to a restraint on alienation – a restraint that would be valid if attached to a life estate but void if attached to a fee simple. The presumption against forfeitures would suggest that the fee simple be chosen over the life estate, the restraint held void, and the property left with a fee simple absolute. The court refused to adopt this approach, instead focusing on the fact that the grantor intended to create a valid restraint on alienation and the only way to achieve that result was to interpret the conveyance as creating a life estate. Which of these interpretations is preferable and why?*

The court focused on the policy of freedom of contract and achieving the intent of the grantor. If the result the grantor intended to create is one that the law allows the grantor to create, then it would seem that the court should determine the actual intent of the grantor and interpret the conveyance to achieve that intent. As long as the proper form is used, the law has no strong interest in preventing the estate (including the restraint on alienation) from being created. The presumption should be in favor of allowing owners to create estates they want to create and limits should be placed only when a sufficiently strong policy suggests that owners should not be able to create the estate they want to create.

The counterargument is that restraints on alienation are so problematic that any doubts should be resolved against creating future interests and against finding restraints to be enforceable. When a conveyance is ambiguous, the court should err on the side of alienability, interpreting the estate not to create a future interest and the restraint not to be enforceable. This will consolidate interests in the original grantee, promote the alienability of property and protect the rights of owners in being free from control by preceding owners. At the same time, since the restricted owner has now died, the decision to interpret the will as creating a life estate does not restrict the property, but instead invalidates Margaret's attempt to disinherit one of her children for refusing to allow her to sell the farm away from them.

Note 5. *The changed conditions doctrine denying enforcement of covenants when circumstances have so drastically changed that they are no longer of benefit to the dominant estate has traditionally not applied to future interests*. Prieskorn v. Maloof, *991 P.2d 511 (N.M. Ct. App. 1999). Some states, moreover, have statutes that remove future interests from charitable properties where the restrictions substantially impede the charitable organization in achieving its purposes or become "unlawful, impracticable, impossible to achieve, or wasteful." See, e.g.,* Wash. Rev. Code *§ 11.96A.127;* N.Y. Real Prop. Acts Law *§ 1955;* Mich. Comp. L. *§ 451.926. Should a court grant relief from such restrictions in the absence of a statute?*

The law of charitable trusts arguably allows this already through the *cy pres* doctrine which allows a court to change the object of a charitable trust if the original purpose becomes impossible to fulfill. On the other hand, when a trust includes a future interest, this suggests that the grantor wanted the ownership of the property to shift if the original purpose of the trust were impossible to fulfill; the owner did not want the ownership to be retained by the original beneficiary if changed circumstances led that beneficiary to act in a way contrary to the grantor's intent. The future interest allows the property to shift to another user and thus the changed conditions doctrine is both unnecessary to free the property from an obsolete restriction and violates the intent of the donor.

§3.4 Waste 779
***McIntyre v. Scarbrough* (1996) 780**

The doctrine of waste highlights the potential conflicts created by the division of rights between present and future interest holders as well as the societal interest putting land to its most valuable use. Although most waste cases are resolved by default rules rather than close reading of grants, we have placed this subject with the materials on interpretation because these are default rules that grantors can draft around, and because it is helpful to study these materials in conjunction with the materials on life estates.

One way to teach the doctrine of waste is to ask about the wisdom of allowing owners to create life estates in the first place. It could be argued that life estates are so inalienable that they contravene the fundamental policy of structuring property rights so as to promote alienability. In addition, to the extent the rules of the estate system are intended to prevent grantors from exercising too much power over subsequent owners, interfering with their ability to exercise autonomy in controlling the property and devoting it to current needs and purposes, life estates may wrongfully deprive the life estate owner of the ability to exercise sufficient control over the property since it must be preserved as is for the next generation. The counterargument is that owners often want to ensure that property is used by their children and passed onto their grandchildren, and they have the right to so control the future use of their property. Moreover, if the property has little value in its current use, the life estate owner can obtain the consent of the remainder holders to change the use. If the life estate owner really wants to sell the property, she can also buy out the future interests and pay for this by the proceeds of the sale, thereby giving the remainder holders current money assets they can invest as they choose. Questions of waste, moreover, are not limited to the life estate context, but play an important role in the relationship between landlords and tenants and those between mortgagees and mortgagors.

The materials also raise the tension between preservation and development of property. The trend to permit ameliorative waste and some exploitation of natural resources on the land serves both the interest of the life estate holder and the interests of society in not having property held idle. At the same time, the prohibition on waste in these circumstances may protect the personhood value of property for the remainder holders, or preserve property in a natural state serving conservation interests.

McIntyre v. Scarbrough presents questions of waste in the context of a sale of land with a reservation of a life estate in part of the land. You might frame the conflict by asking why the parties structured the transaction in this way. Probably because Dillie McIntyre needed income in her old age, but didn't want to leave her home; the Scarbroughs wanted to purchase the land, and were expecting McIntyre to die soon leaving the entire estate to them. McIntyre likely got a below-market price in the sale because of her life estate. Of course, if the property is foreclosed upon because of failure to pay property taxes, the Scarbroughs lose their investment altogether.

This leads to the remedy of forfeiture. The case illustrates both the harshness and the reasons for the remedy. On the one hand, it seems cruel to evict an elderly life tenant from her home because she is in a nursing facility and has not been able to keep up the property. On the other, simply demanding damages in this circumstance will likely leave the Scarbroughs in the position of constantly monitoring the property and the payment of taxes to prevent permanent damage to their future interest. As the dissent notes, some jurisdictions only permit forfeiture in cases of intentional or affirmative waste. You might ask what justifies the distinction. From the perspective of the future interest holder, this distinction does not make sense: an owner like McIntyre who unintentionally allowed a property to deteriorate is no less likely to permit it to

happen again than one who intentionally damaged the property. If forfeiture is understood as a punishment and potential deterrent, however, it makes sense to reserve it for those who intentionally acted wrongfully.

Note 3. *[Discussion of* Melms v. Pabst Brewing*, which held that changed conditions could justify ameliorative waste]. The 1936* Restatement on Property *also encouraged this shift, providing that the duty of the life tenant is not to decrease "the market value of the interests,"* id. *at § 138, and that alternation is only prohibited if the remainder or reversion holders would have a "reasonable ground for objection thereto."* Id. *at § 141. What reasonable grounds for objection might there be to fundamental changes that increase the value of a property? Would preserving a family home be a reasonable ground for objection? What about preserving a wooded area in a relatively undeveloped state? For a critique of the majority rule (and a fascinating history of* Melms*), see* Merrill, supra.

This is largely a rhetorical question, but is intended to highlight the tension between development and preservation as well as the conflict between encouraging alienability and protecting identity interests in property. The Lovett and Purdy articles cited at the beginning of this section draw on a distinction that Morton Horowitz has made more generally, which is also raised in the majority and dissent opinions in *Prah v. Maretti*, that the public interest may no longer justify legal rules favoring development in all cases. The desire to preserve a family home or prevent development, moreover, may be one of the few justifiable reasons to create a life estate in property itself, rather than a trust creating a life estate in the value of the property.

The (in our opinion) architectural travesty of the 1950s and 1960s when beautiful older buildings were razed to make way for highways and ugly commercial developments may present other reasons for favoring an intent to preserve absent contrary grantor intent. At the same time, a bit of architectural ugliness may result in greater economic benefits and dispersal of property to the public as a whole.

As suggested by the facts in *Baker v. Weedon*, moreover, a preference against development may burden the life tenant with property of little utility only to secure a greater benefit for the remainder holders. This may seem unfair absent specific evidence of grantor intent (and indeed, even if such evidence exists). The facts *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. 1929), *aff'd mem. per curiam*, 245 N.Y.S. 402 (App. Div. 1930), *aff'd mem. per curiam*, 177 N.E. 186 (N.Y. 1931), present a different version of this problem. There, possessor had a life estate in one building among several buildings held by the remainder holders. If the parcels were all developed together, they would be of much greater value than if developed singly. The carrying costs of the single building, however, were more than the value the life estate holder could reap from them. In this case, the interests of the remainder holders are aligned with the public interest in the greatest value from the property.

§3.5 Trusts.....785
***A.* Private Trusts 786**
***Phillips v. Estate of Holzemann* (1998).....786**

The Eighth Edition contains a new, short, section on private trusts to reflect their significant importance in property and tax law. The materials are designed to be very straightforward, perhaps providing some relief in a challenging chapter.

Phillips v. Estate of Holzemann concerns a question students often ask about: What about trusts for pets? The case shows how easy it is to create a trust (no specific language is necessary, just the designation of a property for a specific beneficiary). The problem is that at the time, an animal could not be a beneficiary. The court resolves the problem by creating an "honorary trust,"

but today statutes specifically authorize trusts for pets and other private purposes. The court also holds that because the purpose can no longer be achieved (because the dogs are dead) the property goes back to the decedent's estate as a "resulting trust."

Note 4. *Why create a private trust?* Trusts are often used, as in *Estate of Holzemann*, to care for those who cannot care for themselves. They also may address some of the concerns with the rigidity of future interests and life estates by permitting the trustee to manage and sell the trust property in the interests of the beneficiaries. Another common use is to protect assets from creditors and other claimants. As the note shows, while most statutes limit some of these uses, some jurisdictions do not to attract trust business.

B. Charitable Trusts and the Cy Pres Doctrine 790
***Evans v. Abney* (1970).....790**

Charitable Trusts and the *cy pres* doctrine raise the tension between dead hand control and current societal interests quite directly. They also highlight the difficulty of discerning grantor intent, because they almost always do so in the context of circumstances the grantor never expected and could not have imagined. In these circumstances, the question becomes whether the court should focus narrowly on the (usually unhelpful) language of the grant or on the imagined context of the grantor facing circumstances she could not imagine. Because charitable trusts are encouraged and rewarded by the government, moreover, and because state attorneys general play a direct role in overseeing their administration, they also raise the entanglement between private transactions and governmental actions.

Evans v. Abney starkly presents issues of grantor intent, societal interests, and state entanglement. Rather than teaching the case here as part of the future interests materials, you may choose to teach it after *Shelley v. Kraemer*, as part of a unit on the state action doctrine. Senator Bacon of Macon creates a trust in his will leaving property for the creation of a park, Baconsfield. Through substantial investment by the city and federal government, the land becomes a beautiful park (you can find pictures online). He also restricts use of the park to "white women, white girls, white boys, and white children of the City of Macon." (Note the odd gender categories.) The U.S. Supreme Court holds that the fourteenth amendment prevents the park from continuing in its segregated form, and the question is whether it should revert to Bacon's heirs or can continue as an integrated park. (Note that the reversion upon failure of the trust is not mentioned in the will, but is implied as a matter of law. Some jurisdictions hold that the absence of such a reversionary clause is itself evidence of general charitable intent permitting reformation rather than failure of the gift.) The attorney general argues that *cy pres* permits the trust to be amended, but the trial court determines that would be contrary to grantor intent.

Note 1. ***Donor intent.*** *In applying cy pres to charitable trusts, the hypothetical inquiry is whether the donor, knowing of the changed circumstances, would prefer to have the charitable donation fail altogether or modified to serve a related purpose. In* Evans v. Abney*, how should we construct this hypothesized testator? Are we asking what Senator Bacon would have wanted in 1911 had the city refused to segregate the park (unimaginable in 1911), or what he would have wanted had he lived through the changes leading to the decisions that public segregation was unconstitutional and private segregation violated federal civil rights statutes (also unimaginable in 1911)? Which inquiry better respects the donor's wishes? Which better respects the donor*

himself?

The trial court's determination is not unreasonable given Bacon's statement that he is "without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common," and his lifetime support for white supremacy. But consider what this means: a declaration that Senator Bacon would not have amended his opinions in the face of the massive legal and popular changes that made his intent unconstitutional and condemned by federal law. Again, given the continuing resistance to integration in the 1960s, this guess about Bacon's reaction to changed circumstances was not unreasonable, but unless the court agrees that this resistance is justified, it denigrates his memory after his death.

A separate question is whether, in the face of unanswerable questions about the hypothetical intent of a grantor long dead, the state should apply a default rule construing a grant in favor of societal interests. As discussed in the notes, the trend represented by the *Restatement (Third) of Trusts (2011)* and the *Uniform Trust Code (2000)* seems to do just that, presuming a "generable charitable intent" to permit reformation rather than failure in almost all cases.

Note 4. State action. *In* Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held that judicial enforcement of a racially restrictive covenant to prevent a sale to a Black family constituted state action and so was prohibited by the fourteenth amendment. See Chapter 8, § 5.2.* Evans v. Abney*, however, holds that the reversion required by state statute after a trust fails because of violation of the fourteenth amendment is not state action. What justifies the difference?*

One can argue that in *Shelley,* state action existed because the state courts attempted to enforce the covenant by forcing a signatory (or a signatory's successor in interest) to comply with the covenant by refusing to allow that owner to sell the property to a Black family. The state coerced the owner who wished to sell and prevented willing parties from dealing with each other. In *Evans,* in contrast, no one asked the state to do anything. Rather, the owner gave away some portion of his property rights in the land and retained the remaining rights that had not been conveyed away. When the trust terminated, the ownership automatically reverted to the grantor's heirs; no state action in the form of a court judgment was necessary to effectuate this result. The fact that a lawsuit did occur, and that the grantor's heirs needed a court judgment to induce the owner of the park to relinquish it and return it to them, does not constitute state action. The court judgment merely confirmed what had already happened, i.e., that title had already shifted back to the grantor's heirs.

The counterargument is that it is formalistic nonsense to argue that a party called on the aid of the state to enforce the covenant in *Shelley* but that no one called on the aid of the state to force anyone to do anything in *Evans*. If it was the case that the title shifted "automatically" when the trust failed (a remedy implied by the law rather than specified in the grant), it is still the case that a court judgment was needed (1) to determine this fact (by interpreting an ambiguous trust) and (2) to enforce the trespass laws by forcing the current possessor to leave and transfer title to the grantor's heirs. In addition, the statutes in *Evans* that allowed owners to establish racially discriminatory charitable trusts constitute state action because they are laws passed by the legislature which enabled individuals to create unequal access to the marketplace; thus, the statute structured the market in a way that supported and furthered racial segregation.

One could also seek to distinguish the cases by their impact on equality. It may be argued that while enforcing the covenant in *Shelley* would further continuing segregation in housing patterns, the failure of the trust in *Evans* in fact results in the reversion of the property to the market, where ownership and occupation are necessarily open to all as a result of the *Civil Rights Acts*. Further, unlike the public market of housing sales in *Shelley*, the social practice of gift-giving and charity is an expression of individuality and private conscience and should not be regulated by the state.

One could respond that *Evans* furthers inequality in the public sphere no less than *Shelley*. First, the gift in question was devoted to a *public use*, and is not analogous to a private or religious gift in which the intent of the grantor should control. Second, the court in *Evans did* prevent willing parties from dealing with each other; the city wanted to admit Black residents to the park and the court intervened to prevent them from doing this. Third, the result in *Evans* conveyed a message of racial inferiority; the court forced the park to be closed rather than allowing it to admit Black persons. Finally, we intend the natural and probable consequences of our actions; enforcing the will of Senator Bacon does establish discriminatory intent since the court acts in a way that foreseeably and inevitably conveys a message of racial subordination.

Problem 1. *In the 1940s and 1950s, Georgia O'Keefe donated the important art collection of her husband, Alfred Stieglitz, and several of her own paintings to Fisk University, a historically black college in Nashville, Tennessee, which at that time provided a uniquely integrated cultural and artistic center in the South. The gifts were made with numerous specific restrictions including that the works could not be sold, that the photographs could not be loaned for display elsewhere, and that the works had to be displayed as an entire collection, in a room painted in a white or off-white color selected by O'Keefe. In 2005, in dire financial straits and unable to afford to show the collection, Fisk sought permission to sell some of the paintings. What should the court do? See* In re Fisk University*, 392 S.W.3d 582 (Tenn. App. 2011).*

On the one hand, the detailed terms of the grant reveal a desire to maintain a significant degree of control over the circumstances of its use, and sale and even display elsewhere are specifically forbidden. On the other, given the changing circumstances of Fisk University, complying with the bequest would mean both that rather than a "gift" the bequest would become a burden, and that the works would not be seen by the public at all or would revert to the residual beneficiary of O'Keefe's estate, removing them from the South. This would wholly violate the purposes of the gift.

Faced with this dilemma, the Tennessee Supreme Court determined that O'Keefe's general intent was not simply to benefit Fisk, but to make the pictures available to students and others who would not usually have access to art in the South. *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, 312 S.W.3d 1 (Tenn. 2009). A dissent in the case argued that the disposition should be consistent with a general intent to support Fisk in its educational mission. *Id.* at 20 (Dinkins, J. dissenting). On remand, the trial court found that sale of selected works from the collection would not be "as near as possible" to O'Keefe's intent, but approved an agreement with the Crystal Bridges Museum in Arkansas to share the collection, displaying it at both Fisk and Crystal Bridges, for $30 million.

Problem 2. *In* Hermitage Methodist Homes of Virginia, Inc. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990), a testator named Jack Adams died, leaving a charitable trust providing income to the Prince Edward School, "so long as Prince Edward School Foundation admits to any school, operated or supported by it, only members of the White Race." His will further provided that if the school should ever "matriculate … any person who is not a member of the White Race, no further payment of income shall be made" to the school, but all income should go to the Miller School. Further gifts were provided to the Seven Hills School and then to Hampden-Sydney College if the prior recipient violated the "whites-only" provision of the trust. The final beneficiary of the successive gifts over was Hermitage Methodist Homes of Virginia; this final gift had no racial restriction built in. At the time Adams wrote his will, Virginia Code §55-26 made it lawful to create a charitable trust for the education of white or "colored" persons but not of both. The statute was*

later repealed.

In 1987, the trustee sued the first beneficiary, Prince Edward School, because it had admitted Black students. The trial court held that all "racially discriminatory conditions of the Trust are unconstitutional and void" and determined that Prince Edward School should continue receiving the income from the trust. The Virginia Supreme Court reversed, holding that even if it were unconstitutional to enforce a restrictive condition, depriving Prince Edward of the income from the trust effected no such enforcement. The condition in the trust did not take the form of a condition subsequent but was, rather, a "special limitation" that ended Prince Edward's beneficial ownership interest automatically as soon as the condition was violated. Thus, no court action was needed to alter ownership of the income from Prince Edward. Because all of the educational institutions had admitted Black students, the interests in the trust proceeds went to Heritage Methodist Homes, which alone had no restrictions in its gift.

Professor Jonathan Entin reports the history of the Prince Edward School:

> *The Prince Edward School Foundation was founded in June 1955 to establish private schools for white pupils in the event that the federal courts ordered the public schools of Prince Edward County to desegregate. Such an order seemed certain because the county school board was one of the defendants in* Brown v. Board of Education. *The order finally came in 1959. Local officials responded by shutting down the public schools. At the same time, the Foundation opened a private school known as Prince Edward Academy that enrolled almost every white student in the county. The Academy continued to enroll a large majority of the county's white pupils for some years after the Supreme Court ordered the public schools reopened on a desegregated basis in 1964.*

Jonathan Entin, Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 Wm. & Mary L. Rev. 769 (1993). Does this knowledge change your analysis of the case?*

One can present this material as an exercise in precedent, starting with *Shelley,* proceeding to *Evans,* and finally to *Hermitage.* This progression illustrates the differences (1) between a legal estate and a trust (an equitable estate), (2) between a covenant and a condition which leads to forfeiture, and (3) between trusts which do contain future interests and those that do not (and therefore may fail entirely). The fact that it is relatively recent shows that the issues raised by *Shelley v. Kraemer* are not entirely in the past. Second, the case is different from *Evans* because the trust contained executory interests which were to vest and become possessory if the racially restrictive condition were violated. Under traditional interpretations of the *cy pres* doctrine, *Hermitage* therefore presents a stronger case than *Evans* for refusing to implement the doctrine on the ground that it is intended to implement the intent of the grantor and the grantor told us through the language of the trust that his intent was to shift title to the property if his specific intent could not be realized.

It is important to point out that, even if the shift in ownership by failure of the trust in *Evans* and the vesting of the executory interest in *Hermitage* do not constitute state action under the fourteenth amendment and therefore do not deny equal protection of the laws, it *still* may be the case that the cases are wrongly decided as a common law matter. Recent developments with respect to *cy pres* in charitable trusts arguably create more of a role for modification of trusts to further societal interests. One could compare a common law remedy for an invalid racial restriction to the remedy for invalid restraints on alienation and future interests that are invalid under the rule against perpetuities. When an unenforceable restraint on alienation is involved, the remedy is to strike out the future interest entirely, leaving the current owner with a fee simple absolute. A similar result follows in most, but not all cases, of perpetuities violations. Why is the remedy different in the case of racial conditions?

The arguments on both sides of *Hermitage* are quite similar to the arguments relevant to *Evans.* Here are a few additional arguments relevant to *Hermitage*:

First, the argument for state action is stronger in *Hermitage* than in *Evans* because the statutes in *Hermitage* not only allowed the settlor to create a racially discriminatory educational trust, but *prohibited* the settlor from creating a trust to be used by an integrated school. Thus, if the settlor was going to create a trust at all, he had to discriminate. The state coercion is therefore stronger here. The counterargument to this line of reasoning is that the state did not force him to create the trust; he did so voluntarily.

Second, there was evidence in *Evans* of the settlor's discriminatory intent, while there was no such evidence in *Hermitage.* This may mean that there is a stronger argument for finding state action since the discriminatory motive may be solely in the legislators who passed the statute prohibiting trusts for integrated schools. On the other hand, the fact that the grantor in *Hermitage* created an executory interest suggests that he had specific charitable intent rather than general charitable intent and that he therefore would have wanted the income to go to the nursing home (the last beneficiary) rather than remain with a school that was integrated.

The link between the timing of the grant and the effort by both local government and the private Prince Edward School to avoid desegregation creates arguments both for and against reformation of the grant. On the one hand, the timing strengthens the evidence of a specific intent to benefit only segregated schools. On the other, it also strengthens the evidence of state involvement in the discriminatory effect of the grant.

The effects of enforcement of the terms of the trust also provide arguments and counter arguments. One could argue that enforcing the executory interest in Heritage Homes will result in its use in an integrated setting that is also, in contrast to *Evans v. Abney*, a charitable one, serving public interests. The counterargument is that enforcing the executory interests conveys a message of racial inferiority by giving expression to the settlor's discriminatory intent. The grantor cannot lawfully get what he wanted, and the court must choose between his desire to create an educational trust and his desire to discriminate. Moreover, this conveys a message of racial subordination. Imagine a conversation between a white student and a black student at the Prince Edward School. The school has lost a significant source of income and thus has to cut back on its programs, perhaps by cutting its music program. The white student, a member of the orchestra, says to the Black student, "We lost our music program because you came here." The sentiment is wrong and inappropriate; the school lost the music program because the donor did not want the school to have the money any more, and the gift ran out. Nonetheless, the message is there: because the legal system allowed the school to collect the money in the past, and has now changed its mind, the school is being punished for refusing to discriminate.

Problem 3. *Section 1982 of the* Civil Rights Act of 1866*, 42 U.S.C. §1982, provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The statute clearly prohibits any state law that would prevent persons of a particular race from inheriting property. Does it also prevent the state from enforcing a racial restriction placed by a donor in a donative transfer? If it does, does §1982 require the restriction to be stricken, leaving title with the city and thereby keeping the park open? Even if the equal protection clause of the Constitution does not prevent closure of the park to honor the donor's discriminatory intent, does §1982 prohibit enforcement of the racial restriction? See Florence Wagman Roisman,* The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 Ala. L. Rev. 463 (2002) (arguing that it does).*

This question is based on Professor Roisman's argument that the text of §1982 is relevant to questions like this because it mentions the right to "inherit" property. This may merely mean that

Black persons are entitled to inherit if anyone chooses to leave them property. But §1982 is not interpreted in this manner as to the right to "purchase"; *Jones v. Alfred Mayer Co.* held in 1968 (see Chapter 1) that it means that owners cannot refuse to sell or lease property because of the buyer's race. The statute was interpreted, in other words, not merely to give individuals a Hohfeldian privilege to buy property but it gave them a power to compel owners to sell them property if the property is on the market and the only reason for the refusal to sell is the buyer's race. Under a similar interpretation, the statute could read to deny owners the right to deny property to devisees or legatees on account of race. The counterargument is that sale and devise have always been treated differently and depriving owners of the ability to limit bequests or devises on account of race might deprive people of the ability to support funds such as the NAACP or the Native American Rights Fund or the American Indian College Fund.

§4 Restrictions on Estates and Future Interests.....800
§4.1 Rule Against Creation of New Estates (The *Numerus Clausus* Doctrine).....800
§4.2 Rule Against Unreasonable Restraints on Alienation.....802

We deleted *Johnson v. Whiton* as a principal case to avoid confusion about the facts and emphasize the policy justifications of the *numerus clausus* rule. The key points are made clear by the materials: property forms are limited to protect the public interest, but the specific forms change over time to reflect changes in those interests.

§4.3 Rule Against Perpetuities.....802
A. The Traditional Rule.....802

Perhaps more than any other subject, the rule against perpetuities presents the role of the courts in contravening the freedom of disposition by the grantor to further the freedom of action of the present possessor, dispersal of property, and the social utility of land. These are not simply historical issues but rather, as the rise of the perpetual dynasty trust exemplifies, at the heart of modern debates about property.

At the same time, the rule against perpetuities is the bane of the law student's existence, and has been for hundreds of years. We suggest that you emphasize this to your students: if they have trouble with the rule, they are not alone. Tell them that like any new manner of thinking, practice helps the brain build connections that will, eventually, lead to understanding. The examples in the text as well as the problems will give students some practice; more are posted in the Dropbox for this course. At the same time, the rule involves logic puzzles that students with an analytical bent may enjoy, and does present right and wrong answers in a way that may be refreshing after a semester or more of law school. One of us had both a student who freaked out a law firm interviewer by telling the attorney she loved the rule against perpetuities, and another who cited learning the rule in a graduation speech as one of the tribulations that her class had suffered together. Probably most students will fall in the second camp.

Some professors choose not to teach the rule against perpetuities. There are a lot of subjects to cover in property, and if you have to skip one, why not skip one that students find confusing? But because the rule is still covered on bar exams, it may be more responsible to give your students some early practice. In addition, as *Symphony Space* shows, drafting around the rule is easy if you're aware of it, and so devastating if you're not, so basic awareness is an important transactional qualification.

The storied nature of the rule also provides some opportunities for fun. Showing the clip from the will scene in *Body Heat* is one of them. (You can also point out to your students that the description of the operation of the rule in the film is inaccurate—it doesn't void the will, just the

invalid future interest, and it's somewhat hard to imagine a way that the testator might have written an invalid bequest.) Another comes from an Irish court's invalidation of a bequest of £100 with £4 a year to be spent on each of the testator's four dogs for the remainder of their lives. The court held that the bequest violated the rule against perpetuities: "It was suggested that the last of the dogs could in fact not outlive the testator by more than twenty-one years. I know nothing of that. The Court does not enter into the question of a dog's expectation of life. In point of fact neighbor's dogs and cats are unpleasantly long-lived; but I have no knowledge of their precise expectation of life." *Kelly, Clearly v. Dillon*, 1932 Irish Rep. 255

There are three somewhat tricky concepts that are crucial for understanding the rule: creation of the interest, lives in being, and fully vesting. You should devote some time to explaining them. In doing so, using concrete examples and trying to diagram them with a timeline as shown on page 804 may help. (The problem with creating such diagrams, however, is that because there are multiple potential lives in being in many transactions, the diagram is necessarily incomplete.)

Beyond understanding the logic structure of perpetuities problems, perhaps the key concept that students have trouble with is that of vesting. First, the concern is not when the interest becomes possessory, but rather when we necessarily will know both exactly who the interest will go to and are certain that they will get (or will fail to get) the interest at some time in the future. Second, we don't care if the interest does actually vest; it's fine for a grant to fail, so long as we will know within the perpetuities period that it has done so. Perhaps one way to clarify this is to say that the policy concern is that if the future and present interest owners wish to transact to remove any restrictions or consolidate a fee simple absolute in the land, they won't be able to accurately determine who to bargain with and how much to bargain for unless the future interest holders and the nature of their interests are certain. *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972), discussed in the notes on waste, showed the problems arranging a sale of land even between known life and future estate holders; imagine the exponentially greater difficulties if the interest holders were uncertain. Similarly, where an ascertained executory interest holder's possession depends on the violation of a condition by the present interest holder, the possibility for each party of possessing the property forever may undermine the likelihood of bargaining.

Problems

In answering these problems, determine (a) what is the present possessory interest; (b) what are the future interests; (c) does the future interest violate the rule against perpetuities; and (d) if so, how should the interest be reformed? Unless otherwise stated, O, A, *and* B *are human beings who are alive at the time the future interest is created.*

Note: Leave ample time in class for going over these problems, as they usually reveal student confusion that takes some time to clear up. It will comfort students if you post the answers for them. The Dropbox we have created for this book has the answers to post, as well as another set of problems for students to use to test themselves.

1. O *to* A, *but if the land is ever developed, then to* B.

This creates a fee simple subject to an executory limitation, with an executory interest in *B*. It is void—the land may not be developed until long after *A* and *B* are dead. Everything after *A* would be struck, leaving *A* with a fee simple.

2. O *to* A, *but if* A *ever seeks to develop the land, then to* B.

Like **problem 1**, this creates a fee simple subject to an executory limitation, with an executory interest in *B*, but in this case it is valid. *A* must develop the land, if at all, during her lifetime, so this interest will vest or fail to vest by the time of her death.

3. O *to* A *for life, then to* B *if she reaches 25. (*B *is alive but is not yet 25.)*

This is a life estate followed by a contingent remainder. It is valid—*B* must turn 25, if at all, during her lifetime.

4. O *to* A *for life, then to* A*'s children who reach 25.*

This is a life estate followed by a contingent remainder. It is void—*A* could have more children after the interest is created, so they wouldn't be lives in being, and they could turn 25 more than 21 years after *A* dies. The remainder would be struck, leaving a reversion in *O.* This is also a classic case for the application of *cy pres* to reduce the time period to 21 years.

You can play with this one (or any class gift problem) by asking what would happen if *A* had one child who was already 25 by the time the interest was created. There are three possibilities, depending on the jurisdiction. First, it might be void as to that child as well as all the others. Second, it might be valid for that child, but not any others. Third, if the jurisdiction has adopted the rule of convenience and holds it applicable to this case, the remainder would be valid for all of *A*'s children that are 25 by the time of her death; the existence of one child at the creation of the interest means that the class is certain to close upon *A*'s death.

5. O *to* A *for life, then to* A*'s grandchildren.*

This is a life estate followed by a contingent remainder. It is void. *A* could have another child after the interest is created, so that child would not count as a life in being. That child could have a grandchild more than 21 years after *A* dies. Again, the remainder would be struck, leaving a reversion in *O.*

6. O *to* A *for life, then to* O*'s grandchildren. (Devise.)*

This is another life estate followed by a contingent remainder. Despite its similar structure to **problem 5**, it is valid. *O* must have any children he will have by the time of his death, so those children count as lives in being. Those children must have any children they will have (i.e., any grandchildren *O* will have) by the time they die. So all the grandchildren that can be born must be born within the lives in being of *O*'s children. It matters that this is a devise, because it means that *O* is dead and can't have any more children once it becomes effective; if it was a conveyance, it would be invalid under the same analysis as for **problem 5**.

7. O *to* A *for life, then to* A*'s first child to pass the Bar exam.*

This is a life estate followed by a contingent remainder. It is void. *A* could have another child after the interest is created, and that child could be the first child of *A* to pass the bar exam more than 21 years after all the lives in being die. The remainder would be struck, leaving a reversion in *O.*

8. *The first devise below is invalid, the second two are valid. Why?*

a. O *to* A *for life, then to* A*'s widow for life, then to* A*'s children then living.*

This is the unborn widow problem. *A*'s widow could be born after the interest is created, so she wouldn't count as a life in being. *A*'s children to survive her could be born after the interest is created, so they wouldn't count as lives in being either. We may not know whether they survive the widow for more than 21 years after *A* and any other lives in being die.

b. O *to* A *for life, then to* A*'s widow for life, then to* A*'s children.*

This is valid. All *A*'s children have to do to have the interest vest in them is be born. They have to do that within *A*'s lifetime (or shortly thereafter). It doesn't matter if the interest only becomes possessory more than 21 years after *A* dies—we will already know exactly who will get the property after *A*'s widow dies by the time of *A*'s death.

c. O *to* A *for life, then to* B *(who is* A*'s wife) for life, then to* A*'s children then living.*

This is valid because *B* is a named person alive at the creation of the interest, and so counts as a life in being. Even if *A* has more children after the interest is created, we will know which of *A*'s children survive her as soon as she dies.

9. O *to* A*, then to* B *in 1000 years.*

Valid. This illustrates that the concern of the rule is not when the interest becomes possessory, but when it vests. It doesn't matter that the interest will not become possessory until long after *A* and *B* die—we already know that *B* (which really means her heirs or devisees) will get it. Put another way, if anyone wishes to buy *B's* interest, they will know whom to approach and will be able to apply standard economic methods to determine its present value.

B. Modern Approaches and the Rise of the Perpetuity..... 810

The partial demise of the rule against perpetuities illustrates its role in preventing unequal distribution and dead hand control; its abolition for trusts in many states facilitates perpetual ownership virtually tax free for the very wealthy and creates increasing transaction costs in administering trusts for the increasing number of members of subsequent generations. The materials also highlight one of the most important roles of future interest law: structuring the tax liabilities of the owners. Although the demise of the rule has been much heralded, it is important to caution students that these measures have not in fact ended its importance in many jurisdictions. Understanding the rule is necessary to apply it in the many states that have adopted the *Uniform Statutory Rule Against Perpetuities*, and to apply it in all states to interests created before modification of the rule in that state. Even in states that have apparently "abolished" the rule, it may remain viable in some form. Alaska, for example, although a famous example of the abolition of the rule, still apparently requires that the fee to real property be vested within a life in being plus 30 years, and the ability to sell personal property be vested within a life in being plus 30 years. *See* Alaska Stat. § 34.27.100.

C. Other Statutory Limits on Future Interests.....814
D. Commercial Future Interests: Options to Purchase and Preemptive Rights....815
***Symphony Space, Inc. v. Pergola Properties* (1996) 815**

Symphony Space concerns one of the most common contexts for modern rule against perpetuities cases: commercial options such as options to purchase and preemptive rights. It also provides an example of some of the many considerations in structuring a commercial real estate transaction: tax implications; rental income; and present and predicted sale value of the property. To be able to write off the value of the building on its taxes, keep the rental value, and thereby turn a loss-generating asset into a profit-generating one until the Manhattan real estate market turns around, Broadwest sells to the non-profit Symphony Space for only $10,010, retaining an option to re-purchase the property at any time within 24.5 years. Because this is outside the perpetuities period (which is 21 years because we are dealing with corporations), the option is invalid. According to a 1988 appraisal, the properties of which the building is part are worth $27 million with the option, but $5.5 million without, suggesting that the option was worth at that time $21.5 million.

Emphasizing the importance of good drafting, you might ask your students how the option could have been written to be valid. It could have been written to last 21 years simply by changing the date of its expiration to December 31, 1999 rather than 2003! Since the parties sought

to exercise the option in 1985, the 1999 date would probably have been no problem. Should the attorneys who lawyered the deal be found guilty of malpractice for the many millions they lost through their blunder? Well, *Lucas v. Hamm*, 364 P.2d 685 (1961), discussed earlier in this section, found that the rule of perpetuities was so difficult to apply that violation of rule could not be the basis of a malpractice suit. But that case involved a classic trap for the unwary: the grant was invalid because it was vest five years after probate of the relevant will; given the endless will contest rule, the court had to assume that probate might not be complete for more than 16 years. But the *Symphony Space* grant did not involve a tricky application of the rule: it is a simple time period of more than 21 years. In any case, Broadwest had already sold all its interests, so can't claim to have lost through any malpractice its lawyers committed.

Note 1. *Is it true that allowing the option in* Symphony Space *would have hindered the productive use of the property?*

Symphony Space might well have hesitated to invest in the property from fear that the option would be exercised and the investment lost. Even new seats for its theater might have eaten up the $10,010. However it is unlikely that without the option Broadwest would have been willing to give Symphony Space such a sweet deal, and that deal likely served everyone's interests by allowing Broadwest to hold on to the property without significant costs until the market turned around, allowing Symphony Space a prime location in which to stage performances that the market does not usually richly reward, and allowing the community to benefit by having an excellent cultural resource in what had not so long ago been a blighted high-crime neighborhood.

Problem. *Grantor,* O, *conveys property to* A *so long as it is used for residential purposes.* A *opens a law office on the premises, and* O *sues for a declaratory judgment that title has reverted to* O. *Possibilities of reverter are, of course, viewed as '''vested''' and thus exempt from the rule against perpetuities.* Alby v. Banc One Financial, *82 P.3d 675 (Wash. Ct. App. 2003) (a possibility of reverter is "immediately vested in the grantor").* A *responds that the policies underlying the common law rule against perpetuities apply to possibilities of reverter as well as to executory interests, and that it is nonsensical to continue to exempt possibilities of reverter from the rule on the grounds that they are "vested."* A *further argues that this proposed change in the law (applying the rule against perpetuities to possibilities of reverter) should be applied retroactively, on the ground that when the rule was first developed in the* Duke of Norfolk's Case, *22 Eng. Rep. 931 (1681), it was applied retroactively to the conveyance in that case. What arguments could you make for the plaintiff? For the defendant? What should the court do?*

Consider that in Washington State Grange v. Brandt, *148 P.3d 1069 (Wash. Ct. App. 2006), a conveyance provided that "the land herein deeded reverts back to original plot in event it is no longer used for Grange purposes." The court interpreted "to original plot" to mean to the "current owner of the retained land at the time the condition is violated"; since this was an executory interest in a third party, the court held that it was void under the rule against perpetuities. However, this left language creating a possibility of reverter ("the land . . . reverts back . . . in the event it is no longer used for Grange purposes"). Since possibilities of reverter are not subject to the rule, the court deemed that interest valid. Does this make sense?*

The main argument for holding the possibility of reverter void is that the distinction between possibilities of reverter and executory interests is a formalistic one that bears no relationship to the policy justifications for the rule. It is fair to apply this change retroactively, because the vesting of a contingent possibility of reverter is so uncertain that a party could not reasonably rely on it, and it is unfair for a nonowner exercise such control over *A*'s autonomy.

There are several responses. First, *A* willingly agreed to this restriction and likely the price of the property reflected this agreement. Second, judicially voiding the possibility of reverter

would unfairly deprive *O* of the benefit of her bargain and provide *A* with a windfall. It might even give rise to a constitutional claim for takings without just compensation. Finally, in this case the restriction facilitated alienability of property by permitting *O* to ensure that the alienated land would not be used in ways that conflicted with *O*'s interests.

§4.4 Rule Against Unreasonable Restraints on Marriage 825
***Estate of Guidotti* (2001) 825**

The restrictions on marriage materials present stark restrictions on important autonomy interests; what, after all, could be more personal that one's choice of whom to marry? Nevertheless, they are usually upheld unless they significantly restrict an individual's ability to marry at all; the majority rule, moreover, is that total restrictions on the remarriage of one's surviving spouse are valid.

Estate of Guidotti concerns the enforceability of a man's life estate to his widow on condition that she not remarry or live with a man as though married. Darlene Guidotti's concern with the restriction is apparently not that she wishes to remarry, but that such a restriction on a life estate would render it ineligible for the marital estate tax deduction. The court considers the restriction under a California statute that recognizes the distinction between the desire to forbid marriage and the desire to provide support until marriage. Relying on evidence that Earl Guidotti was an extremely jealous man, the court holds the restraint on marriage void.

Note 1. *Should other states, by common law or statute, require review of remarriage restrictions and strike them down if they are simply demands for faithfulness from beyond the grave? The* Restatement (Second) of Property (Donative Transfers) *§ 6.3 (1983), while it otherwise requires review for reasonableness for restrictions on remarriage, would simply uphold without review restraints on remarriage by the testator's spouse.*

As the notes suggest, a traditional justification for allowing restraints on marriage by a surviving spouse to implement the desire not to share one's widow and property with another man. One could argue that this is a patriarchal impulse that a court should not enforce—why should a dead spouse be able to reach beyond the grave to force a surviving spouse to choose between love and financial support? While some grants to a surviving spouse over a child from another marriage may be motivated by concern for support of the spouse, California's law makes accommodation for that motivation.

Against adoption of such a law, perhaps courts should not intervene regarding a grantor's decision with respect to this most personal of relationships. Moreover, California's compromise permitting restrictions if the intent is support while unmarried sanctions dependence on a spouse rather than permitting financial independence regardless of marital status.

Problem. *A testator creates a trust to be shared among his grandchildren, but his 2007 will provides that the children of his son Robert may not benefit from the trust if Robert shall "not be married to the child's mother within six months of the child's birth." Robert, who his father knew was gay, is married to a man with whom he has a child via a surrogate. New York, where the will is construed, enacted the* Marriage Equality Act *in 2011, providing in part that "marriage is a fundamental right. Same sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage." Robert challenges the restriction in the will as restricting his right to marry and encouraging a sham marriage. What arguments could you make as the attorneys challenging or defending the condition? How should*

the court rule? See Kathianne Boniello, Manhattan Businessman's Will Ordered Gay Son to Marry Woman Who Gave Birth to Their Child*, N.Y. Post, Aug. 19, 2012 (reporting dispute, but not resolution).*

One could argue in favor of enforcing the restriction that the requirement does not prevent Robert from marrying; rather, like the cases requiring a beneficiary to marry someone of a particular religion, it requires him to marry someone from a particular group of people. Moreover, that group (women) is large enough that the chances of finding an appropriate partner are large. One could also argue that the guarantee of equal access to marriage in the *Marriage Equality Act* applies only to state action; because a private trust is involved, the Act is irrelevant.

Against enforcing the restriction, one could argue that the restriction effectively prevents Robert from marrying the only people with whom he would have a true marriage: men. In fact, because Robert is already married to a man, the restriction should be unenforceable because it tends to encourage divorce: for his child to benefit from the trust, Robert must divorce his husband and marry his surrogate. Because the quoted language from the *Marriage Equality Act* does not refer to state action, there is a (somewhat weak) argument that enforcing a restriction such as this one would deny same sex couples the "benefits of civil marriage." More persuasively, even if the *Marriage Equality Act* does not apply directly, it expresses the public policy of the state, which is antithetical this kind of testamentary blackmail of same sex couples for over their choices of whom to love and marry.

10. Leaseholds 831
§1 Leasehold Estates 831
§1.1 Categories of Tenancies 831
§1.2 Commercial and Residential Tenancies 833
§1.3 Regulation of Landlord-Tenant Relationships 834

Themes

The materials in this chapter build on the foundations of the estates and future interests as well as the materials on concurrent ownership but are likely to be a more familiar context for most students. Themes of this chapter include the following:

(1) *The relational nature of the leasehold*. Many doctrines covered in this chapter highlight the complex nature of the leasehold as both a contractual undertaking between the parties as well as the transfer of an important property interest—the "contract/conveyance" issue. The chapter also underscores, however, that the tenant-landlord relationship is usually an ongoing and intertwined set of interactions, given the shared nature of the property at issue. This relational view of leaseholds emphasizes that tenancies, whether residential or commercial, involve not just the initial transaction that leads to the conveyance of the tenant's possessory interest, but also an ongoing process of adjustment, interaction, and, at times, conflict. Important aspects of landlord-tenant law, notably involving the reciprocal obligations of the parties (such as the warranty of habitability), recognize that what happens during the leasehold can be as important as how the leasehold is formed and terminated.

(2) *Interpretation of ambiguous agreements.* Many issues in the chapter concern disputes about the exact terms of the agreement the parties reached. For example, these issues concern the rights of tenants to sublet or assign and the duty of commercial tenants to continue operating. As with servitudes and future interests, the courts sometimes focus on trying to achieve the result the parties intended or would have agreed upon if they had focused on the precise question before the court. At other times, the court subordinates the probable intent of the parties to the goal of achieving particular public policy goals such as increasing the alienability of property or protecting the interests of the party who is thought to have less bargaining power.

(3) *Judicial role.* Many of the doctrines in this chapter are of (relatively!) recent vintage. Landlord-tenant law has changed drastically since the 1960s. Some scholars, and judges, argue that it is inappropriate for judges to change common law doctrines and that such changes, if any, should be left to the legislature. Others argue that judges have always modernized common law doctrines to take account of changing values and social conditions. The reality is that what courts and legislatures do influences each other; this is especially true in the area of landlord-tenant law. Legislatures implemented building codes; courts interpreted those codes either to require imposition of an implied warranty of habitability or concluded that the common law of landlord-tenant relations was inconsistent with the public policies embodied in those codes if such a warranty was not recognized; the legislatures often responded by codifying the implied warranty, perhaps with limitations or specifications about its exact scope and meaning. Thus, each of the lawmaking institutions influenced the other. If this is the case, the simple argument that judges should not make law is probably oversimplified. However, the opposite principle—that judges should make law without regard to what the legislature thinks—is also oversimplified. The problem is to understand and theorize about the appropriate relationship between the lawmaking bodies.

(4) *Compulsory terms.* Many of the issues in this chapter concern rules of law that impose compulsory terms in lease agreements and provide that any terms to the contrary are void as against public policy. These doctrines include, for example, the implied warranty of habitability, retaliatory

eviction, and statutory controls on eviction. The question of when, and whether, it is appropriate to limit contractual freedom by requiring the parties who enter lease agreements to agree to particular terms continues the discussion that formed a centerpiece of Chapters 8 and 10, where the rules about servitudes and the estates system regulated the types of land use agreements that were enforceable in order to achieve a variety of ends. A summary of certain standard arguments presented in the context of debates over the propriety of making certain terms in contracts compulsory (non-waivable) include the following concerns:

(a) *Freedom of contract and unequal bargaining power.* Almost every case that imposes nonwaivable terms justifies this result by reference to the unequal bargaining power of the parties. This argument raises a host of questions about how to distinguish contractual freedom from coercion. The presence of unequal bargaining power is sometimes thought to derive from the structure of the particular market (i.e., that housing is a necessity, there is a shortage of affordable housing, and that tenants as a class are poorer than landlords as a class). At other times, it is thought to be demonstrated simply by the presence of unfair terms in the agreement, on the assumption that parties with sufficient bargaining power would simply never agree to such onerous terms. The argument that landlords and tenants have unequal bargaining power suggests that tenants do not "voluntarily" agree to certain onerous terms in leases and that the courts should enforce the terms to which the parties would have agreed if they had relatively more equal bargaining power. The counterargument either characterizes the bargaining relationship as sufficiently equal to justify enforcing the contract terms or concludes that regulating the agreement between the parties is worse for the party with less bargaining power than not regulating the agreement because it forces the weaker party to make trade-offs different from those the weaker party would choose to make, given her circumstances.

(b) *Paternalism.* A central argument against compulsory terms is that, even if it is true that the parties have unequal bargaining power, they are the ones who can best judge what terms in their agreement will maximize their own welfare, given the difficult circumstances set by their budget constraints. The courts and legislatures should not substitute their judgment for the judgment of the individual as to what set of trade-offs will maximize their welfare. This is often posed as an argument against paternalism; the state should not substitute its judgment for that of individuals about what is in their best interest. There are a wide variety of counterarguments to this line of reasoning. Some arguments simply claim that individuals are not always the best judges of their own interests, in part because of common heuristics—such as a tendency to be overly optimistic about the likelihood that bad things will occur, among others—that can lead people to evaluate decisions poorly. Other arguments claim that, while individuals *are* the best judges of their own interests, they may make mistakes about what kinds of contractual agreements will further their own interests if they have imperfect information. It may be the case that the state does a better job of helping citizens attain their own preferences by protecting them from mistakes they are very likely to regret later.

An alternative way of responding to the claim that regulation constitutes impermissible paternalism is based on John Rawls' social contract theory of justice. The question is what principles of social justice and constitutional framework individuals could and would accept if they had to construct a political society from an original position in which they did not know what place they would occupy in that society. This question suggests that they would ban certain kinds of objectionable human relationships. The marketplace is not a war zone. Relationships among market participants take place within certain patterns of accepted social interaction and established expectations. Absolute freedom of contract would allow individuals to establish relationships that are incompatible with a just market society. This point can be easily understood by taking extreme examples. An employer cannot, for example, be allowed to condition an employment contract on

an employee's handing over her first-born daughter to the employer. The law supporting a market system must prohibit contracts for slavery and relationships short of slavery that recreate feudalism.

It might be argued that competition will allow individuals to avoid onerous contracts. However, historical experience suggests that this argument is wrong and ignores power dynamics; consider the sharecropping contracts characteristic of the post-Civil War era which came close to re-establishing slavery. Inequalities of wealth and the existence of differences of social and economic status may force some individuals to agree to relinquish too much of their autonomy. Regulation of contractual relationships is necessary to delimit the outer contours of allowable social relationships to prevent oppression. Under this view, rather than interfering with autonomy, regulation of contractual relationships to establish minimum rights for the more vulnerable party to the relationship are a *precondition* to the operation of a free market system. These regulations do not override the parties' intentions; instead, by requiring powerful market actors treat the less powerful in accord with common decency, they implement the terms of social relationship which most persons would agree constitute minimum conditions of liberty. They therefore respond to and support autonomy by enacting the type of society which can be supported by everyone as just and free. Such a society allows for substantial freedom for individuals to vary the terms of human association. At the same time, there are definite limits to this freedom because certain kinds of social relationships are inherently morally objectionable and are foreign to the form of life connected with the market system. Since they would arguably be banned by individuals who had to decide on the kind of society they were going to create if they did not know what place they would occupy in that society, they arguably implement the will of individuals who had to choose, not the terms of particular contracts within an unjust system, but the contours of a social relationships in a polity characterized by social justice.

(c) *Efficiency.* Legal scholars have long proffered arguments about the economic wisdom of alternative legal regimes in the market. The deregulatory argument focuses on the notion that protecting contractual freedom by decreasing or eliminating compulsory terms in contracts is the best way to maximize individual satisfaction and hence social welfare. Any regulatory law that imposes nonwaivable terms in contracts prevents people from entering mutually advantageous deals. The efficiency-based argument for imposing compulsory terms takes a variety of forms, including (i) denying that the contractual relationship is voluntary and therefore negating the presumption that it is in the interest of both parties; (ii) arguing that the parties had imperfect information and that in the absence of the transaction costs associated with obtaining adequate information the parties would have agreed on the compulsory term imposed by the state; and (iii) arguing that externalities are caused by the agreement which cannot easily be remedied by the market because of transaction costs and that, in the absence of transaction costs, all parties affected by the transaction would bargain for the result set by the compulsory term. A final argument is the last response to paternalism outlined above; some compulsory terms make both parties—and everyone else—better off by ensuring minimum standards of decency in social relationships.

As to the question in §1.3 about the proliferation of lease terms that are either illegal or close to the edge – *Why do you think that the improper lease terms in residential leases are becoming more common and what avenues for reform seem most promising?* – there are a number of issues that might be at play, although the emerging empirical literature offers no definitive answers. One dynamic may be the proliferation of standard-form agreements, particularly among non-corporate landlords (the empirical evidence suggests that larger, more professional landlords are less likely to include unenforceable terms), that are heavily pro-landlord and the relative vulnerability of tenants in a market in which alternative lease forms are unavailable. Meirav Furth-Matzkin also notes how difficult it is for many tenants to challenge unenforceable lease terms—both for reasons of access to counsel and also for the burdens of litigation regardless—and predicts

that illegal clauses will continue as long as monitoring and enforcement fail to deter landlords. Why this problem seems to be getting worse is hard to say and may be localized in terms of power dynamics between landlords and tenants and market conditions that facilitate these kinds of consumer harms.

Problem. *Consumer protection laws generally regulate those involved in "trade" or "business" or "commerce." If a landlord owns a two-unit building and rents out one unit, is she engaged in a trade or business? What arguments can be made on both sides? How should the court rule? Compare* Billings v. Wilson, *493 N.E.2d 187 (Mass. 1986) (no), with* Stanley v. Moore, *454 S.E.2d 225 (N.C. 1995) (yes).*

The landlord might argue that the relationship between the landlord and tenant is "of a private nature" and does not concern a "trade or business" when the landlord merely rents out one unit in what is otherwise her home. The landlord might argue that the line between the private world of the "home" and the public world of the "housing market" should be drawn between owner-occupied residences with only two or three or perhaps four apartments and residences that have more units or are not owner-occupied. Both the size and the fact of owner-occupancy are relevant to the owner's interests in exercising greater control over the property than when the property has been placed in the public world of the market. Moreover, the fact of owner-occupancy gives the owner privacy interests in controlling the property without regard to general rules otherwise applicable to the rental housing market. When a tenant rents a unit in a house, the relationship is likely to be more personal and thus should be protected from heavy-handed regulation by law. Similarly, an owner of a house is not in a "trade or business" when they look for a buyer; only a housing developer satisfies that definition. The landlord can argue that his position is similar to that of the owner of a single-family home seeking a buyer and that he is therefore outside the scope of the statute.

The tenant will argue on the other side that, once the owner decides to rent part of his property, he has waived some of his privacy and sovereignty interests in controlling what happens in "his" house. The landlord engages in a business relationship by renting the property and thus is obligated not to engage in unfair or deceptive practices. This is not unfair to the landlord and is fair to the tenant. The place to draw the line is when two parties live together in the same household or if a residential tenant is looking for a subtenant. For example, a residential tenant who advertises for a roommate or a subtenant may be exempt from the coverage of the statute. Similarly, an owner selling a house may be exempt. However, this is distinguishable from the owner who rents since the landlord engages in an *ongoing relationship* with the tenant that puts the landlord in the permanent position of managing a business relationship. The seller of a single-family house, in contrast, engages in a single transaction that does not require ongoing management.

§1.4 Distinguishing Tenancies from Other Property Relationships 836
***Vásquez v. Glassboro Service Association, Inc.* 837**

Vásquez involves a program that was overseen by the Puerto Rican Department of Labor that brought farmworker labor to places like New Jersey. The Glassboro Service Association was a non-profit company that contracted with farmers to supply labor—farmers would request workers, and Glassboro would then transport those workers from company barracks. This work was done under a series of annual contracts that lasted from 1948 until the early 1990s, when farm workers from Mexico largely displaced those coming from Puerto Rico. *See* http://articles.philly.com/1993-06-30/news/25973039_1_puerto-ricans-mexicans-farm-labor-contractors.

In terms of the basis for the decision in *Vásquez,* be aware as background that the *New Jersey Anti-Eviction Act* is unusual in that it prohibits eviction absent "good cause." Only the District of Columbia and New Hampshire have similar statutes. The chapter starts with *Vásquez* because it usefully introduces the entire subject of landlord-tenant law. It addresses the nature of landlord-tenant relationships, focusing on the meaning of possession and the extent to which the rules in force regulate possessory rights by protecting the interests of tenants whether or not they have a contractual agreement with the "owner" of the land voluntarily agreeing to such protections. *Vásquez* also draws on *State v. Shack* as a major precedent. It therefore allows discussion both of statutory interpretation and analysis of precedent.

The preliminary question in *Vásquez* is whether migrant farm workers are "tenants" within the meaning of the provisions of the *New Jersey Anti-Eviction Act* which prohibit dispossession of tenants without prior notice and court eviction proceedings. Since the court answers this question in the negative, the question is whether the court should imply compulsory terms into the employment/housing agreement between the employer/owner and the employee/licensee when no statute does so.

Vásquez can usefully be taught as both an exercise in statutory interpretation and an exercise in the relationship between statutes and the common law. One can build on the statutory interpretation question by asking whether other kinds of employees should be treated as tenants under the statute, raising, for example, a pastor residing in a parsonage, or a law professor for whom the school provides rental housing. In most contexts, these employees are not like janitors or superintendents, because they do not necessarily work in or near the places where they live. In the context of the likely concerns of the legislature, they are similarly situated: they have private, permanent residences that are likely to become "homes" in the ways that the Glassboro barracks do not.

One can then focus on the common law question addressed by the court, which puts at center stage the question of whether the courts should change common law rules to accord with recently expressed legislative policies or whether the failure of the legislature to change those rules suggests that the courts should leave them alone on the grounds that the legislature affirmatively chose *not* to change those rules of law.

π Vásquez's argument for notice and court eviction proceedings.

Judicial role. Plaintiff Vásquez can argue that the court should change or modernize outdated common law rules to accord with the general policies underlying recently enacted landlord-tenant statutes. The general policy underlying the New Jersey statute is a sweeping one. Not only does it generally prohibit self-help and require both notice and court proceedings to dispossess a tenant, but it narrowly circumscribes the substantive grounds on which a tenant can be evicted. The effect of the statute is to ensure the availability of a court proceeding to determine whether the grounds have been established. The fact that the statute does not clearly include a person in π's situation does not mean that the legislature affirmatively intended to exclude π from the types of protection the statute offers. The legislature simply may have overlooked the particular situation in which π finds himself, and not foreseen that migrant farm workers would not fit within the traditional definition of the general term "tenant." It would therefore not constitute illegitimate judicial activism to extend the statutory protections, or some version of them, to π. Indeed, it would contravene the policies underlying the statute not to provide π with comparable protection. Deference to the legislature therefore requires a change in the common law rule.

Rights. People need to have time to find a new place to live when their housing accommodations don't work out. This is a matter of individual dignity and respect; even those who breached an agreement by not paying rent should not be summarily thrown out on the street. The employer/landlord has no right to create a relationship with the employee/tenant that makes the tenant vulnerable to becoming homeless at a moment's notice. The contract between the parties

that subjects the π to this vulnerability was not a voluntary agreement; no person who had the power to do so would agree to accept this kind of vulnerability. Precisely because the term is so unfair, we can conclude that no one with a minimally adequate amount of bargaining power would agree to it. The court should enforce the terms the parties would have agreed upon if they had relatively more equal bargaining power, at least to the extent of not enforcing unconscionable contract terms. Finally, the contract was negotiated by the Puerto Rican Labor Department and not the farm workers themselves. The Department's interests *may* diverge from those of the farm workers; it may be interested in maximizing employment possibilities for its citizens rather than protecting them from unfair and oppressive contract terms. This gives an added reason for skepticism that the contract adequately promotes the workers' interests.

Social utility. The court should create legal rules that give employers and landlords incentives to treat their employees and tenants fairly. The rules governing landlords will not maximize the general welfare if they allow enforcement of leases that contain unconscionable terms to which no one would voluntarily agree if they had the power to avoid them. When bargaining power is so unequal, the agreement is not obviously mutually beneficial to the parties, but may represent a coerced contract that benefits one party to the detriment of the other. While the contract may leave the worker better off than if the worker were unemployed and homeless, this is not the appropriate test for determining whether enforcement of a contract maximizes the general welfare. The courts must be concerned about the distribution of benefits created by the housing and employment market. When they are very unequally distributed, the general welfare is not maximized. The goal is the greatest utility for the greatest number of persons, not simply the greatest utility overall. Market power is not a perfect measure of utility; those with insufficient market power may not be able to register adequately their legitimate preferences in the market. Because of the decreasing marginal utility of money, granting an entitlement to a poorer person may increase their utility more than granting it to a relatively wealthier person, even though the wealthier person would be willing and able to pay more for the entitlement if it were sold at an auction.

Finally, there are externalities of allowing landlords to make tenants homeless at a moment's notice. If the community is not willing to let people simply sleep on the street, it must provide for shelters and services for homeless persons. The employer/landlord who fails to allow time for the tenant to find a new place to live benefits from the tenant's labor while displacing onto the community the costs of taking care of the tenant in times of crisis. Farm owners will not invest appropriately in providing sufficient wages and benefits for their workers if they are allowed to displace the costs of maintaining their workers onto the community. To ensure efficient levels of investment, the law must force the employer to internalize these external costs. Employers may feel free to fire workers arbitrarily if there is a sufficient pool of unemployed persons who are competing to find scarce jobs. In this situation, the employer will have no incentive to treat the workers fairly. Imposing a compulsory term in the agreement is necessary to give the employer sufficient incentives to act in a way that does not impose unnecessary and avoidable costs on the public.

Δ*/employer-landlord's argument for allowing immediate dispossession.*

Judicial role. When the legislature passes comprehensive legislation in a particular area, and leaves out a remedy for a particular situation, this suggests that the legislature *intended* the remedies provided in the statute to extend only to the situations covered by the statute. For the courts to change the common law to extend the terms of the statute will contravene the legislative intent and upset the careful balance of interests worked out in the compromise that characterizes most legislation. Since this is an area subject to extensive regulation by the legislature, the court should leave changes in the common law to statutory development. Otherwise, the court is subverting the democratic process.

Social utility. Employers are unlikely to fire anyone without a good reason. If they do, it will be harder to find workers willing to work for them. Moreover, the employer will be imposing costs on itself; the worker must be replaced. Thus, the economic incentives ensure that employers will not act arbitrarily. In addition, requiring employers to go to court to evict employees and to house them while they are not working will increase costs on the employer; this will make the employer either reduce the total level of employment or reduce wages. Thus, regulation of the contract will hurt the very people that it was intended to protect. Workers are better off with a chance of getting a job, even though they can be summarily fired when they slack off, than not having a job at all. Although being fired and evicted does impose hardships on those who face this possibility, they are still better off than if they did not have the job in the first place. Regulating the contract will simply deprive the workers of choices, and since they have little market power, this will prevent them from doing the best they can for themselves, given their difficult circumstances.

Rights. There was no coercion involved in this contract. Negotiated by the Puerto Rican Department of Labor, the court should conclude that it adequately protects the interests of the workers. Imposing compulsory terms on the employer/landlord will raise the cost of hiring workers and may decrease the number of people who are hired or decrease further their already low wages. The workers are better off with this contract than without it. They have the right to obtain employment by agreeing to terms that will encourage the employer to hire them. If the court makes it difficult to fire workers easily, the possible decrease in employment or benefits for workers will wind up hurting those who are working hard. The court should not rewrite the contract; this paternalistically prevents the workers from making the best deal they can, given their circumstances. The workers may wish to face the possibility of summary eviction in order to obtain a job; this may be preferable to not having a job at all.

Problem 1. *Two university students living in a college dormitory come to you with the following problem. Along with signing many other forms and documents, the students signed form dormitory contracts that stated "LICENSE" at the top of the first page. The contract granted the students a "license" to occupy a dormitory room in exchange for an amount to be paid one semester at a time. The form stated that the university "reserved the right to cancel the license at any time for any reason." It also stated: "This agreement is not a lease." One student placed a banner reading "SUPPORT THE LIVING WAGE CAMPAIGN" outside her window in an effort to persuade the university to raise the wages it pays to its lowest-paid employees to enable them to earn enough to live in the community without taking a second job. The other student placed a banner reading "ABORTION KILLS" outside her window. The university had a policy prohibiting students from placing any banners outside their windows. The students knew about the policy but decided to violate it on the ground that it interfered with their right to free speech. Because of their violations of the rules, they were given 24 hours to vacate their dormitory rooms. They were not suspended or otherwise punished for their conduct. A state statute provides that "tenants" cannot be evicted without one month's notice and a court eviction proceeding.*

a. What is the students' argument that they are "tenants" protected from eviction without judicial process?

b. What is the school's argument that they are licensees, rather than tenants, and can be removed with self-help and no notice?

c. How should the court rule?

This problem is intended to place the issues addressed in *Vásquez* in a context that will be more familiar to most law students. Many arguments for compulsory terms which focus on unequal bargaining power suggest that it is only the poorest persons in society who are or should be the subject of this solicitude. The hypothetical situation should serve to help students, who might not otherwise do so, sympathize with the plight of the farm workers. At the same time, it affords the opportunity for the teacher to elaborate the arguments against compulsory terms. In my experience,

most students believe that the university should not be able to evict the students in this situation. You can take advantage of this intuition by playing the role of the lawyer for the university and argue in favor of "freedom of contract". This forces them to come up with justifications for regulating lease agreements and to answer the various criticisms you make of their arguments. The result is usually that they develop a more sophisticated understanding of what they mean when they talk about "contractual freedom."

In addition, this problem can be taught (1) on the assumption that it takes place in New Jersey and the anti-eviction law is in effect or (2) in one of the overwhelming majority of states without a just cause eviction law. In the latter case, assume state statutes require eviction procedures to dispossess "tenants" but that no just cause requirement exists by common law or statute. All that need be shown is that the lease term is over or that the tenant has breached the lease. The analysis in both New Jersey and elsewhere will be similar on the question of whether eviction proceedings are needed to dispossess farm workers except that the existence of the just cause eviction law may suggest a stronger policy against evicting tenants.

One can use the question as an exercise in applying and distinguishing precedent by telling students to assume the role of the lawyer for the University and distinguish *Vásquez*, and then the role of the lawyer for the students and argue that it applies. In favor of distinguishing *Vásquez*, one can argue that the students are less vulnerable with respect to their dispossession and the contract itself. They read and write English at a college level, are almost certainly economically better off, and therefore have more power to understand the contract and to find alternate housing on expulsion. Further, maintaining disruptive students in the dormitory is detrimental to the order of the dormitory and may undermine the educational process. In favor of using *Vásquez*, one could argue that the students are also vulnerable: they are probably young, and may well be minors in a strange place far from home. As in *Vásquez*, they had no power to negotiate the terms of the housing agreement; many universities, moreover, require students to live in dormitories for at least their first year. Unlike *Vásquez*, moreover, there is unlikely to be any need for their rooms until the next semester begins.

In a more general sense, these questions address both the question of how much *notice* is required to dispossess a "tenant" and whether court *eviction* proceedings are required to do so. Does the *form* of the agreement (calling it a license) control the result or does the *substance* of the arrangement (which looks like a term of years) control? If the school specifically intended to grant only a license, is the school disempowered from revoking the license under the doctrine of *easement by estoppel* or *constructive trust?* If not, should there at least be provision for a time period for the students to be able to find another place to live, i.e., a notice requirement? Should there, in addition to a notice requirement, be a court proceeding to determine if the arrangement between the parties will be interpreted as constituting a lease rather than a license, and if so, whether the students breached the lease in a manner that justified the eviction? Is the provision that grants the university the power to evict the students "for any reason" enforceable? Are the students "tenants" within the meaning of the statute requiring eviction proceedings? Are any other statutes relevant to the problem?

Most of the arguments canvassed above in connection with the discussion of *Vásquez* are relevant here. The argument against enforcing the agreement as written is likely to focus on (1) the substantive unfairness of its terms and (2) the expectations of the parties based on the students' presumption, despite the clause granting the school absolute power to dispossess them, that the school would not do so unreasonably. One way to make the students' argument is to emphasize that the agreement is ambiguous because, although it purports to grant the school absolute power, the circumstances of the transaction are such that the students reasonably understood the school's literature in its brochures to suggest that the school would treat them fairly and reasonably. Thus, the exact same arguments relevant in the context of easements by estoppel and constructive trust

doctrine are relevant here. Despite the seemingly clear language of the agreement, the school arguably conveyed conflicting messages the students. The message that should prevail is the implied promise to act reasonably.

A second way to make the argument for requiring eviction proceedings is (1) to acknowledge that the parties agreed to grant complete discretion to the school to dispossess the students under a revocable license and (2) to argue that such an agreement is unenforceable either as a matter of common law public policy or because the students are "tenants" for the purpose of the statute which prohibits the use of self-help to dispossess tenants and requires the use of court eviction proceedings. The argument for requiring both notice and court proceedings is that the purpose of the statute is to ensure that tenants have enough time to try to find a new place to live, even if they have wrongfully breached their agreement with the landlord. This result may be deemed fair or it may be necessary to prevent imposing social costs on the community by having to deal with the problem of homeless dispossessed tenants with inadequate notice.

The argument against requiring notice and court proceedings is that the students freely agreed to the arrangement. Assuming that the university did not require students to live in the dormitory, they arguably chose to do so rather than living in a rental apartment. Even if they had no alternative but to live in the dormitory, they had a choice of universities with different policies about living arrangements and it might be argued that they implicitly agreed to the rules of the university when they choose to go there. The university may have legitimate interests in retaining strict control of its dormitories to protect the interests of all students living there by excluding students who are disruptive. Moreover, all students may benefit by reduced tuition if the school does not have to pay for eviction proceedings for students who violate school rules. In addition, the school may concede that it should ordinarily give more than 24 hours' notice but argue that it should not have to utilize court proceedings to dispossess students who have broken school rules. Even if the New Jersey *Anti-Eviction Law* is in effect, *Vásquez* is distinguishable because the students have clearly waived their rights to more than 24 hours' notice and court eviction proceedings, and since they are licensees rather than tenants, they are not protected by the statute. (In *Vásquez*, there was arguably no express waiver of rights, meaning a voluntary relinquishment of a known right.) Further, students living in a dormitory voluntarily submit to the rules of the school and therefore have no justified expectation of continued possession when they violate those rules.

Problem 2. *A tenant invites her boyfriend to move in with her on the condition that he pay half the rent. Is he a tenant or a licensee? In* Kiehm v. Adams*, 126 P.3d 339 (Haw. 2006), the court held that the question should be decided by the intent of the parties but that roommate arrangements should be presumed to be licenses if the roommate does not have the "right to occupy a distinct and separate part of the premises," the right is not intended to be assignable, and the right is not for a particular term. However, a dissenting judge would have found a sublease since a state statute,* Haw. Stat. *§521-8, defined a "rental agreement" to mean all agreements that concern the "use and occupancy of a dwelling unit and premises."* Id. *at 350 (Acoba, J., dissenting). Who is right, and how should this question be decided in general? From the landlord's perspective, what are the consequences of treating a roommate who is not a signatory to the lease as a licensee?*

The question may turn on whether the lease prohibits sublease or assignment or allows it only with the landlord's consent. If the lease allows sublease, the question is a hard one – like asking how many angels fit on the head of a pin. If the intent of the parties is what matters, then the question is whether the tenant intended to create a permanent arrangement giving the boyfriend the right to occupy the premises with her as long as the lease lasted (or for some specific more limited period). Tenants cannot be removed except through court eviction proceedings; did the tenant intend to grant such security to the boyfriend? On the other hand, it is not clear why intent

is the deciding factor. Tenants have the right not to be evicted without court order even if the lease provides to the contrary. Another way of looking at intent is whether the boyfriend has the right to occupy a specific part of the apartment. But it is hard to see why this should be determinative; a tenant can sublet by allowing the subtenant to share use of the apartment. The agreement to pay rent is likely to make this look like a tenancy rather than a license; at the same time, the failure to have a specific agreement that indicates some evidence of intent to make the permission nonrevocable suggests an intent to grant a license.

The problem might be solved by looking to policy issues other than party intent. Should the law presume that such arrangements can be ended easily by the tenant through revoking the "license" or should the law protect the expectations of the boyfriend by denying the right to evict without court judgment? Ordinarily, when two people rent an apartment together, both are obligated to pay the rent and any disputes about living arrangements do not deprive them of both rights and obligations under the tenancy. On the other hand, the tenant may legitimately want more control over who is living in her home and the mere fact that the boyfriend agreed to pay rent does not necessarily deprive her of the right to kick him out when their relationship sours.

From the landlord's perspective, there is no contractual or privity relationship with a licensee, which may give the landlord more latitude to dispossess the boyfriend, but may also make imposing obligations (including the obligation to pay rent) on the boyfriend difficult. This underscores that the ongoing landlord-tenant relationship, as a practical matter, is often built around reciprocal obligations and the attempt to characterize the relationship to avoid some obligations (such as notice to a tenant) may undermine other aspects of the relationship as well.

§2 Conflicts About Occupancy 847
§2.1 Initial Occupancy: Landlord's Duty to Deliver Possession 848
§2.2 During the Leasehold 848
A. Landlord's Right to Inspect and Repair 848
***Uniform Residential Landlord and Tenant Act §3.103* 848**

Problem. *A tenant has a one-year lease that grants the landlord the "right to inspect the premises at the landlord's discretion." After living in the apartment for three months, the landlord notifies the tenant that he intends to inspect the property three days later at 10:00 a.m. and that she need not be present if she does not want to be there during the inspection. The tenant decides not to be present. After the inspection, she finds some papers on her desk moved around. She asks the landlord about this, and he says he was checking to see if she had too many electronic devices plugged into the socket. A similar event happens a month later. She decides to stay in the apartment during the inspection this time. When the landlord comes, he does a cursory overview of the apartment and then tries to engage the tenant in conversation. She is friendly but not interested in becoming friends with the landlord and wishes he would leave. The inspections begin to occur once a month, and when the tenant asks the landlord why he needs to inspect so often, he says "just to make sure things are safe for you." These frequent visits are not customary, and the tenant is uncomfortable with them. What advice would you give the tenant? If she complains to the landlord and the landlord calls you for legal advice, what would you tell the landlord?*

The problem asks the students to think in a problem-solving mode rather than a litigation mode, although potential legal claims may underlie bargaining postures. The problem does allow discussion of the meaning of the right to inspect in the *Uniform Residential Landlord and Tenant Act* (*URLTA*). The landlord's activity does seem to exceed what is appropriate under the statute and may constitute an "abuse" of the right of access. One would think that this should be handled

informally if at all possible, communicating to the landlord her discomfort with the visits and asking for less frequent "inspections," especially since the last visit seemed not to involve an inspection at all and because she may feel the landlord is rifling through her private things. Moreover, the tenant may believe that this verges on sexual harassment and makes her feel unsafe or unprotected in her own home.

The law does protect the tenant from unreasonable inspections but the problem is meant to get students thinking about the difficulty of enforcing those rights. If the landlord does not desist, must the tenant sue? Will it be easy to find and afford a lawyer willing to take the case? What reasons would the landlord give for the frequent inspections? Will the landlord lie? Will the court believe the tenant? Will the tenant want to live in the apartment after suing the landlord or will the suit make relations unsustainable? In many ways, litigation is not a viable way to resolve the situation.

An alternative is to have a conversation between the tenant and the landlord to communicate her concerns and if that doesn't work, arrange to have a lawyer call. At the same time, having a lawyer call the landlord is likely to poison the relationship between the landlord and the tenant, making it difficult for the tenant to live there. Alternatively, the tenant can try to move and get out of the lease, but that embroils her in another set of practical and legal issues. In the end, the issue raised here is the limits of the law in protecting people and the need for problem-solving techniques that involve persuasion and negotiation outside of court.

B. Tenant's Right to Receive Visitors and to Marry 849

Problem. *Tenants have a nondisclaimable right to receive visitors.* Odumn v. United States, *227 A.3d 1099, 1107 (D.C. 2020);* State v. DeCoster*, 653 A.2d 891, 894 (Me. 1995). Similarly, a tenant who gets married should be entitled to live with his or her new spouse. But does the tenant have a right to live with someone other than a spouse? What rights go along with the leasehold? Does the landlord have the right to control occupancy to those listed on the written lease, or does the tenant have the right to have a family member or a boyfriend or girlfriend move in with her? Cf.* Barrett Japaning, Inc. v. Bialobroda*, 892 N.Y.S.2d 35 (App. Div. 2009) (landlord entitled to injunction to limit tenant to no more than one roommate). Should it matter if the landlord has religious objections to cohabitation outside marriage?*

This problem can be used to highlight the potential conflict between tenants' rights to receive visitors and to marry (and have their spouse move in with them) with landlords' legitimate interests in controlling occupancy (to prevent wear and tear, noise, etc.). There are both practical issues and fundamental rights on both sides of this equation. On the tenant's side, most tenants probably assume, unless a lease says otherwise, that they can have a partner or spouse come share the space—after all, they've rented it. Moreover, there are important tenant interests in privacy and associational freedom at issue.

On the other hand, landlords take on risk when people they have not had contact with occupy the space they have rented, and landlords have a long-term interest in preserving that space. As to whether a religious landlord's personal objection to cohabitation should trump tenants' rights, a strong argument can be made that when someone puts a product or service into commerce—by renting out housing—they must abide by market norms and be open to all. Would it make a difference if the housing is in a small building where the landlord lives? Should it?

C. Tenant's Duties Not to Commit Waste or Cause a Nuisance, and the Problem of Domestic Violence 850

Problem. *A woman breaks off her relationship with a man and moves out with their two children. He repeatedly harasses her at work, calling more than 10 times a day, and threatens her life. She moves to a new apartment and goes to court to obtain a restraining order on him ordering him to stop harassing her and to stay away from her. He then shows up at the new apartment, throws a brick through the window, and kicks down the front door. She calls the police, who arrest him. Then the landlord sues to evict her for violating the lease terms against "committing waste" and "causing a nuisance." Is the landlord entitled to evict her? Does she have any possible defenses?*

An increasing amount of litigation deals with this issue. From the landlord's perspective, the tenant's occupancy is resulting in harm to the property and a nuisance to the neighbors. From the tenant's perspective, she is a victim and has done nothing wrong and allowing her to be evicted is to compound her victim status by giving her ex-partner the power to act so as to deny her sanctuary in her own home. The tenant may also argue that she is not the one causing waste or committing a nuisance and thus the landlord is not entitled to evict her. The landlord will respond that tenants are legally responsible for harms to property caused by their visitors; her response of course is that the ex-partner is not a visitor but an intruder who is victimizing both her and the landlord.

As the materials in §2.5 in this chapter spell out, this is also an area that is increasingly subject to legislation. Much of the legislation is designed to protect victims of domestic violence who may be seeking to leave (and thus terminate their lease before the end of the lease term), but some of it is designed to limit landlords' rights to use domestic violence as a reason for evicting victims (or refusing to rent to victims of domestic violence).

D. Tenant Use Restrictions and Obligations.....850

This section turns the tables and asks whether there is a duty of good faith *on the tenant.* Many of the arguments here are structurally similar to the arguments above.

Note 1. *In commercial and retail leases, particularly those involving multiple tenants in office buildings and shopping centers, restrictions on the use to which tenants can put the property are quite common and can regulate the nature of a tenant's use in detail. Can you see why?*

This is meant to help students understand that not only is the leasehold an ongoing relationship over time between a tenant and a landlord, but leases also structure the relationships between multiple tenants in many instances. The easiest example is a shopping center. Each tenant has some incentive to make sure that they have a say in the nature and business of the other tenants who will occupy the same shopping center. This can be anti-competitive, of course, and if tenants have sufficient bargaining power, they can obtain lease terms that limit the ability of landlords to rent to other tenants who might compete. But such terms can also ensure that the significant investments that a tenant makes—in improving/building out their particular space, in site-specific marketing, and the like—can be protected (to some extent) against sharing space with other tenants who might harm those investments.

Note 2. *Is an implied duty to operate likely to be more consistent or less consistent with the actual intent of the parties at the time they contracted? Should commercial tenants be exempt from implied obligations on the grounds that commercial landlords are sufficiently sophisticated*

and can adequately protect themselves by including an explicit covenant to operate in their leases? Should the result depend on whether the tenant had a right to sublet or assign the lease? Why? Does a negatively phrased obligation not to use the premises for anything other than a specific purpose, such as a restaurant, imply an affirmative duty to operate? What result best promotes the efficient use of property? Most likely reflects the intent of the parties?

These questions are intended to direct attention to the specific topics that should form the crux of a policy discussion. For a complete analysis, see the problem below. One issue to flag here is the question of whether the result should turn on whether the tenant has a contractual right to sublease. The presence of a right to sublease would give a strong indication that there was no obligation to continue operating. On the other hand, the agreement is likely to give the landlord the right to approve the sublease and the landlord is not likely to do so unless the subtenant is financially stable and as attractive a tenant as the original tenant. Nor will the landlord agree to the sublease unless provision for rent can be made that would be satisfactory to the landlord. In the absence of the landlord's consent, it may be argued that the tenant does have a duty to continue operating to generate the earnings from which the rent will be paid.

Problem. *A shopping-center lease for a franchise of a café-style restaurant chain that sells sandwiches, coffee, and soup provided that the landlord would not lease to any other sandwich-selling businesses in the same center. Three years into the five-year term of the lease, the landlord sells the shopping center to a new owner. A few days before the transfer, the original landlord signed a lease with a franchise of a Mexican-style fast-casual restaurant chain that sells burritos, quesadillas, and tacos. When the new restaurant opens, the sandwich restaurant franchise owner complains to the new owner of the shopping center, who responds that the new restaurant does not violate the non-competition provision and, even if it does, the violation occurred before the sale, so it was the original owner's responsibility. If the tenant seeks to enforce the non-competition clause against the new owner, how should a court respond?*

This problem can illustrate several issues in commercial real estate, covering both the nature of the transfer of a landlord's leasehold interest as well as the tenant use restrictions. To begin, the question is whether any obligations imposed on a landlord in a lease transfer to a new landlord upon the sale of the underlying asset. The general rule is that if a new owner has actual or constructive knowledge of a lease, they are bound by the terms of that lease. Here there is no indication one way or the other, but it would not be commercially reasonable (to say the least!) for the purchaser of a shopping center not to review existing leases in the shopping center as part of the due diligence for acquisition, so it is safe to assume that the new owner had knowledge and is therefore bound. (It is common for purchasers of real estate assets whose value is based on tenant rental income, such as a shopping center, to obtain an estoppels statement from each tenant that commits that tenant to the terms of the lease and specifically places the tenant on record as to whether there are any understandings between the tenant and the seller-landlord not reflected in the written lease.)

The second question is whether a Mexican-style fast-casual restaurant is covered by a prohibition against leasing to "sandwich-selling businesses". Arguments can be made on either side: for the original tenant seeking to enforce the lease covenant, it does not matter whether the competition arises from a restaurant that is largely in a different category. Competition is competition. For the purchaser-landlord, on the other hand, the new tenant is filling a different niche and may pose only minor competition.

Does a breach by a landlord selling property create liability for the new landlord, if it is not ongoing, as a breach of the non-competition clause (if there was a breach) would be? There are good arguments on both sides: that the new landlord succeeds to all right, title and interest, and,

correspondingly, all liabilities, of the former owner; but the new owner could argue that any liability from a one-time breach (arguably not material, although a close case) should reside with the former owner. That said, the on-going competition may give the original tenant some leverage in settlement negotiations.

§2.3 Transfers of the Landlord's Leasehold Interest.....852
§2.4 Assigning and Subleasing.....853
***Kendall v. Ernest Pestana, Inc.* (1985).....856**
***Slavin v. Rent Control Board of Brookline* (1990).....861**
§2.5 Tenant's Right to Terminate Early.....866
§2.6 The End of the Tenancy: Landlord's Right to Recover Possession versus a Tenant's Right to Remain.....867

There are several issues that may usefully serve as a focus of class discussion. First is the relationship between the question of whether the landlord should have a duty to mitigate damages when the tenant breaches the contract and leaves before the end of the lease term and the question of whether or not there is an implied "reasonableness" term in the lease agreement that gives the landlord the right to consent to a sublease or agreement such that the landlord breaches the agreement when she refuses a sublease or assignment unreasonably. One way to teach this issue is to ask whether the students can tell, by reading *Slavin,* whether the Massachusetts Supreme Judicial Court is likely to hold that landlords have a duty to mitigate damages.

Another way to approach the case is to generate the arguments for and against recognizing an implied reasonableness term either in the residential or the commercial context. (It is important to specify which context one is addressing since different considerations *may* be relevant.)

Third, the teacher may ask whether commercial and residential leases are distinguishable and, if so, which way that cuts.

The issue in the principal cases and in problem 1 below is one of contract interpretation. Should the courts interpret a clause that grants the tenant the right to sublease or assign "with the landlord's consent" as obligating the landlord to agree to a "reasonable" assignment or sublease? The issue in the question in note 2 is whether an agreement that clearly grants the landlord absolute and arbitrary discretion should be enforced or held unenforceable as a matter of public policy. The argument for enforcing the provision is that the goal of the court is to determine what arrangement the parties actually made. Implication of a duty to act reasonably simply describes the probable intent of the parties and their mutual understanding of what the agreement meant; if the parties make clear that this is not what they intend, the result should be different. In addition, it is important to counter the argument on the other side which will suggest that the landlord has no right to act unreasonably. The landlord can argue that she is not claiming a right to act unreasonably but rather the right not to have to go to court to defend the landlord's own decision not to agree to the assignment. This contract term arguably helps the tenant by reducing the landlord's vulnerability and therefore allows the landlord to charge a lower rent. Because the landlord wants to ensure that the rent is coming in and because there is always a possibility the tenant will leave and breach the lease, the landlord has strong incentives not to deny an assignment or sublease unreasonably. Thus, enforcing the clause giving the landlord absolute discretion on this question is both unlikely to hurt the tenant (since the landlord has adequate incentives to act reasonably) and may even hurt the tenant (by allowing the landlord to charge a lower rent).

The counterargument is that the underlying policy justification offered in *Kendall* for imposing a duty to act reasonably is the policy against inhibiting the alienability of property. This policy arguably applies even more strongly if the agreement specifies that the landlord has the

policy to act arbitrarily and in bad faith. If the landlord has no commercially articulable reasons to offer for her actions, then we arguably have a conflict between the policy of promoting the alienability of property and the landlord's interest in controlling the future use of the property. If the granting of possession to a lessee is analogous to the sale of a fee simple interest, then allowing the grantor to prevent future transfers of the property thus conveyed not only retains too much control over the property (denying autonomy and equality) but inhibits the operation of a free market in real estate. (The counterargument, of course, is that a sale and a lease *are* distinguishable because the landlord legitimately retains more control over the property than the seller because of the landlord's reversion, and that this retention of control may actually induce the landlord to lease in the first place. Thus, allowing the restraint on alienation may encourage the property to be shifted to its more highly valued use by the lessee without interfering with the lessor's interests. It may therefore promote, rather than inhibit, alienability.)

Note 1. *Should parties be able to contract for the standard of reasonableness that will apply to their agreements? What are the best arguments on both sides?*

This can facilitate a conversation on the primary themes of the chapter—about bargaining power, intent, justice and efficiency—in the context of subleasing and assigning.

Note 2. *Why is it unreasonable for a landlord to take potential competition from an assignee into account? Would it have been unreasonable for the landlord to have refused to lease to that party in the first place?*

The issue here is under what circumstances might a landlord use its ability to control subleasing and assigning to protect a competitive position. This is a variation of what the *Kendall* court described as a landlord "trying to get more than it bargained for in the lease." But is that right? One argument here is that what the landlord bargained for is a right to approve a sublease or assignment and even one that is cabined by reasonableness must define what reasonable means. The court in *Kendall* assumes that using that approval right to share in any way in the economic value of a sublease or assignment is unreasonable—and there is a good argument for that position. But it is not as cut and dried as the *Kendall* court seems to suggest.

One way to understand this is to assume that a landlord is choosing between two potential tenants, one of whom would compete with the landlord and the other of whom would not. Would it be unreasonable of the landlord, all things being equal, to rent to the latter over the former? From the landlord's perspective, there is no material difference between this scenario and the sublease/assignment scenario. Of course, from the tenant's perspective, the two scenarios look quite different: having chosen to enter into a landlord-tenant relationship, the landlord's options are, arguably, not nearly as unconstrained as they might have been at the initial rental stage.

Note 3. *Do the reasons for implying a reasonableness requirement differ in the residential context? If the arguments applicable to commercial leases are inapplicable to residential leases, what other arguments could you make on behalf of the tenant? How would you argue that residential leases, but not commercial leases, should be subject to an implied duty of reasonableness?*

Slavin refuses to impose an obligation on residential landlords to act reasonably while *Kendall* does impose such a duty on commercial landlords. Arguably, if one is going to make a distinction, it should be the other way around since residential tenants are likely to be less sophisticated than commercial tenants and may not realize what they are signing; moreover, unequal bargaining power is likely to be more of a problem in the context of residential leaseholds. On the other hand, it may be appropriate to require the landlord to act reasonably in the commercial context because this accords with commercial custom and is therefore more likely to represent the actual intent of the parties, while in the residential context, the landlord may care about more than

the financial trustworthiness of the tenant. Since the rented premises may be the landlord's present or future home, the landlord of a residential tenant may have stronger reasons for exercising control over who occupies the premises.

A different approach is to argue that residential and commercial tenancies are indistinguishable. Again, which way does this cut? It may be a reason for imposing a duty in both instances (because of an implied duty of good faith) or in neither instance (to give the parties exactly what they bargained for).

The *Kendall* court argues that implying a duty on the landlord to act reasonably is appropriate because (1) it promotes the alienability of commercial property; and (2) this would reconcile commercial leasehold law with all other contract law which now imposes a duty of good faith in all agreements in order to better enforce the probable intent of the parties, to encourage reliance on agreements, and to lower the costs of transacting by ensuring that agreements are interpreted in light of commercial custom, thereby avoiding the need to write 10,000 page contracts to list all the things the other party is *not* allowed to do; (3) because absolute power to refuse a sublease is inconsistent with the duty to mitigate damages; and (4) because this result not only best promotes the legitimate interests of both parties but is Pareto efficient because it arguably helps the tenant without hurting the landlord's legitimate interests.

The counterarguments are that the property may well be more alienable if the court enforces the precise language in the agreement. The landlord may have been willing to lease the property only on the condition that the landlord retain control over who possesses it. The duty of good faith is intended to promote the intent of the parties who are ordinarily assumed to act in accord with commercial custom. However, landlords have the right to prevent subleases and assignments entirely; there is therefore nothing inconsistent with commercial custom for the landlord to explain to the tenant that subleasing will be allowed only if the landlord consents. There is no unfair surprise to the tenants; if they wanted a right to freely sublease, they should have bargained for this right. Efficiency is achieved by enforcing the agreement the parties reached; requiring the landlord to agree to the sublease rewrites the agreement, giving the tenant something for nothing and thereby harming the landlord. If the tenant really values the right to sublease more than the landlord values the right to retain control over possession, let the tenant bargain for it. Finally, retaining an absolute right to refuse a sublease is not inconsistent with the duty to mitigate damages. For further explanation, see problem 2 below.

Note 4. *The court in* Slavin *finds the laws in other states cited by the tenant to be inapposite since they are incorporated into the statutes rather than the common law of those states. See, e.g.,* N.Y. Real Prop. Law *§ 226-b(2)(a) (tenants can sublet with landlord's consent; such consent cannot be unreasonably withheld). What difference does this make? On one hand, it can be argued that this question should be, and has been in other states, left to the legislature to address. On the other hand, since the theory underlying contract law is that the court should enforce the presumed intent of the parties, it might be argued that because these laws reflect changing values and expectations, the presumption underlying the common law rule no longer reflects the justified expectations of the parties. Would it have made a difference to the Massachusetts Supreme Judicial Court if the tenant could have identified another state that had modernized its law by common law ruling rather than statute? Should that make a difference? Doesn't some state have to be first?*

The question itself contains the analysis of the answer. The court argues that it needs a *court opinion* from another state to give it the sense that the *common law* of subleasing is changing. If it is, it may be appropriate for the courts to act without waiting for the legislature to change the law. If, however, the law is being changed only by legislatures, this may give an indication that most courts think that this is the *kind of issue* that should be left to the legislature to address.

The counterargument is that the courts should modernize common law rules to accord with contemporary values and social conditions and to rationalize the law as a whole. It might be argued

that, in contract law in general and in commercial law (Uniform Commercial Code) in particular, the practice is to presume that there is an implied duty of good faith in all agreements. This duty furthers the presumed intent of the parties and promotes predictability by making it clear to the parties that they are being held to the obligations a reasonable person would understand they were assuming; they cannot breach the deal by looking for technical loopholes. Until recently, real property law was the one area where duties of good faith still seemed to be lacking on the theory that owners get exactly what they pay for and no more or the idea that owners retain absolute control over their property unless they alienate that control—thus the idea that licenses are revocable at will. However, this has never been a completely accurate picture of real property law. Whenever equity intervened, we got duties of good faith. Remember equitable servitudes, easements by estoppel, constructive trusts. One might ask: Why should we preserve an *exception* to the general duty of good faith for subleases? Rather than waiting for the legislature to act, the court can reconcile conflicting cases by implementing the new background principle of good faith. In addition, the actions by legislatures in recent statutory law supports this approach by giving evidence of democratic support for this result and showing that this approach would better accord with emerging social values. It is inappropriate in the last decade of the twentieth century to ignore the policies underlying current statutes. Statutes are a major source of public policy which should inform the development of common law rules. Considering the policies underlying the Uniform Commercial Code, for example, gives judges a better indication of current social values than a judicial decision from 1920 denying a right to expect reasonable business conduct.

Problem 1. *Suppose a law student in the Commonwealth of Massachusetts has a one-year lease, running from September 1 through August 31, that states "no subletting or assignment without the landlord's consent." The law student wants to move out on June 1 and sublet the apartment for most of the summer so that she can move to Washington, D.C. for a summer job. Does it make any difference whether Massachusetts law requires landlords to mitigate damages? Is there anything the tenant can do to protect herself from a lawsuit by the landlord?*

The student should talk to the landlord and try to work it out. She should also try to find a reasonable subtenant or assignee so that the landlord does not face any costs associated with the sublease. Keeping good relations with the landlord and finding a reasonable subtenant will make it more likely the student will get what she wants.

It does make a difference if there is a duty to mitigate damages. If there is such a duty, and the landlord refuses to agree to the sublease, the student can simply announce that she intends to breach the agreement by leaving early, find a reasonable replacement tenant and present that replacement to the landlord. If the landlord refuses to agree to the replacement, the landlord will have failed to mitigate damages and, in the event of a lawsuit, will not be entitled to any further rent. Because of this possibility, it may be argued that, if the rule of law is that the landlord has the right to reject a sublease arbitrarily, it would be inconsistent for the court to impose a duty on the landlord to mitigate damages. If a duty to mitigate exists, the landlord will not be able to enforce her right to collect rent from *these* tenants for the entire lease term and avoid either the obligation to look for new tenants every summer or the uncertainty associated with a new tenant.

When you ask students whether the court that decided *Slavin* would hold that the landlord has a duty to mitigate damages, most students will conclude that the court would not impose such a duty for precisely the reasons stated above. Imposing such a duty would seem to negate the landlord's power to refuse a sublease. Consider the case of a lease term that explicitly states that the apartment "shall not be assigned or sublet." This term is enforceable and does not constitute an unlawful restraint on alienation. It is a property right the landlord retains. The tenant has obtained possession of the premises subject to this limitation. However, if the landlord has a duty to mitigate damages, the clause *may effectively be unenforceable.* Thus, it can be argued that a court that

accepts the rule in *Slavin* probably would (or should) not impose on the landlord a duty to mitigate damages.

Is there any way to argue that the issue in *Slavin* is distinguishable from the issue of whether the landlord should have a duty to mitigate damages? The tenant wants to argue that the cases are distinguishable and that, even if there is no implied duty on the landlord to act reasonably in consenting to a sublease, the landlord does have a duty to mitigate damages when the tenant breaches the lease. As a practical matter, it is true that this may mean that the landlord has to consent to a reasonable sublease, but this result is justifiable and not inconsistent with the result in *Slavin.* First, the issue in *Slavin* is one of interpretation: How should the court interpret an ambiguous agreement? The duty to mitigate damages is not an issue of interpretation but a regulatory rule that provides the remedy for breach of contract; it arguably does not depend on an interpretation of the agreement. (This argument would have to be modified if the court would enforce a lease provision that relieved the landlord of the duty to mitigate damages!) It is thus perfectly sensible to conclude that, as a matter of interpretation, the landlord *intended* to retain absolute power to decide whether to consent to a sublease, but that, as a matter of contract remedies law, *the landlord has no right to do this.* In other words, the landlord cannot lawfully refuse a reasonable sublet and then go after the tenant for the remaining rent.

Second, *Slavin* specifically dealt with a tenant who wanted to remain in the apartment and choose a new roommate. In this situation, the landlord may reasonably want to retain control over who the new occupant is; thus the landlord can reasonably retain absolute control over the new occupant. On the other hand, when the tenant or tenants move out entirely, the landlord can comply with the duty to mitigate damages by choosing the new occupant herself; the duty to mitigate does not require the landlord to lease to whoever the tenant presents to the landlord. Thus, it may be reasonable to distinguish the two cases because, together, they give the landlord the power to control occupancy. Requiring the landlord to consent to a reasonable sublet would, *unlike* the duty to mitigate damages, force the landlord to accept whatever new occupant was chosen *by the tenant.*

Third, the duty to mitigate damages gives the tenant the right to easily get out of the contract entirely. However, if the tenant wants to retain her possessory rights and sublet or assign her interest, the tenant is effectively *affirming* the contract rather than attempting to get of it. If the tenant wants to do this, it is reasonable to require the tenant to comply with the strict terms of the contract. This result actually protects the tenant's interests in the following way. If the tenant cannot get the landlord to agree to a new roommate, the tenant can leave and is protected by the duty to mitigate damages. If there were no duty to mitigate damages, the landlord could impose her own interests on the tenant by forcing the tenant either not to find a new roommate or to find a roommate acceptable to the landlord. At the same time, this construction of the lease protects the landlord's interests by ensuring control over who possesses the property. Interpreting a landlord consent clause to allow the landlord to act unreasonably while imposing on the landlord a duty to mitigate damages therefore arguably best balances the tenant's interest in getting out of an arrangement that is no longer in the tenant's best interest while protecting the landlord's legitimate interests in controlling who is occupying the landlord's property.

Problem 2. *The tenant of property on which a grocery store is operating arranges to sublease the property to a business owned by Japanese Americans. The landlord refuses to agree because of prejudice against the sublessees. What should the courts do if the landlord refuses to approve the sublease based on racially discriminatory motives? Should a lease provision granting the landlord the absolute right to approve or disapprove any subleases be enforceable under these circumstances?*

On one hand, the landlord could argue that the tenant and the prospective sub-tenant have no legal right to challenge the landlord's decision since the agreement explicitly grants the landlord

absolute power over the sublease. Thus, whether or not racial discrimination is wrongful, there is no claim that can be vindicated. This rule of law may be justified by the argument that it protects the landlord from the fear and the reality of litigation over assignment and sublease and protects the landlord from unsuitable subtenants while helping the tenant by allowing the landlord to charge a lower rent since the landlord does not face the potential cost of a lawsuit over this issue. On the other hand, racial discrimination is prohibited by federal law, 42 U.S.C. §1982, which provides that every person shall have the same rights to purchase and lease property as do white citizens, and perhaps by state law as well. If it could be proved that the sole reason that the landlord refused to agree to the sublease was because of the national origin of the subtenant it might be argued that a lease provision giving the landlord absolute power over any sublease violates state or federal antidiscrimination laws. This result would also follow even if discriminatory motives were merely a substantial factor in the decision. This question is therefore here to remind students that there will be some substantial limits on the extent to which the landlord can act in an arbitrary manner set by antidiscrimination statutes. This raises the further question of whether the courts should, by analogy to the antidiscrimination laws, create other exceptions to the rule that would allow the landlord to act unreasonably. This suggests that the policy underlying the rule may not merely be one of interpreting the intent of the parties to an ambiguous lease agreement but may be one of public policy limiting the parties' contractual freedom to agree to unreasonable control by the landlord.

Problem 3. *An office tenant has a 20-year lease with a clause requiring landlord consent to sublet, such consent not to be unreasonably withheld. The neighborhood where the office building sits has been redeveloped significantly and rents for similar office space in the area are increasing significantly. The tenant seeks permission from the landlord to sublet half of its office space, and the landlord agrees on condition that the tenant pays the landlord 25 percent of any profits that result from the higher rent the tenant can now charge to any subtenant. Is this a reasonable exercise of the landlord's discretion?*

This problem is a variation on the *Kendall* court's reluctance to allow the landlord to demand any share of price appreciation once the initial rent level was set. As discussed above, this is not an unreasonable position, but it does make a determination about an allocation of economic benefit that the parties did not explicitly address, under the banner of "reasonableness." Should the court assume that that is what the parties would have bargained for had they been explicit? You might need to know a lot more about market norms and customs, as those can vary significantly in commercial real estate from market to market. What is "standard" and assumed by parties in an office building in New York City might not pertain to one in northern Virginia, Columbus, Ohio, or the Bay Area.

It is not clear, moreover, in a situation in which you have two commercially sophisticated entities, which way fairness cuts in filling in the terms of the contract if the contract is silent on this point. This may be a situation in which there is unequal bargaining power, but commercial tenants often have significant leverage, so you can't assume that across the board. Another way to approach resolving this conflict is to ask whether the nature of the leasehold itself should shape the parties' expectations and the court's resolution of whether this condition is reasonable. If we think of the lease as an absolute, time-limited conveyance of a property interest, then it makes sense for the tenant to retain any upside of market appreciation that the landlord failed to bargain for by including a clause that explicitly gave the landlord the right to a rent escalation. On the other hand, if we recognize that the tenancy is a long-term relationship between the landlord and the tenant in which the landlord's interest is not exclusively limited to the landlord's reversion, then that argument might be weaker.

§3 Conflicts About Rent.....868
§3.1 Landlord's Remedies When Tenant Fails to Pay Rent. 868

In additional to the general rules that pertain to landlord remedies for tenant failure to pay rent, the materials in this section highlight the consequences of eviction and efforts, such as the growing number of jurisdictions that impose good-cause or just-cause eviction standards to mitigate those consequences. Note that these statutes generally still allow landlords to evict for nonpayment of rent, which limits their ability to mitigate economic dislocation. The materials also highlight the connection between access to counsel and evictions, with a number of local governments following the example set by New York City in 2017 to begin providing universal access to counsel in housing matters for low-income tenants.

§3.2 Landlord's Duty to Mitigate Damages 872
***Sommer v. Kridel* (1977).....874**
§3.3 Security Deposits 882

The doctrine about the duty to mitigate damages is fun to teach, again because it involves the students' self-interest. One way to teach this issue is by using the problem; because many law students want to be able to move someplace else for the summer, while most leases last for 12 months rather than 9 months, this problem forces the students to come up with arguments for regulating the lease agreement to impose this added duty on the landlord. Their intuition is almost uniformly that they should be able to move away for the summer; yet they often have not thought through the implications of this intuition or considered whether it is justified.

Note 2. *How can the landlord increase the likelihood that the courts will find that the landlord did not accept the tenant's surrender of the lease?*

The landlord should send a certified, return-receipt letter—or similar formal communication—to the tenant stating that the landlord is "reletting on the tenant's account", that the landlord "does not accept the tenant's surrender of the lease", and the tenant remains liable for rental payments if the landlord is unable to find a replacement or the replacement tenant fails to pay the rent due under tenant's lease.

Note 3. *Is either of these explanations convincing? Should it make a difference whether the landlord has limited a tenant's right to sublease or assign? Why?*

The first argument in favor of the efficiency of the duty to mitigate damages suggests that the landlord is indifferent between enforcing and not enforcing the contract; as long as the rent is coming in, and no harm is coming to the premises, the landlord is equally well off whether the rent is coming from the original tenant or a replacement. The second argument for imposing a duty to mitigate damages on the landlord if that even if it does impose a duty on the landlord which the landlord wanted to avoid (looking for a new tenant during the lease term), this result is justified because of the negative externalities associated with wasting a scarce resource (leaving the apartment vacant) and preventing the tenant from maximizing the tenant's welfare by taking a job in another city.

The counterargument is that the duty to mitigate damages does not leave the landlord equally well off because it imposes a duty to act on the landlord, and the whole purpose of the agreement was to enable the landlord not to have to look for a new tenant within the lease term. In addition, the apartment is not being wasted if it was worth it to the tenant to bargain for use of the apartment and it was worth it to the landlord to refuse to rent for less than a 12-month period. The mere fact that the apartment is not being used does not mean that it is being wasted. This might be its most highly valued use. In addition, if the tenant decides not to breach the lease and stay in the

apartment, this means that the benefit to the tenant of breaching the agreement was less than its costs to the landlord; although this result may not be what the tenant wants, it may maximize social wealth overall.

This disagreement is partly a factual one about whether there will in fact be a significant amount of vacant housing if there is no duty to mitigate damages, and if there is, whether there are significant externalities associated with vacant housing and finally, whether transaction costs will prevent efficient deals from emerging. It is also partly a disagreement about how to measure the efficiency of a particular situation. On one hand, it might be argued that whatever result emerges from market transactions, including vacant apartments or tenants prevented from moving, presumptively maximizes social wealth because the landlord's failure to agree to different terms suggests that the entitlement is worth more to the landlord than it is to the tenant, and that any externalities are likely to be low relative to the interests of the particular parties to the agreement. On the other hand, one may conclude that because housing is a necessity, it is scarce, and many people are homeless, and that the interest in being free to move is so fundamental, that any contract that effectively limits the tenant's freedom to travel or leaves housing vacant, is presumptively inefficient on the ground that ability to pay may not adequately measure utility. The fact that the parties agree to unconscionable terms does not mean that they maximize the general welfare; rather, it means that the distribution of wealth, and hence bargaining power, is sufficiently unequal that market transactions may cause entitlements to go to the party who is able to pay more for them but values them less in the sense that they grant that party less utility than they would to the poorer party. The answer therefore partly depends on how well market transactions are thought to be useful proxies for maximizing the general welfare.

If a landlord has limited a tenant's right to sublease or assign, that would limit the tenant's ability to mitigate on the tenant's side (by assigning or subleasing space the tenant can no longer afford or need). That might make us think differently about the fairness of a landlord's failure to mitigate, on the argument that it is worse for the landlord to allow damages to accumulate when the landlord limits or bars the tenant's ability to do something about it.

Note 4. *In a jurisdiction that imposes a duty on landlords to mitigate damages, what advice would you give a tenant who wanted to leave before the end of the lease term? Should she give the landlord notice before she leaves? Does the duty to mitigate damages protect her sufficiently so that she can leave in confidence that she will be relieved of rent obligations for the rest of the lease term? How can the tenant minimize her legal exposure?*

The tenant can make the landlord's duty to mitigate damages costless by finding a reasonable new tenant and presenting that tenant to the landlord and attempting to persuade the landlord to accept the subtenant. (The damages are not totally costless because there is always some uncertainty with a new tenant which the landlord may want to avoid.) If the replacement tenant is reasonable, the landlord's failure to accept the new tenant may mean that the original tenant is relieved of further rental obligations. The original tenant must realize that, if the replacement tenant fails to pay the rent, the landlord may go after the original tenant for the rental payments. The tenant can minimize her exposure by choosing a replacement tenant who is trustworthy and entering into a written contract with the replacement tenant that would clearly allow the original tenant to sue the replacement tenant for any unpaid rent.

Note 6. *Which approach is better?*

This question can help students think about the consequences of a burden of proof. What happens if a party cannot meet the burden? If the burden is on the tenant, how do they prove the failure of the landlord to take reasonable steps to mitigate? Why would courts take a different approach to residential than to commercial tenancies? What informational or power dynamics

differ between these two contexts? And, finally, do the advantages of a shifting burden in terms of more subtly allocating burdens outweigh the additional litigation complexity that comes from that kind of approach?

Problem 1. *A professional real estate company with a large portfolio of properties manages a recently developed 16-story apartment building with 80 units. Each floor in the building contains the same mix of studio, one-bedroom, and two-bedroom apartments. Each apartment of a given type has the same layout and standard finishes, and the views from each are similar, although slightly better from higher floors. A tenant breaches her one-year lease on a one-bedroom apartment and moves out after only three months. At the time the landlord sets out to re-let the apartment, the building has three other one-bedroom apartments available to rent, and a handful of studio and two-bedroom apartments vacant as well. If a prospective tenant comes to the building's leasing office seeking an apartment and does not specify any particular unit, must the landlord rent the newly vacated unit before offering any other vacant units? What if the prospective tenants are a couple with a small child?*

This is meant to illustrate a dilemma raised by the duty to mitigate that can arise in the context of multiple, relatively similar units that a landlord might re-let. If a landlord, fulfilling her obligation to mitigate, leases the vacated unit when another unit is also available, that would seem to put the landlord at a disadvantage, given that they could have rented that other unit to the prospective tenant had there not been a breach. The court in *Sommer* stated that "If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment. In such cases he must treat the apartment in question as if it was one of his vacant stock," and this appears to be the approach that most courts take to this issue. But is that right?

The twist with the prospective tenant who are a couple with a small child is that it might call into question the equivalence between the vacated unit (the tenant who breached having rented a one-bedroom) and a unit that such a couple might be looking for (which might be a two-bedroom). In that situation, the landlord might have a more solid case for showing the couple a two-bedroom and not the vacated one-bedroom apartment.

Problem 2. *A landlord who lives in a three-unit building rents two of the apartments. The building is located in an urban area with many universities and a shortage of rental housing; many prospective tenants look for housing much of the time. Most of the tenants are students, many of whom go elsewhere for the summer. Because the landlord lives in the building, she is concerned about finding tenants who will not be disruptive. Because the state imposes a duty to mitigate damages, however, tenants have started leaving at the end of the school year and stopping rent payments. This constitutes a breach of the year-long lease; however, they know that the landlord will be able to find replacement tenants and that she has a "duty to mitigate damages." Because she can easily find new tenants, she is unlikely to come after them for the money. The landlord comes to you for advice. She would rather not have to look for new tenants twice a year, in September and again in June. Suppose she were to place a clause in the lease that states:*

> *If Tenant abandons or vacates the Leased Premises during the Term of this Lease, Landlord may elect to re-enter the premises and, at her option, re-let the Leased Premises. If the Landlord elects not to re-let the Leased Premises, Tenant shall be liable for the remainder of the rent due under the Lease until its expiration. Landlord has no duty to mitigate damages.*

Would such a clause be enforceable? Should it be?

One way to teach this problem is by first addressing the propriety of the duty to mitigate damages itself. Many students think there should be a duty to mitigate damages because they identify with the tenant in the problem and want to have a right to move. If you ask them, "If you wanted a nine-month lease, why didn't you bargain for one?," they often answer that landlords refuse to grant such leases. You can then answer that landlords will certainly grant them if you offer enough money. Students often respond that they cannot afford to pay more or that they should not have to do so because the landlord has no right to prevent them from moving when their landlord's monetary interests in rent payment can be satisfied in another way. The problem is a useful one to explore the meaning of free contract because the students effectively argue either than they have unequal bargaining power with landlords or that the failure to allow the students to move out early is inherently unfair. You can then rehearse the arguments about the efficiency of imposing a duty to mitigate damages as outlined above in the discussion of note 3.

The specific question in the problem alters the nature of the legal issue from one of interpretation (what should the remedy be for breach of contract in the absence of contractual language to the contrary?) to one of regulation (should the duty to mitigate damages be nondisclaimable?). It turns out that both of the efficiency arguments discussed in note 3 are relevant here. The first argument concerned which of the parties valued the entitlement in question more. The fact that the landlord insisted on bargaining for relief from the duty to mitigate damages may show that the landlord values the right to be free from this obligation more than the tenant values the right to leave before the end of the lease term. On the other hand, the tenant can argue that she had imperfect information when she signed the agreement and did not know what the "duty to mitigate damages" meant and, even if she did know, she had imperfect information about how useful it would be to her, and she would never have agreed to it if she had known this. The second argument concerns the question of whether there are significant externalities associated with leaving the apartment vacant or preventing the tenant from moving or whether, on the contrary, the most highly valued use for the premises, as measured by willingness and ability to pay, may be either to leave the apartment vacant or induce the tenant to stay in town.

The question also requires consideration of competing rights and fairness arguments. The tenant may argue that she has a right to travel and that the agreement infringes on this fundamental right. In addition, the courts should protect her from mistakes she is almost certain to regret. Refusing to enforce the agreement is therefore not illegitimately paternalistic; rather, it promotes the best interests of the parties as they themselves conceive of them. The landlord may respond that she has a right to look for and rent her property only to tenants who will stay for a year; if tenants do not like this arrangement, they can either go somewhere else or compensate the landlord sufficiently to compensate her for the costs associated with looking for and accepting a new tenant after nine months. There is nothing unfair about the agreement.

§3.4 Rent Regulation 882

Rent regulation—rent control, rent stabilization, and similar policies—is a politically explosive topic. Very popular in certain municipalities, it is vehemently opposed by many landlords, and despite fairly strong affirmations of its constitutionality by the Supreme Court in *Yee v. Escondido*, 503 U.S. 519 (1992), and other cases, landlords persist in arguing that it effectuates an unconstitutional taking of property without just compensation. In addition, many economists use rent regulation as the textbook example of a type of public policy that backfires, harming the very persons it is intended to help. Although rent regulation exists only in a limited number of jurisdictions, it is growing in importance and likely to continue to do so in coming years.

§3.5 Commercial Leases During the Pandemic and Excuse of Performance Doctrines 883

The Covid-19 pandemic raised a number of important landlord-tenant issues, as jurisdictions imposed stay-at-home orders and economic dislocations impacted residential and commercial tenants. Materials in §3.1 touch briefly on eviction moratoria and similar policies in the residential rental sector. This section touches on the commercial side and raises important questions about the allocation of risk: should commercial tenants have to continue to pay rent when either the government policies or hard-to-foresee market conditions significantly undermine or even (temporarily) bar a business from operating altogether? Courts have been generally (although not entirely) unsympathetic to such claims and, in practice, much of this litigation has been focused on insurance claims.

§4 Tenant's Rights to Quiet Enjoyment and Habitable Premises 884
§4.1 The Covenant of Quiet Enjoyment and Constructive Eviction 884
***Minjak Co. v. Randolph* (1988) 884**

The constructive eviction doctrine has been eclipsed to a substantial extent by the implied warranty of habitability since the tenant can appeal to the implied warranty even if the tenant fails to move out. Thus, it proved an alternative ground of liability in *Minjak.* However, constructive eviction doctrine does retain significance because certain situations may arguably constitute interferences with quiet enjoyment but not infringement of the warranty of habitability. The problem, which focuses on noisy neighbors, may be an example of this. Although there may be no provision of the housing code to which the tenant could appeal to argue that the landlord violates the implied warranty of habitability by failing to control the noise generated by other tenants, the tenant may nonetheless prove constructive eviction. Similarly, the common law doctrine of the implied warranty may be interpreted as encompassing the physical condition of the premises only; it may therefore be narrower than the constructive eviction doctrine. For example, sexual harassment by the landlord may constitute constructive eviction entitling the tenant to move out before the end of the lease term (as well as a violation of the *Fair Housing Act* entitling the tenant to damages for sex discrimination) even though it does not constitute a violation of the implied warranty of habitability.

Note 6. *In the absence of such a clause, should a tenant have an implied duty not to disturb his neighbors such that violation of the duty would constitute a breach of the lease and entitle the landlord to evict the tenant? Should the landlord have not only the right but the obligation to evict a noisy tenant to protect the interests of neighboring tenants? Should it be enough to find a violation of a tenant's covenant of quiet enjoyment that a landlord rents to a new tenant whose use of the premises is likely to conflict with the existing tenant's use?*

The traditional constructive eviction doctrine allows the tenant to get out of the lease early and to sue the landlord for damages when (1) the landlord has acted (2) to substantially and materially deprive the tenant of quiet enjoyment and (3) the tenant moves out within a reasonable time. The question here is whether the landlord has "acted" by not protecting the tenant from noisy neighbors. The traditional view is that the landlord has done nothing himself; the landlord is not the guilty party. The tenant's remedy is to sue the neighbor for committing a nuisance. The view adopted by *Blackett* is that because the landlord has the right to require tenants to refrain from making noise, the landlord's failure to do this constitutes an action by the landlord, within the landlord's control, that infringes on the quiet enjoyment of the tenant's leasehold. It is not clear whether the case would have come out differently if the clause had not been in the lease. In my

view, it probably would have because an implied duty in all tenancies is an obligation on the tenant not to disturb the use and enjoyment of other tenants. Violation of this duty constitutes a breach of the lease, giving the landlord the right to evict the noisy tenant. *Blackett* holds that a landlord who has the right to evict a tenant has a *duty* to do so if this is necessary to protect the interests of *other* tenants, whose quiet enjoyment the landlord covenanted to protect.

Problem 1. *A client comes into your office with the following story. She is a law student renting a third-floor apartment in a three-unit apartment house near the law school. She shares the apartment with two roommates; all three of them have signed the lease, which runs from September 1 to August 31. It is now November 10. Starting in October, the tenant occupying the second floor began making unwanted sexual comments to your client as she walked up to her apartment. He has never touched her and has not directly threatened to attack her. She is afraid of him because of these comments, which he now makes daily. She believes he waits for her to come home so that he can accost her on the stairway as she goes up to her apartment. If it were not for this neighbor, she would be very happy with the apartment, which is well maintained, reasonably priced, attractive, and close to both school and shopping. At the same time, she is considering moving out — something her roommates do not want her to do. She asks you for advice about her legal rights.*

(a) What questions would you ask her? Has she talked with the landlord? Does she want to stay there or does she want to move out? Does she have some place she can go—perhaps staying with a friend until she finds a new place to live? Does she have a written lease? Do the neighbors have a lease? What is her relationship with the landlord like?

(b) What options does she have? She can (i) do nothing; (ii) talk to the landlord to induce the landlord to evict the harassing tenant; (iii) talk to the other tenant or have someone else—a friend or a lawyer—do so; (iv) move out, with or without finding a replacement tenant; (v) attempt to sue the harasser for violating the *Fair Housing Act* by interfering in her right to obtain housing without regard to discrimination on the basis of sex, 42 U.S.C. §3617.

Note that if she has a month-to-month tenancy, she can simply move out with a month's notice (or whatever period is required by statute) whether or not she has been constructively evicted. Note also that the client may be upset and not thinking clearly. If she has not thought of it, she might be advised not to go home alone so that she never has to confront her neighbor alone at her house.

(c) What legal advice would you give her? Several legal issues are present that require extrapolating from *Blackett* to this situation. The first question is whether the landlord is responsible for this tenant's conduct. In *Blackett*, the court found the landlord responsible because (i) a clause in the bar's lease required it not to interfere with the quiet enjoyment of the neighbors and (ii) there was an inherent conflict between the bar and the residential tenants such that the landlord should have known, by the mere fact of leasing the premises to the bar, that the residential tenants' quiet enjoyment would be disturbed. In this case, there is no explicit lease term requiring the tenant not to interfere with the quiet enjoyment of the neighbors. Although this was helpful in *Blackett,* it was probably not necessary to the result; the court is likely to conclude that there is an implied duty on all tenants to refrain from disturbing their neighbors. However, there is no inherent conflict between renting property to two residential tenants; thus the landlord could not have known, prior to renting, that this tenant would disturb his neighbor. For this reason, it may be inappropriate to make the landlord responsible for this tenant's conduct; the landlord has done nothing wrong. On the other hand, the landlord may have done something wrong by failing to provide a safe place to live by failing to evict a tenant who is harassing his neighbor. It is probably a good bet that the court that decided *Blackett* would extend the ruling to this case and find that the landlord has a duty to evict the harasser and that the failure to do so constitutes constructive eviction of the other tenant.

The second issue is whether the harasser's actions have "substantially" interfered with the tenant's use and enjoyment of her property. The landlord may argue that the interference, even

though serious, does not rise to the level of making the apartment uninhabitable; nor should it impose a duty or a right on the landlord to evict the tenant who is making the offensive comments. However, under contemporary and emerging social values, it is likely, but by no means certain, that the harasser's actions are sufficient to constitute constructive eviction since they place the victim in fear and, even if they do not place her in fear, they impose a substantial psychological harm, rightly making her angry or upset or both.

Problem 2. *Do tenants have a right to leave if a registered sex offender moves in next door? See* Knudsen v. Lax*, 17 Misc. 3d 350 (N.Y. Civ. Ct. 2007) (yes, because this "resolution approximates the terms the parties would have negotiated had they foreseen the circumstances that have given rise to the dispute").*

The case raises all the same issues as *Blackett* and problem 1 about when the landlord is responsible for acts of other tenants and involves a feeling of personal safety. On the other hand, if "next door" means in an apartment not owned by the landlord, then it appears there is no action attributable to the landlord that caused the apartment to be unlivable. The question then is whether the landlord should be vulnerable to tenants breaking the lease in such cases when the landlord is not morally responsible for the apartment becoming unlivable to the tenant. On which side should the burden lie?

§4.2 Warranty of Habitability 891

***Javins v. First National Realty Corp.* (1970).....892**

One version of the revolutionary development of landlord-tenant law since the 1960s is that it started out dominated by principles of property law based in the estates system with tenants characterized as owners of leaseholds and landlords characterized as mere reversioners with no duties to the current possessor. This conception was rejected when the courts began to conceptualize leases as contracts and imported into landlord-tenant law the implied duty of good faith and the doctrine that performance by either party was dependent on performance by the other. As this conception developed, the courts began to impose compulsory terms into leases to protect the party that was thought to have less bargaining power and to create uniform minimum standards for leaseholds which were nondisclaimable. Because these duties were nondisclaimable, the landlord-tenant relation began to resemble a status (analogous to marriage) with nonwaivable duties, thus moving from property to contract to status.

This historical picture hides contradictory conceptions of both property and contract. The principles underlying contract law sometimes focus on the notion of promoting individual freedom to set the terms of contracts; under this interpretation, the courts should defer to the agreement the parties make. When the lease is ambiguous, the court can develop default rules or presumptions, but the parties should be able to contract around these presumptions; it is inconsistent with freedom of contract for terms to be nonwaivable. However, contract doctrine sometimes includes specific implied duties that are nonwaivable. For example, it would inconsistent with the principle of freedom of contract to enforce contracts that are not voluntary, but are the result of unequal bargaining power. Thus, to ensure that contract law promotes freedom rather than coercion, the courts should not enforce unconscionable terms because no one would agree to those terms if they had the power to avoid them.

Similarly, the principles underlying property law sometimes focus on the freedom and power of owners to control their use and transfer of their property by transferring it only upon conditions chosen by them; under this view, the landlord should be able to contract for the right to receive rent in exchange for possession and to have the obligation to pay rent not dependent on the landlord complying with any statutory obligations to maintain the premises. On the other hand,

property law often requires bundling of particular rights through the estate system in order to promote alienability and to protect the legitimate interests of current possessors; it is therefore perfectly consistent with property law to argue that the leasehold gives the tenant a nondisclaimable right to a habitable dwelling and that any disclaimer clause is "repugnant" to the estate granted.

Note 1. *Were these legitimate considerations to influence Judge Wright? Would it have been possible for a judge sitting in the District of Columbia to rule on landlord-tenant matters at the time without considering them?*

This might require some arm-chair psychologizing about the judicial process, but it can help students focus on what it must have been like to be a judge during the urban crisis of the 1960s and 1970s with any sensitivity to the plight of urban residents. Whether judges *should* be influenced by those conditions is, of course, debatable, but it is hard to imagine that they are not.

Is the implied warranty of habitability compatible with the policies underlying summary process statutes? If so, how?

On one hand, the implied warranty seems incompatible with summary process statutes since it complicates the procedure and introduces issues other than the question of whether or not the tenant paid rent and whether or not the lease term has ended. On the other hand, the purpose of summary process statutes is to enable the landlord to dispossess the tenant *if the landlord is legally entitled to do so.* Violation of the implied warranty means that the landlord has forfeited the right to evict. The summary procedure does enable landlords to get relatively quick court dates even if the implied warranty is an issue. Landlords ordinarily do not have to wait several years for eviction proceedings to occur as they may in other types of civil actions. Thus the purpose of the summary proceedings is still effectuated.

Did Judge Wright engage in illegitimate judicial activism to create a new defense to the landlord's claim for possession? Or was Judge Wright's innovation in the law a legitimate implementation of the policies underlying the housing code?

On one hand, it might be argued that the court should wait for the legislature to adopt such a major change in property law. Housing codes did *not* provide that the tenant had a right to withhold rent when the landlord violated the housing code, and the remedies in it may have been intended to be exclusive. On the other hand, the court could further the policies underlying the housing code by reinterpreting landlord-tenant law to comport with those policies. This result promotes the will of the democratically elected legislature rather than subverting it.

In addition, the implied warranty is one of the clearest examples we have of the interaction between the courts and the legislatures as lawmaking bodies. After the legislature imposed the housing code, the court reinterpreted landlord-tenant law to include an implied warranty in order to make the common law consistent with the public policies underlying the statutory regulation. In many states, legislatures responded by codifying the implied warranty to both support it and make its administration more predictable. What the court did influenced the legislature to address an issue it had ignored. Thus, the court's act of lawmaking arguably was compatible with the role of the legislature as the more democratically legitimate lawmaking body. On the other hand, it might be argued that the court should not intervene in this way but to leave major changes to the legislature to work out in order to give them, from the beginning, greater legitimacy.

Note 2. *Which approach is better?*

Balancing landlord obligations with the fact that some landlords may not know about conditions and allowing them the opportunity to remedy those conditions in the first place has the advantage of judicial economy and fairness to landlords who may, in good faith, not have been on notice. On the other hand, if the remedy for breach of the implied warranty is monetary, then a rule

that triggers that liability as soon as a condition arises might incentivize landlords to take greater care in inspecting units and proactively fixing problems before they trigger a violation of the warranty.

Does it make sense to distinguish commercial from residential leases in terms of the expectations of the parties and the other grounds Judge Wright discussed in Javins*?*

These questions can be used to frame a discussion around the nature of commercial relations in landlord-tenant law and contexts where the relatively strength of the bargaining positions might not be so clear.

Note 5. *How might these shortcomings be remedied? Would our legal system be better off without an affirmative obligation on the part of landlords to maintain habitable premises, even if relatively few tenants are able to succeed in pressing claims in court based on this duty?*

The question of access to justice in the context of rental housing is very challenging and it seems unlikely that either the Supreme Court will recognize a right to counsel in that context (or most civil contexts) or that our society will devote significantly greater resources to providing such counsel. Some advocates have been working on alternatives to counsel, such as non-lawyer representatives (although this quickly runs afoul of ethics rules and unauthorized practice of law problems), "unbundling" of legal services, where lawyers can offer limited representation, and a range of reforms to court process and substance to level the playing field for pro se litigants.

As to whether it is better to have an imperfect, poorly enforced warranty of habitability or none at all, it is hard to argue that the absence of the right would leave tenants in a better position.

Problem 1. *Assume your state has adopted* URLTA *and imposes a warranty of habitability on residential tenancies but imposes no implied warranty of habitability or suitability in commercial tenancies. Assume the same facts as in Minjak. The tenants rent a loft — a large open space — pursuant to a written agreement entitled "Commercial Lease," stating that the premises are leased for "commercial purposes." The landlord knows that the tenants will be using the space for work purposes, storing and using equipment to make electronic music, but the landlord knows also that the tenants intend to live in the space, treating it as their residence. The landlord fails to maintain the premises in a safe condition, allowing hazardous conditions — such as flooding in the tenants' apartment caused by the operation of a health club with jacuzzis upstairs, the presence of huge clouds of dust caused by the landlord's renovation work in common areas, and the formation of holes in the stairway — to develop unchecked. Two questions arise.*

a. How would the courts interpret the lease — as a residential lease, a commercial lease, or a mixed residential/commercial lease?

b. If the courts interpret the lease as a commercial or a mixed residential/commercial lease, and the tenants are using the space as their residence, is it still subject to the implied warranty of habitability, or does the "commercial" designation constitute an effective waiver by the tenant of the implied warranty?

The formal arrangement is a commercial lease but the informal understanding is that the tenant will live there. When an informal understanding exists, does this constitute *consent* on the landlord's behalf and an acceptance of the duties of a residential landlord? The answer to this question also revolves around the issue of whether the landlord can easily escape the obligations of the implied warranty simply by calling the lease a "commercial one" under these circumstances.

Problem 2. *Suppose you are testifying before a legislative committee on the proposed amendment to the statute.*

(a) What arguments would you make on behalf of the real estate board to allow tenants to waive the protections of the implied warranty of habitability?

(b) What arguments would you make on behalf of the tenants' association to make the protections of the implied warranty of habitability nondisclaimable?

The answer to this problem is effectively analyzed in the list of arguments and counter-arguments contained in this section. You can teach this material by dividing the class into groups, with one group arguing for the tenants' organization, a second group arguing for the landlords' organization and a third group acting as members of the legislative committee. The legislators prepare for class by constructing two questions to ask both sides. The landlords and tenants prepare for class by constructing a short, two-minute statement of the argument on their side and being prepared to answer questions. The exercise is meant to give the students practice in manipulating the arguments, in constructing the most plausible case for their side, and learning how to respond to arguments from the other side.

In addition to asking students to make arguments on both sides of the question, you might ask them how they would vote on the legislation. After hearing all the arguments, what *exactly* persuades them to go one way or the other? What is the key factor that influences their personal judgment? You might then attempt to get students on opposite sides of the issue to talk to each other to clarify their own judgments and to attempt to persuade other students sitting in the same room, rather than trying to hypothesize which arguments would be most persuasive to an anonymous legislature or to some court.

Problem 3. *Tenants living in an apartment in a 20-unit building in New England in the wintertime awake to find that they have no heat. They call the building manager to fix the problem and he says he will talk to the landlord and call them back. Two hours later, the manager calls to say that the furnace is broken and it is not clear when it will be fixed. The temperature outside the apartment is 30 degrees Fahrenheit and the temperature inside is now about 55 degrees. The tenants then read in the morning newspaper that the landlord, who owns 10 buildings in the surrounding area, is in financial straits and may be forced to declare bankruptcy. The tenants call you for advice. What rights do they have under the* URLTA *and how should they proceed? As the landlord's lawyer, what advice would you give?*

This question requires careful reading of the statute to determine both what the rights and obligations of the landlord and tenant are, what remedies they have, and what actions they need to take to vindicate those remedies. Landlord duties to maintain are defined in §2.104 and the tenant's means to vindicate those rights (including notice and any relief of the duty to pay rent) are defined in §4.101 and §4.104. Many jurisdictions have local housing inspectors that tenants can call to enforce the housing code and any citation by the inspector to the effect that the apartment has no heat would be good evidence in court to support the tenant's claim of a violation of the warranty of habitability and provide possible defenses to the tenant who stops paying rent or who moves out before the end of the lease term. The statute also defines the circumstances in which the tenant may engage in self-help to secure heat or hot water if the landlord fails to act (see §4.104(a)).

§4.3 Landlord's Tort Liability to Tenants.....910
§4.4 Landlord Liability for Tenant-to-Tenant Discriminatory Harassment.....914

Problem 1. *A tenant notifies the landlord that another tenant in the building is selling drugs out of his apartment. The landlord does nothing. The tenant is held up at gunpoint and robbed in the hallway of the building by a customer of the drug dealer. The tenant sues the landlord for negligent infliction of emotional distress.*

a. What is the tenant's argument that she should be able to hold the landlord responsible for damages?

The landlord almost certainly has the legal power to evict a tenant for selling illegal drugs. The failure to exercise this legal right arguably resulted in foreseeable harm to the other tenant. The power implies the duty to exercise it. The landlord's failure to act was unreasonable and makes the landlord a proximate cause of the harm to the tenant.

b. What is the landlord's argument that he is not responsible for the harm?

The landlord did nothing wrong. He did not commit the crime and was not responsible for it. It is wrong to hold the landlord responsible for a crime committed by someone else. Evicting a drug dealer may place the landlord in danger. The tenant who notified the landlord of the drug use could also have called the police to induce them to investigate. The landlord should not be charged with law enforcement given the dangers associated with attempting to do so.

Problem 2. *Assume a state statute provides that "whenever a child under six years of age resides in any premises in which any paint, plaster or other accessible structural material contains dangerous levels of lead, the owner shall remove or contain said paint, plaster or other accessible structural materials." The statute also provides that a "landlord who fails to comply with the act shall be liable to any child injured because of that failure for damages."*

A landlord fails to comply with the act and a four-year-old child becomes ill with lead poisoning after eating paint chips that fell from a windowsill. The child's father sues the landlord for negligence, arguing that the landlord's failure to abate the lead paint in the apartment posed a foreseeable risk of harm to his child and caused his child's illness. The landlord seeks to reduce whatever liability made be found against her by arguing that the tenant was "contributorily negligent," i.e., that if the father had been more vigilant, he would have prevented the child from ingesting the paint chips and the harm would not have occurred.

a. What is the child's argument that the statute does not allow the landlord to raise a defense of contributory negligence?

b. What is the landlord's argument that such a defense is consistent with the statute?

c. How should a court rule?

The argument for not allowing the landlord to escape or decrease liability by raising the contributory negligence (or comparative negligence) defense is that the statutory purpose was to impose an incentive on landlords to protect children by de-leading the apartment. If the tenant may be held contributorily negligent, tenants will have little incentive to bring lawsuits and the statute will not serve its purpose of giving landlords an incentive to correct the problem. Thus, the statute will simply not achieve its purpose if the landlord can raise this defense. In addition, the statute imposes "strict liability" on the landlord and this is arguably a non-fault-based theory designed to impose appropriate incentives on the landlord. A strong counterargument is that the statute imposes liability on the landlord for all damages "caused" by the landlord's failure to remove the lead. When the tenant is contributorily negligent, the harm is arguably caused only partly by the landlord's failure to act and is partly caused by the tenant's negligent failure to supervise the child.

§4.5 Minimum Standards Revisited.....916

The following summary can serve as a tool kit for use in advocacy settings.

Rights Arguments

	Arguments against minimum standards	**Arguments for minimum standards**
Freedom of contract arguments	**Enforce voluntary contracts: freedom of action** People should be free to enter into whatever agreements they wish; making particular terms nonwaivable prevents tenants from agreeing to waive the right to withhold rent in return for lower rent, even if they wish to do so; compulsory terms interfere with contractual freedom by preventing individuals from doing the best they can, given their circumstances. Because of competition among landlords for tenants, landlords do not have the power to dictate terms to tenants; so long as a relatively competitive market for rental housing exists, landlords cannot as a class have disproportionate bargaining power over tenants as a class.[3]	**Unequal bargaining power: coerced contracts entered into under duress are not voluntary** Tenants and landlords have unequal bargaining power because housing is a *necessity* and because of *structural* disparities between landlords and tenants associated with the fact that landlords own real property and tenants do not; in addition, landlords often *collude* by using form leases drafted by real estate associations and including terms favorable to landlords. No one would voluntarily agree to rent an apartment that did not comply with minimum standards of habitability; the fact that people agree to do so is evidence not that they affirmatively wanted to agree but that they were forced to agree because they had no legally available alternatives. Courts should enforce the agreement the parties would have made if they had relatively equal bargaining power; only

[3] *See* Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 Harv. J.L. & Pub. Poly. 107 (1986).

such contracts can be rightfully deemed voluntary.

Distributive considerations

Regulations impose unfair burdens on landlords

So long as a competitive market for rental property exists, the only source of unequal bargaining power between landlords and tenants is that landlords, as a class, may be richer than tenants as a class; tenants cannot afford to pay landlords enough to induce them to offer better housing; if tenants could do so, landlords would provide it because it would be profitable to do so.

Making the implied warranty of habitability nondisclaimable imposes new costs on the landlord since it exposes the landlord to the possibility that the tenant will stop paying rent; the landlord will therefore attempt to raise the rent to compensate for this new vulnerability. However, landlords will not be able to pass the entire cost on to tenants because if tenants were able to afford the true cost of the new duty, it would have been profitable for landlords to provide the term to begin with. Landlords will provide even luxury housing to tenants who can afford it; thus, when landlords try to raise the rent, some tenants will be unable or unwilling to pay a higher rent and will either double up with

Minimum standards regulations promote justice in ongoing social relationships

It is not unfair to require landlords to bear some of the costs of providing habitable housing; on the contrary, it would be unfair for landlords to make a living by providing substandard housing. Just as product manufacturers have obligations to provide safe products and employers have duties to provide safe workplaces, landlords have obligations to provide safe and habitable housing.

Landlords are engaged in the business of earning a living by renting property. In so doing, they create an ongoing relationship with their tenants. It is fair to require them to conduct those relationships in accordance with minimum standards of decency. No one has a right to earn a living from someone else's misery. Just as it is unlawful to enter a contract of slavery, it is unlawful to enter a contract by which one agrees to allow someone else to live in deplorable conditions. Tenants do not have economic incentives to invest in maintenance, since only the owner will recoup the value of the increased value of the

friends or family, move to a cheaper location, or become homeless. Because some tenants will exit the market when landlords try to raise the rent, landlords as a group will be unable to raise the rent sufficiently to pass on the entire cost of the new duty to the tenants; the result is that some wealth is redistributed between landlords as a class to tenants as a class.

This redistribution is unfair because it places the burden of dealing with poverty on a small subset of the population (that is, landlords) when the obligation to care for poor people should be shared by all taxpayers through rental subsidies or welfare programs; it amounts to a tax on landlords to help tenants. If tenants are too poor to be able to afford habitable housing, the proper remedy is to use the tax system to raise money to provide welfare payments for poor tenants, spreading the cost of providing essential housing services to all taxpayers rather than just the class of landlords. Landlords are not responsible for the poverty of tenants and should not unfairly have to bear the burden of rectifying it by themselves.

property. It is therefore fair to place the burden on the landlord to provide premises consistent with contemporary standards and values.[4] The failure to comply with the implied warranty of habitability imposes costs on third parties who must deal with the social consequences of substandard housing; the community at large should not have to subsidize the landlord by protecting the landlord from liability for the social costs of substandard housing.

[4] *See* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 Yale L.J. 1093 (1971).

Paternalism	Self-determination Individual citizens are the best judges of their own interests; the state should not prevent people from entering into voluntary agreements on the ground that it is not in their best interest to enter into such agreements. If tenants are willing to waive rights in exchange for other contractual benefits, such as lower rent, they should be allowed to do so since they are entitled to self-determination; their choice should not be constrained by government on the ground that the choice is mistaken. **Institutional competence** Neither courts nor legislatures are equipped to determine what private arrangements best satisfy the parties' needs; choice is always better than constraint. Even if individuals suffer from cognitive distortion, there is no reason to believe courts or legislatures are free from such distortions; thus the parties rather than the government should determine the terms of their collaborative arrangements.	**Actual Intent of the Parties** A contract by which tenants waive basic rights to habitability is unlikely to represent the actual intent of the parties; tenants may not read or understand what they are agreeing to when they sign form leases that may incorporate terms favorable to the landlord. **Cognitive Distortion**[5] Even if tenants understand what rights they are waiving, we should protect people from mistakes they are very likely to regret later; people often underestimate the possibility that bad things can happen (for example, that a landlord will fail to provide basic services in the apartment); they may also fail to understand the utility of withholding rent in inducing the landlord's compliance with the building code. Making particular claims compulsory protects people from the short-run temptation to give up entitlements that they know are in their long-term best interests, as forced saving in the form of Social Security payments, for example, protects people from failing to save for retirement or disability.

[5] *See* Cass Sunstein, *Legal Interference with Private Preferences*, 52 U. Chi. L. Rev. 1129 (1986).

	Freedom as the baseline The only minimum standards individuals require are rules protecting property rights and promoting freedom of contract, with rights determined by contract enforceable in court; that structure is the baseline that best allows individuals to pursue their ends in their own way without overbearing and oppressive government interference.	**Minimum Standards** Some contractual agreements are so fundamentally unfair or unconscionable that they should not be enforced even if the parties have voluntarily agreed to them; it violates common decency and individual dignity for courts to enforce terms that are outrageously unfair. All contracts are subject to statutory and common law regulation to ensure that they comply with minimum standards for social and market relationships in a free and democratic society; freedom of contract takes place within boundaries established by these minimum standards regulations and any contracts that contradict these requirements violate public policy.[6]
	Economic Arguments	
	Arguments against minimum standards	**Arguments for minimum standards**
Incentives to invest in safety & maintenance	**Available income to pay for repairs** Requiring the tenant to pay rent ensures a steady source of income from which the landlord can pay for needed repairs; allowing the tenant to withhold rent means the landlord may have no resources to make needed repairs.	**Only effective sanction for failing to comply with the housing code** Rent withholding is not only an extremely effective way to prevent landlords from violating the housing code but may be the only effective remedy in an era of government cutbacks and a shortage of housing inspectors.

6 *See* Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 Harv. L. & Poly. Rev. 139 (2008).

Enforcement of the housing code obligations is sufficiently ensured through administrative enforcement by the housing inspector.

If landlords know tenants can withhold rent, they will set rents accordingly and save enough to make repairs.

Effects on allocative efficiency in the housing market

Free bargaining creates Pareto optimal results

Compulsory contract terms are necessarily inefficient because they interfere with the parties' ability to bargain for mutually beneficial terms. If the tenant is willing to live in a less well-maintained apartment, she should be able to enter into a contract for lower rent and then have money available to use for other things such as food and clothing. Moreover, the landlord is obligated to maintain the apartment under any existing housing code; all the implied warranty adds is the ability to get out of the lease or stop paying rent or obtain a rent reduction if the landlord fails to maintain the premises adequately. The tenant may well believe that the housing code constitutes a sufficient guarantee of performance and be willing to give up other enforcement mechanisms like the right to withhold rent. Preventing the tenant from making such an arrangement prevents both parties from maximizing their utility, thereby reducing social wealth. Third-party effects are minimal in this situation

Market imperfections impede efficient results

Externalities

There are significant third-party effects of substandard housing. It is harmful to children and other inhabitants and produces medical problems that society ultimately must pay for; blighted areas have difficulty attracting new residents and business investment; even if the parties wish to agree to waive particular rights, others are negatively affected by housing contracts that do not give landlords sufficient incentives to comply with the housing code. Allowing waiver therefore decreases social welfare.

Imperfect information

Tenants may not understand the significance of waiving the implied warranty of habitability; even when they do understand, they may incorrectly judge both the likelihood that a violation will occur and the utility of withholding rent if it does; if they had perfect information, they would refuse to waive the protections afforded by the warranty. Courts should enforce the results to which the parties would have agreed if they had

and are sufficiently addressed by zoning laws and the housing code.

possessed perfect information.

Distributive effects

Landlords will raise the rent and decrease the supply of housing

Landlords will respond to the implied warranty by raising the rent. The tenant has the right to withhold rent or break the lease if problems arise; if the landlord is not able to fix the problems quickly, the landlord faces a greater possibility of loss of income than in a legal regime without the implied warranty. To compensate for this additional legal and economic exposure, the landlord will respond by raising the rent, hurting tenants—the very people the reformers intended to help.

In a competitive market, any significant increase in rent will cause some tenants to leave the market. Because demand is sensitive to price (higher rents may reduce the quantity of housing demanded as some tenants double up or become homeless), landlords are unlikely to pass on to their tenants the full cost of the implied warranty. Marginal landlords who are barely making it will not be able to cover the full costs of the new regulation, and some of them will leave the rental housing market altogether. Thus, because the costs of doing

Effect of the implied warranty will depend on existing conditions in the market

It is impossible to predict, *a priori*, what effects the implied warranty will have on the market. The result depends on a host of factors affecting both demand and supply. For example, if demand is elastic, that is, extremely price-sensitive, and the price of housing services goes up even a little, quantity demanded falls precipitously. This may happen because tenants are already paying rents that are high relative to their incomes and simply cannot afford higher housing costs. Or it may be that tenants prefer not to pay any more and are willing to double up with roommates or family members or even move out of town to limit their housing expenses. If demand is highly elastic, landlords may simply be unable to pass the cost along to tenants. Any landlord who tries to do so will find no takers for her apartment and will be forced to lower the rent in order to stay in business.

Imposition of the implied warranty may not decrease the supply of housing if landlords are earning economic rents, which exceed the minimum

business have gone up, the supply of housing will go down, as some landlords shift to more profitable investments. With a decreased supply of housing, even more competition for the housing remains, further raising the price and subjecting tenants to even higher rents, again hurting the very people the regulation was intended to benefit.

required to keep the investment in its current use. This could happen if land is scarce but demand is high because of both the necessity and the limited availability of housing. Landlords may be able to raise rents substantially, making housing far more profitable than equally risky investments. In a perfectly competitive market, more housing providers would enter the market, increasing the supply of housing and thereby lowering the price as tenants have more places available. If, however, the supply of housing cannot rise either because land is scarce or because zoning laws prohibit owners from increasing the size of their buildings or constructing rental housing in nonresidential areas, then rents will remain high for a long time. If landlords are earning economic rents with high profits, a reduction in those profits may allow them to stay in business and still earn more than they could in other businesses. The implied warranty would simply redistribute wealth between landlords and tenants but would not result in a decrease in the supply of housing.

11. Real Estate Transactions 921

Themes

Real Estate as a Locus of Transactional Lawyering

This chapter, in addition to covering the doctrinal and regulatory substance of basic real estate practice, can be used to highlight aspects of transactional practice that may be unfamiliar to most first-year law students. The first part of the chapter, in particular, is structured around the phases of a typical real estate transaction, with an emphasis on residential real estate, although in the main the general arc pertains on the commercial real estate side as well. These phases beginning with pre-contracting, then move to contracting and the executory period, before shifting to closing and post-closing matters. This timeline and the discussion of institutional roles throughout the process can be used to discuss what "deal" lawyers actually *do* and how they add value, especially given that many of the functions they are responsible for, at least in the residential real estate context, could be undertaken by other professionals such as brokers or title companies using form documents in many cases. There is an extensive literature on transactional lawyering, but the chapter frames a few key concepts:

(1) *Deal lawyers as structural managers*. Perhaps the most straight-forward aspect of what transactional lawyers do is oversee and manage the structural details of a transaction, including negotiating the terms (beyond the basic economics of the deal, which brokers generally negotiate), memorializing the deal, and ensuring that various contingencies and responsibilities are met as the process moves from pre-contracting to post-closing. Lawyers often leverage their drafting responsibilities into this broader structural role and students need to understand that much of what lawyers do in day-to-day transactional practice involves the practical wisdom to interact with other professionals (such as title companies, environmental engineers, finance experts, and the like) and the project-management skills necessary to keep complex, overlapping processes moving smoothly. This is not unique to real estate (the same set of skills is necessary for most business transactions), but real estate provides an example that is relatively accessible for students.

(2) *Deal lawyers as risk managers*. A slightly more complex set of tasks that transactional lawyering requires is the evaluation, allocation, and mitigation of risk, whether legal, business, property-specific, or otherwise. Think of the risk that a property has environmental contamination that will require a purchaser to engage in costly clean up. How is that risk discovered? Who bears the risk? What tools are available to lawyers to reveal that information and then decide how to handle the inevitable lack of complete knowledge? Information is not costless to generate. Some examples, then, of tools that transactional lawyers can bring to bear to managing risks in an environment of imperfect information include:

(a) *disclosure requirements*, which obligate a party to reveal otherwise hidden information (such as whether a parcel was ever used in the past for the storage of hazardous materials);

(b) *due diligence*, which gives a party the right to investigate for a given risk (by, for example, hiring an environmental expert to examine a site and search the records for evidence of hazardous materials);

(c) *representations and warranties*, which allocate the risk of information failure to the party making the undertaking (by, for example, committing a seller to state, often to the

best of the seller's knowledge, that there is no contamination, which creates potential liability if that representation and warranty turns out to be untrue);

(d) *contingencies*, which give a party the right to rescind or not close if they are not satisfied with the state of certain risks;

(e) *guarantees and escrows*, and similar economic risk-sharing techniques that hedge the possibility that an un-evaluated risk might emerge post-closing.

This does not exhaust the transactional lawyer's toolkit but gives some standard examples of how a given risk—whether physical or legal (such as title risk)—might be ascertained and allocated between the parties (or to third parties, such as insurers or guarantors).

(3) *Transactional lawyers as value engineers*. Finally, and perhaps most abstractly, transactional lawyers, if they are doing their job right, have the potential not only to slice the deal pie more accurately (risk allocation) and perhaps more favorably for their client, but also to *grow* the size of the pie by finding ways to bridge divides between the parties. To give one example, think about a situation in which a company is interested in buying a shopping center but concerned that the anchor tenant may leave when its lease is up in two years. There may be no way to control that risk before the closing, but the seller might be willing to offer a guarantee or other post-closing undertaking to bear a portion of that non-renewal risk, which, if structured right, might allow a deal to close that would otherwise not move forward.

Broader Themes About the Nature of the Market for Real Estate

Many of the themes in this chapter also build on issues explored in our chapters on servitudes, future interests, common ownership, and landlord-tenant law. All of these chapters either involve contracts that allocate rights in real property or non-contractual relationships that create legitimate expectations that access to property will be protected.

(1) *Formal v. informal ways to create property rights.* Just as the topics of adverse possession, prescriptive rights, easement by estoppel, and constructive trust raise the question of the circumstances under which informal arrangements will create property rights, the doctrines of part performance and estoppel in this chapter address exceptions to the statute of frauds, allowing enforcement of contracts to convey real property in the absence of a written agreement. Equitable mortgages and the treatment of some contracts for deed similarly recognize the parties' expectations when they diverge from the parties' formal arrangements.

(2) *Fiduciary obligations and consumer protection.* Just as the materials on common owners addressed the extent of fiduciary obligations among common owners, and doctrines about easement by implication and implied reciprocal negative servitudes, as well as doctrines about constructive eviction and the implied warranty of habitability all raised questions of the obligations of housing providers to avoid misleading purchasers by creating false impressions about the property interest conveyed, so do the doctrines of misrepresentation and fraudulent nondisclosure by addressing the obligations of sellers and brokers to act in good faith toward purchasers of real estate. Similarly, the compulsory terms in leases designed to protect the interests of consumers further similar policies those that underlie regulation of mortgages, installment land contracts, and deeds of trust.

(3) *Relativity of title and the rights of bona fide purchasers.* The concept of relativity of title introduced in Chapter one is explored here in the context of the recording system. A title good against the seller may not be good as against a subsequent bona fide purchaser. The recording system and the bona fide purchaser doctrine enable a well-functioning real estate market to exist by protecting the rights of purchasers who rely on the recording system. At the same time, the system involves choosing between innocent purchasers when an owner wrongfully conveys the same property interest twice; sometimes bona fide purchasers are *not* protected by this system (forged deeds are the primary example).

§1 Real Estate Transactions: Structure and Roles 921
§1.1 Attorneys' Transactional Roles 921
§1.2 Phases of the Transaction 922
A. Pre-Contracting and the Role of Brokers 923
B. Contracting: The Purchase and Sale Agreement 927
C. The Executory Period 928
D. Closing 930
E. Post-Closing 931

These materials are designed to allow students to track a typical real-estate transaction and the various roles for lawyers and other professionals—as well as the legal concerns and risks—that predominate at various stages.

Note on Brokers and Consumer Protection. *Why do you think the traditional fixed-fee brokerage model persists even as the cost of connecting buyers and sellers of residential real estate continues to decline?*

Brokers can be protectionist and their organized lobby has fought efforts to democratize the information available to consumers. Some brokers, however, have embraced the lowering of cost barriers to sharing information about real estate and have taken a more entrepreneurial approach to using that information. Remember that most of what brokers do involves acting as an intermediary for information: advertising listings, finding listings, communicating deal terms at the pre-contracting stage. There has been increasing pressure on brokers—including from on-going regulatory actions as well as consumer suits noted in the casebook—to lower their standard fees, but so far that pressure has not yielded significant declines in many markets, raising antitrust concerns.

§2 Purchase and Sale Agreements: Form, Formalities, and Remedies 931
§2.1 The Terms of the Agreement 931
***Offer to Purchase Real Estate* 932**
***Standard Form Purchase and Sale Agreement* 933**

Introductory note. *What mechanisms, if any, do the documents include to allocate or mitigate these risks? What important contingency discussed above is not mentioned in these agreements?*

These questions, and the questions that follow the standard form real estate documents, provide an opportunity to explore the most significant risks that tend to arise in real estate transactions and how one set of standard transactional documents addresses those risks. As an introductory matter, these questions are intended to frame how students might read the documents: as a roadmap for risk and mutual obligations, rather than as a collection of free-floating requirements.

Note that these documents split into two agreements obligations that in many jurisdictions are contained in one purchase and sale agreement. The first document, the Offer to Purchase Real Estate, is primarily about documenting the basic terms of the transaction but note that it structures the pre-contracting period by requiring a deposit and then, in paragraph 5, provides that if the potential buyer does not fulfill their obligations under this preliminary agreement, the deposit will become the property of the seller. One question you might ask students is why a buyer would agree to bear that risk. The primary reason is that it is a risk on the seller's side to take a property off the market (although it is possible to enter into a primary contract and continue to negotiate or even execute back-up offers), and sellers must be enticed to take that risk. Forfeiture of deposits is a very heavily litigated issue, not surprisingly. The second document, the Standard Form Purchase and Sale Agreement, then contains the primary terms of the transaction.

Among the primary concerns the Standard Form Purchase and Sale Agreement addresses are:

(1) *Title matters*: clauses 4, 10 through 12, and 14 together provide a mechanism for the buyer to insist on title free from defects. Clause 4 allows for easements, restrictions, and reservations of record that do not prohibit or materially interfere with the current use of the premises; clauses 10 and 11 give the buyer the right to rescind if the seller cannot remove defects in title; clause 14 allows encumbrances to be cleared through use of the purchase money (which is common); and clause 12 allows the buyer to accept the state of title, even if imperfect.

(2) *Physical condition of the premises*: clause 9 provides that the physical condition at closing will be the same condition as at the time of contract execution. This can help answer the second question above, which is what important contingency is not mentioned. That contingency is a physical inspection. Why is there no provision for a physical inspection of the property? Because the structure of the transaction assumed by the two documents is that an inspection will occur before the contract is signed. In many other markets, particularly in commercial real estate, a contract is signed and then due diligence is undertaken, often with the right to rescind following due diligence (or more limited rights to rescind on certain conditions).

(3) *Casualty*: other clauses address physical risks during the executory period, including clause 15, which requires the seller to maintain insurance; clause 11, which provides a right for the buyer to rescind if there is a casualty and an insurance payout, but the seller's mortgagee refuses to allow the funds to be used to restore the premises; and clause 12, which provides a mechanism for paying over insurance funds or credited against the purchase price.

Problems. *How do the Offer to Purchase Real Estate and the Standard Form Purchase and Sale Agreement address the following situations?*

1. After signing the Offer to Purchase Real Estate, but before executing the Standard Form Purchase and Sale Agreement, the seller receives a much higher offer for the property and would like to accept it.

The Offer to Purchase contemplates a binding agreement to execute the Standard Form Purchase and Sale Agreement but sellers sometimes decide not to proceed (whether before or after signing the actual Purchase and Sale Agreement). Sellers sometimes seek to invoke other clauses as grounds not to proceed in this situation and litigation can ensue about the latitude granted to sellers not to proceed. The Offer to Purchase does not provide any explicit grounds for a seller to avoid a commitment to proceed to executing the Purchase and Sale Agreement (see clause 3) or closing (see clause 4), but a court is likely to read those obligations through a lens of reasonableness. It is likely not reasonable to seek to rescind simply because a higher offer comes along.

2. Assume the parties sign the Standard Form Purchase and Sale Agreement. The buyer is concerned about possible environmental conditions on the property and wants to have an environmental consultant conduct an inspection. What if the seller told the buyer before they signed the contract that "there is nothing to worry about" in response to a question by the buyer about these environmental concerns?

Again, the structure of these two documents contemplates an inspection occurring before the contract—and any contingencies related to the results of that inspection being reflected in the terms of the contract itself. Since there is no explicit inspection contingency, the students are going to have to realize that that is an issue that will have to be added or addressed prior to contracting.

As to an oral representation, there are several issues here. First, is the statement accurate and is the buyer entitled to rely? If it is not accurate, it might constitute misrepresentation, but there is no reason to believe that the statement is necessarily so. Second, in terms of contracting, you can focus students' attention on clause 25, which disclaims any warranties and representations. If the buyer wants to bind the seller to representation and warranty about environmental quality, which is common in commercial real estate, then that would have to be added as a carve-out in that clause.

3. The seller's property is damaged in an electrical fire a week before the scheduled closing. Does it matter whether the seller had property insurance?

The contract contains specific provisions (primarily clauses 9-12) that govern risk of fire and insurance obligations during the executory period. In general, they provide that the premises will be delivered in the same condition as the time of contracting, subject to ordinary wear and tear (9); that if that condition is not met, any payments made under the agreement shall be returned and further obligations lifted – provided that the seller can extend the time for performance by 30 days (10-11); but the buyer can choose to proceed nonetheless (12). Remember that clause 15 allows for the specification of insurance during the executory period and clause 12 then governs the use of insurance proceeds in the event of a fire or casualty insured against.

4. The buyer, in examining the state of the property's title, discovers a judgment lien against the property, arising from a tort suit between the seller and a third party.

This is an opportunity to walk through the structure of title-related obligations with students, as spelled out in the introductory overview. Clause 4 specifies that title shall be delivered free from encumbrances, except those specified in the clause (with the ability of the parties to add existing liens). New liens that arise during the executory period trigger clauses 9-12, discussed above in the context of casualty, and clause 14, which governs the use of the purchase money to clear encumbrances.

5. The buyer unexpectedly loses her job shortly after signing the Standard Form Purchase and Sale Agreement and is now unable to obtain the loan that she thought she could.

This is the flip side of the situation in which the seller wants to rescind because a better offer has emerged, and the same set of questions about what contingencies might be invoked (or misused) to provide some out can be applied here. Clause 26 is the key clause here, as it provides for a financing contingency and obligates the buyer to pursue such financing with "diligent efforts." Events beyond the control of the buyer that undermine the ability of the buyer to obtain financing are likely to be found to be a legitimate ground to invoke this clause, but one question is whether there is any alternative financing that can be found. Likely not, but worth asking.

6. The seller agrees to remove an old outbuilding from the property, but says that he needs another two weeks after closing to complete the project.

This illustrates the issue of merger and carve-outs to merger. Clause 13 is the merger clause and if the parties want this obligation to survive closing, they need to draft an exception to that clause.

§2.2 Statute of Frauds versus Part Performance and Estoppel 937
***Burns v. McCormick* (1922).....937**
***Hurtubise v. McPherson* (2011).....939**

The Statute of Frauds requires transfers of interests in real property to be in writing to be enforceable. We saw a variety of exceptions to this principle in Chapters 5 and 8, including adverse possession, prescriptive easements, easements by implication, necessity, and estoppel, implied reciprocal negative servitudes, and covenants running with the land. This section covers additional doctrines that constitute court-structured exceptions to the statute of frauds.

On one hand, one could argue that courts should not create such exceptions because they harm the purposes of the Statute of Frauds itself. Allowing the parties to sue to enforce informal agreements decreases incentives to place the agreement in writing, encourages litigation and decreases the predictability of property rights. Strictly enforcing the Statute of Frauds may allow some sellers (and buyers) wrongfully to escape oral promises, but the alternative will subject all owners to fraudulent claims by disappointed buyers and sellers. Both predictability and the prevention of fraud will arguably be better ensured by rigid enforcement of the Statute of Frauds. In addition, the creation of exceptions by the court illegitimately rewrites the statute, evading its plain language. This practice is antidemocratic and constitutes illegitimate judicial activism.

On the other hand, the exceptions of part performance and estoppel narrowly circumscribe the circumstances in which an oral promise will be enforced to ensure that the policy underlying the Statute of Frauds is furthered rather than undermined. In circumstances that give very strong evidence that a promise was made, the failure to enforce the oral promise will undermine the policy of preventing fraud by empowering one of the parties to engage in fraud. Although this does decrease predictability somewhat, the primary goal of the Statute of Frauds is not predictability but the protection of reasonable expectations and the prevention of fraud. It therefore furthers, rather than undermines, the legislative purpose to enforce oral promises when circumstances are such that evidence of the promise is clear.

Burns and *Hurtubise* each illustrate different facets of the problem. In *Burns*, an elderly man, James Halsey, induced a husband and wife to care for him in his old age in exchange, it was alleged, for receiving the man's house, furniture and equipment on death. Nowhere was this promise written down. In *Hurtubise*, by contrast, there was no dispute that an oral agreement had been reached and then relied on by Hurtubise, although there was a question about what, exactly, the parties had agreed to. McPherson was invoking the statute to avoid an agreement he felt was not sufficiently clear, but did not deny reaching.

Note 1. *When discussing the housekeeper, Cardozo refers to "her conduct"; but when discussing a hypothetical buyer he refers to "his conduct." Why does he make this shift in gender? Plaintiffs were a married couple. Is there any evidence Cardozo considered the circumstances of the husband's conduct?*

Why does Cardozo refer to the person providing personal services as a "housekeeper" while calling the one who improves the land a "buyer"? Doesn't this use of language beg the question? Why is performing personal service less indicative of a contractual arrangement than payment of money? Does Cardozo assume that "housework" is normally performed by women for no compensation? Are housekeepers likely to engage in personal service in exchange for a chance of an indefinite reward while those who work the land are unlikely to do so?

It may be the case that gender has nothing to do either with the way the case came out or with the way Justice Cardozo understood the social relationships involved. He may have simply referred to the housekeeper as a woman since this case involved a woman; he may have referred to the hypothetical buyer as "his" because the masculine pronoun was traditionally used to apply to men and women when applying to hypothetical situations. On the other hand, plaintiffs were a married couple, referred to in the reported opinion as "John A. Burns & wife". Why, then does Cardozo refer to a housekeeper as "she"? There is a strong argument that, when Cardozo thought of a "housekeeper," he thought of a woman and when he thought of a "buyer" he thought of a man. Perhaps Cardozo used the feminine pronoun to describe a "housekeeper" because a male housekeeper might be understood as fulfilling a female social role. There is an argument that the fact that Cardozo referred to the social role of housekeeper as "she" indicates that Cardozo was distinguishing in his mind conduct or a social role that was thought to be characteristic of women; the fact that many women often did not work outside the home and would work "for free," as it were, inside the home, may have supported his assumption that the behavior exhibited by plaintiffs was understandable absent a definite promise of future reward.

Is it true that no other explanation might fit the set of facts which includes (a) paying a large sum of money; and (b) improving real property? Remember the cases about easements by estoppel and constructive trusts in Chapter 7.

While a distrustful person would not enter a situation on faith, insisting instead on a written easement, lease or conveyance, a person who *trusted* a landowner might very well invest large sums of money based on his word. The plaintiffs in *Burns* might have trusted defendant, assuming he would leave them the house in his will simply because he said he would. This behavior is not irrational. On the contrary, if they had insisted on seeing something in writing, this might have indicated that they distrusted defendant. Such a demonstration of distrust might suggest to him that *they* were not to be trusted; if they imagined that he would defraud them, perhaps they were the type of people who could imagine defrauding others, and might deal badly with his property, which, after all, he was asking them to manage. Demonstration of their distrust might have caused him to consider not giving them the job at all. The fact of trust as a reason for not getting a deal in writing is especially powerful in the context of relations among family members and friends, as may have been the case here.

Note 2. *Should an exception to the Statute of Frauds be made for agreements among family members? After all, doesn't the proposal to "put it in writing" suggest that one does not trust the other person? Would the world be a better place if family members started asking each other to put everything in writing?*

This question alludes to the arguments made above in the analysis of note 1 and in the analysis of the doctrine of constructive trust that contract analysis of relations among friends and family members should differ from "arms-length" agreements among strangers or business associates (although even in business relations, there may be long-term relationships based on trust). In some types of social relationships, even if the parties know that an agreement must be in writing to be enforceable, and even if they have strong interests in an agreement's enforceability, they may still refuse to put it in writing because of the distrust the writing suggests. It would arguably be a bad thing to legalize all family relationships by inducing family members to put everything in writing.

On the other hand, family members sometimes act very badly towards each other. They may lie and cheat each other, and may have personal motives for doing so. In other words, there may be even more reason to believe that fraud is possible in the family than in the public sphere of the market when bitter personal relationships are involved. When large property interests are at stake, perhaps it is not unreasonable to encourage family members to put things in writing. This

may not undermine the trust and personal closeness they feel for each other; rather, it may simply be understood as the way to memorialize transactions of such magnitude. After all, a trust created by a parent must be put in writing; the transfer of a house should require no less of a formality.

Note 3. *Does the relative informality of electronic communications undermine one of the goals of the Statute of Frauds, which is to remind the parties of the significance of the transaction before it becomes binding? On the other hand, should real property be treated differently from other types of assets, often of great value, that can be traded electronically today?*

Our legal system, in part by tradition, and in part for very good reasons of consumer protection, requires a higher level of formality for the conveyance of real property than for many other assets that might have equal or even greater value, such as stocks. This question can help focus on the discussion of formality in the face of technological change. Although there are clear transaction costs to requirements like the Statute of Frauds, the arguments in favor of formality, particularly in residential real estate where a home is likely to be the most significant purchase a family may invest in in their lifetime, seem undiminished by electronic signatures, and arguably even more significant in light of the increasing informality of communication.

Note 4. *How would* Burns v. McCormick *come out under the standard adopted in* Hurtubise v. McPherson*? Was the plaintiffs' reliance reasonable? Is the result unjust? How would* Hurtubise *have come out if McPherson had denied making a promise altogether? How important should an admission of a promise be, if there is one?*

The test the court quotes in *Hurtubise*, citing *Hickey v. Green*, 442 N.E.2d 37, 38 (Mass. 1982) and quoting from *Restatement (Second) of Contracts* §129 (1981), is whether someone acts (1) in reasonable reliance (2) on an oral promise and (3) so changes one's position (4) that injustice can be avoided only by specific enforcement. In *Burns*, the critical question was not reliance as such but rather whether actions taken in reliance on a promise are "unequivocally referable" to the agreement. This can lead to a discussion about which frame of reliance—one that tends to prove the fact and details of an agreement or one that more generally vindicates reasonable reliance interests—makes the most sense where a party raises the defense of the Statute of Frauds.

What about the promise in *Hurtubise*? Should admission of a promise make a difference? Admitting an oral promise means that strict application of the Statute of Frauds would allow the promisor to commit a kind of fraud on the promisee; such a result would not protect individuals from fraud, but would rather enforce the *formality* of putting things in writing. It would therefore serve not an *evidentiary* purpose (of proving that a promise was made) but only a *cautionary* function of requiring contemplation before agreeing to the deal. In the presence of clear evidence of an agreement, the paternalistic goal underlying the cautionary function of the Statute of Frauds arguably should be subordinated to the goal of preventing fraud. *Burns* is distinguishable from *Hickey* since the promisor is dead, and therefore has not, and cannot, admit that a promise was made. Thus, in *Burns,* unlike *Hickey,* we are faced with the real possibility that plaintiffs are lying, and that no promise at all was made by decedent. Conveying title to them might have the effect of perpetrating a fraud on the persons who otherwise would inherit the property. In the absence of clear evidence of whether a promise existed, whatever the court does, it will be doing something wrong. The question probably rests on whether there is any explanation for plaintiffs' conduct in selling their business and taking care of the decedent, without remuneration, other than a conveyance of the house or some other remuneration. The fact that the will did *not* provide any compensation for plaintiffs may strengthen their argument since most people would not do what they did for nothing; on the other hand, some people would act as they did for personal reasons and emotional ties to the decedent, and the presence or absence of such ties would be important to know to make a judgment about the justice or injustice of the result.

Note 5. *Would it be better to enforce the Statute of Frauds rigidly rather than creating equitable exceptions for part performance and estoppel? Do these exceptions enable the court to obtain justice in the individual case or do they reward negligence and undermine predictability? Which rule is most likely to accord with the will of the parties? Which rule is more likely to reduce the costs of transactions? Which rule is more likely to prevent fraud?*

All of the arguments rehearsed in Chapter 8 on easements by estoppel, constructive trusts, and easements by implication, are relevant here. Refusing to enforce the oral promise may be unjust if such a promise were made, allowing the promisor to act in a way that defrauds the promisee; enforcing an alleged promise in the absence of a writing may enable the plaintiff to perpetrate a fraud on the defendant or his heirs. The argument for rigid enforcement is that people will know that they should put things in writing; this will help clarify property rights and reduce misunderstanding, and ensure that the courts implement the will of the parties; it will reduce the costs of transactions since it will drastically limit litigation over the terms of the agreement; it will prevent fraud by ensuring that the deal is clarified in writing and allegations based on misremembered or made-up oral statements will be disallowed. The argument for enforcement of oral promises is that, regardless of what the law provides, people will sometimes make agreements without putting them in writing because they are ignorant of the law, because they trust the other person, and because asking for a writing may indicate a lack of trust; this rule may lower the costs of transactions since people will not waste time putting every agreement into writing and drafting 100 page contracts to take care of every contingency; enforcing the alleged oral promise will prevent fraud when circumstances indicate that a promise was made and relied upon by the promisee.

§2.3 What Constitutes a Breach of the Contract 946
A. Misrepresentation and Fraudulent Nondisclosure 946
***Johnson v. Davis* (1985) 946**

These materials continue the topic of determining the extent to which informal social relationships should serve as the basis for legal rights in property. Do sellers of real property have duties of care they must meet in their relations with potential buyers, whether or not they voluntarily adopt such duties in formal agreements? The focus of this section is whether a duty should exist on the seller to disclose latent defects. One way to approach this question is to ask which rule better reflects the expectations of the parties. Which rule increases the likelihood that the parties both get what they bargained for?

The question of whether sellers have disclosure duties is related to the question of whether there are implied warranties in the sale of property. On one hand, it might be argued that the parties to the contract should assume nothing; they get only what the contract states they get and they have the right only to assume that affirmative statements made by the seller are truthful. This position focuses on the formalities of the contractual relationship, centering attention on the terms of the written contract. No oral disclosures prior to the contract are enforceable or actionable (unless they are intentionally misleading and hence fraudulent), and no obligations are assumed by the seller unless the contract so states. This approach may help to focus the expectations of the parties by centering attention on the written contract; requiring the parties to specify all their obligations and understandings is arguably the best way to prevent misunderstanding and to limit litigation.

On the other hand, there may be an implicit statement by the seller of a house that it is inhabitable. The buyer may understand the offering of the house for sale as a statement that it is suitable for the purpose for which it is being put on the market. If there are major defects, it is not suitable for that purpose, and the seller is taking advantage of the fact that the buyer trusts the seller

not to sell a house that is not what it appears to be. Thus, as in the cases of constructive trust, easement by implication, estoppel, and necessity, and implied negative reciprocal servitudes and equitable servitudes generally, the seller who fails to reveal information the seller knows the buyer would want to know about is conveying conflicting messages. On one hand, the seller says, "I make no promises other than what is in my contract." On the other hand, the seller says, by his conduct in offering the house for sale for a large sum of money that the house is *worth* that large sum of money, i.e., that it is fit for its intended purpose. The seller cannot justly be allowed to benefit from the buyer's misimpression about the condition of the property; to allow the seller to so benefit is to allow the seller to perpetrate a fraud on the buyer and to benefit from enforcement of an agreement that does not represent a meeting of the minds.

Note 4. *Why might brokers be in favor of statutes regulating disclosures?*
Brokers might do so as a defensive measure to limit their liability.

Note 5. *Would it be better to encourage everyone to read their contracts carefully before signing? What rule would best reduce transaction costs? Which rule best discourages fraud? What arguments could you make on both sides of these questions?*

In an abstract sense, it arguably might be a good thing for people to read their contracts before signing them, at least in the context of major transactions like the sale of real property. As a realistic matter, however, in many situations, people do not read their contracts and do not understand them when they do read them. An issue is whether rules requiring formality should be strictly enforced in order to change the parties' conduct and expectations, inducing them to distrust each other and put everything in writing. Again, all the arguments relevant to easements by estoppel and constructive trust and easement by implication are relevant here. On one hand, it would arguably reduce transaction costs to require people to put everything in writing and to read their agreements since this would clarify contracts and property rights and decrease disputes and litigation, thus lowering the costs of contracting. On the other hand, this requirement that people distrust each other will increase the length of contracts as people try to close all loopholes, thereby increasing the cost of transacting. It is also likely to increase the use of "legalese" and make contracts opaquer to nonlawyers as clauses are added by lawyers to close multiple technical loopholes. In addition, putting everything in writing will not solve the problem since sellers may try to put in disclaimer clauses that buyers do not understand; thus, there can still be litigation over the question of whether the written agreement diverged from the parties' understanding of the deal. Moreover, disclaimers may be viewed by both parties as formalities to protect the seller from unexpected liabilities; they may not dissuade the buyer from the notion that the seller will in fact tell the buyer about all relevant facts.

Note 8. *Can you distinguish the relevant facts in* Danann *and* Mulkey*?*

It is much harder to argue that the as-is clause in *Mulkey* was the result of neutral, arms'-length negotiations entered into with full opportunity for investigation, as opposed to a last-ditch effort to limit liability. Whether that should put *Danann* in a different light depends on the faith one has in the capacity of purchasers to evaluate the consequences of an as-is clause in light of oral representations, which in turn depends in part on the nature of the parties and the transactional context in which they're operating.

If sellers cannot enclose a clause in the contract of sale stating that the buyer agrees to buy the property "as is" or that the buyer is not relying on any oral statements made by the seller, how can sellers protect themselves from buyers who falsely allege that the seller made an oral statement on which the buyer relied?

The *Danann Realty* case describes the arguments on both sides of this question. The argument for enforcing the disclaimer clause is that it protects the parties' expectations, induces the buyer to perform a suitable inspection, reduces the price since it protects the seller from litigation for nondisclosure or misrepresentation, and protects sellers from false claims that they made oral statements that they never made. The argument against enforcement is that fraud vitiates consent; there is no meeting of the minds, and rather than promoting the will of the parties, enforcement of the agreement will provide the seller the power to steal the buyer's property by fraudulent conduct and do so with the majesty of law and the aid of the state.

Problem. *Sellers of a home seek to move because their 10-year-old son was sexually molested by an older minor boy living next door. The older boy was found guilty of the offense in juvenile court. The sellers feel torn about whether they should disclose this fact to potential buyers. They want to protect any families that might move into the home; at the same time, they know that revealing this information may make it much harder to sell their home. They are also aware that they cannot refuse to sell their home to a family with children because the federal* Fair Housing Act, *42* U.S.C. *§3601, prohibits discrimination against families with children. In addition, they know that juvenile records are supposed to be sealed to protect the identity of juvenile offenders, although they are not directly bound by that confidentiality provision and may lawfully reveal the information. Do they have an obligation to reveal the information? Should they? If they do not have such an obligation, does the broker have a duty to reveal the information?*

This is certainly material information a prospective buyer would want to know. It would induce many buyers not to go through with the deal. On the other hand, it does not relate to the condition of the house and a general duty to reveal dangerous conditions in the neighborhood would be a broad duty indeed. Must owners reveal knowledge of local crime statistics? The question here is who should bear the burden here – the prospective buyer or the sellers? It might even be deemed negligent not to reveal the information if a new family moves in and suffers a similar fate. On the other hand, there is generally no duty to act to help a stranger and no general duty to speak and it is not clear that the buyer-seller relationship changes that general rule. This is obviously a difficult fact situation that could generate debate in the classroom about the extent of the seller's obligations in a case like this.

B. Seller's Failure to Provide Marketable Title.....957
C. Seller's Breach of Warranty of Habitability for New Residential Real Estate 958
D. Buyer's Failure to Make Good Faith Efforts to Obtain Financing.....958

How else does the Standard Form Agreement address questions of encumbrances that might undermine marketable title?

This is an opportunity to review the structure of clauses 10 through 12, and 14, as discussed in the introductory materials to the form contracts.

Given the possible uncertainties of adverse possession litigation and the fact that buyers may well hesitate to buy property so acquired, should a buyer be forced to conclude the transaction?

This gets back to the issue of whether parties should be bound to the literal terms of potentially quite unfavorable terms. A party represented by counsel should understand the nature of the title promised by the terms of the contract, but note that many standard-form contracts contain a standard that is not very protective of purchasers. Indeed, this is an opportunity to remind students

that the Massachusetts forms in the casebook only provide for quitclaim deeds (see clause 4 on page 923).

§2.4 Remedies for Breach of the Purchase and Sale Agreement.....958
A. Buyer's Remedies 958
B. Seller's Remedies 959

Does the Flureau *rule still make sense, given the generally high quality of public records about title in the United States?*

Arguably no, because the rule is based in large measure on the challenges of determining the quality of title that might be facing the seller, a predicate that no longer holds in most jurisdictions.

§3 Deeds.....960
§3.1 Essential Terms.....960
***Sample Deed* 961**
§3.2 Delivery.....963
§3.3 Title Covenants 964
A. Warranties of Title 964
B. Remedies for Breach of Warranty of Title 965

This section provides a brief introduction to deeds and warranties of title. The primary materials on the recording acts, title insurance, and other means of title assurance are in §5 of this chapter, which will allow you to cover both conveyancing and financing matters in the context of title disputes.

§4 Real Estate Finance 966
§4.1 The Basic Structure of Real Estate Finance.....966
§4.2 Regulating Mortgage Markets 967
***Commonwealth v. Fremont Investment & Loan* (2008) 969**

This section concerns a number of critical issues involved in financing real estate. First, there is the perennial question of whether there should be nonwaivable terms in real estate financing contracts to protect consumers of financing arrangements. The arguments relevant here are in most cases identical to the arguments covered in Chapter 10 in connection with the issue of whether or not the implied warranty of habitability should be disclaimable.

Second, this section addresses the question of whether the courts should enforce only those protections clearly required by statute or whether they should impose additional protections under the common law or through broad interpretation of statutory language. Do the statutes represent the maximum or the minimum in regulation? Do the courts interfere with the careful balance of competing interests chosen by the legislature when they grant mortgagors even greater protection than the legislation clearly provides? This issue is similar to the question of whether the common law should be changed to provide a new claim to accord with the policies underlying a statute when the statute itself does not expressly create a private right of action.

Structurally, this section is designed to disaggregate several doctrinal themes, although in practice there is much overlap. The first subsection provides an overview of basic finance concepts; the next subsection turns to ways in which we regulate mortgage markets and the spectacular failure of that regulatory structure in the subprime crisis. The next two subsections work together to cover

default and the regulation of foreclosure sales. Finally, the last subsection addresses alternative financing, particularly from a consumer-protection perspective.

With respect to *Fremont*, it may be helpful to provide students with some context about the subprime mortgage crisis that was beginning to unfold at the time. By 2007, many of Fremont's subprime mortgage loans were in default and the Massachusetts Attorney General's Office filed an innovative lawsuit to try to slow the pace of Fremont's foreclosures. The AG's office obtained a preliminary injunction that restricted but did not remove, Fremont's ability to foreclose on loans with particularly onerous terms, which the Massachusetts Supreme Judicial Court upheld. As the case discusses, the case involved a novel theory under the Massachusetts unfair consumer-practices statute, *Chapter 93A*, targeting residential adjustable rate mortgages where: (1) the borrower was offered a low introductory interest rate for the first three years of the loan; (2) the rate then jumped much higher; (3) with the higher rate, a borrower would need to pay more than half their income to make the required loan payments; and (4) the amount borrowed represented 100% of the value of the house or involved a substantial prepayment penalty.

Note 2 (after *Fremont*)**.** *How capable are most home borrowers of fully understanding loan disclosures and making informed choices?*

This question is meant to prompt a discussion of the comparative advantages and disadvantages of information-forcing regulatory strategies and more substantive approaches. Consumer disclosure requirements assume a level of knowledge and sophistication about mortgages that many consumers may lack, and they also tamp down advocacy for more direct regulation. On the other hand, setting loan terms and minimum requirements may not respond to market conditions and may hamper access to credit, with equity implications, if not designed and implemented with care.

§4.3 Borrower Defaults, Foreclosure, and Consumer Protection 978
***U.S. Bank National Association v. Ibanez (2011)* 980**

Although the standard story often described in most property classes suggests an unbroken line of precedent from early common law and equity to modern foreclosure, recent scholarship by Claire Priest, K-Sue Park, and others illustrates distinctly American changes spurred by the centrality of land to colonial markets—often centered around foreclosure of Native property—as well as using enslaved human beings as collateral. The relative ease of foreclosure today, let alone the distributional consequences of foreclosures, cannot be understood without noting that history.

Note 3. *Ibanez was somewhat unusual in that the successful bidders at the foreclosure sale, U.S. Bank and Wells Fargo, brought a quiet title action, which then allowed the original borrowers to contest the validity of the foreclosure itself. In what ways might this procedural posture matter for the resolution of disputes relating to the foreclosure*

It can matter a great deal, practically, whether a borrower is defending against a judicial or non-judicial foreclosure and the unusual posture in *Ibanez* may obscure this proposition. In a judicial foreclosure, there is court oversight of the right to foreclosure, the fact of default, and other important threshold matters. A borrower can raise these issues affirmatively in a challenge to a non-judicial foreclosure but doing so requires the resources and impetus to take affirmative steps to challenge the foreclosure.

§4.4 Foreclosure Sales 987
***Baskurt v. Beal (2004)* 988**

Introductory note. *Although publicity should generate knowledge about the sale and offers from anyone interested in the property, it is often the case that the mortgagee is the only entity or person bidding at the foreclosure sale. Can you see why?*

There are a number of informational and transaction-cost barriers—such as the inability to conduct due diligence—to efficient bidding at foreclosure sales and for many properties, these are so significant that there are no bidders other than the creditor. Moreover, mortgagees have an inherent advantage in that they do not have to put up cash for the amount of their lien, which is a further deterrent to other bidders.

Note 5. *Is there any reason to allow self-help after foreclosure if a statutory eviction process is available?*

This reflects the similar discussion of self-help versus eviction proceedings in Chapter 10 and the question is whether there is anything distinctive about the post-foreclosure context that would mitigate concerns about potential violence and the unfairness of dispossession.

§4.5 Alternative Financing Arrangements 996
A. Installment Land Contracts 996
Sebastian v. Floyd (1979) **..... 997**

The issue here is very similar to the question of whether the implied warranty of habitability should be nondisclaimable. The material in the casebook rehearses some of the strongest arguments on both sides of this question in Chapter 10. Most of those arguments are directly relevant here.

Briefly, the argument that it hurts low-income people to prohibit installment land contracts is that such a prohibition will increase the costs of lending money and will decrease its likely rewards. Because it is risky to lend to low-income people, lenders will only do so if they reap greater rewards; installment land contracts allow lenders to obtain great security for the loan and possibly a windfall if the buyer/borrower defaults. This possibility of a greater payoff will increase the seller/lender's willingness to sell/lend to a low-income family. Making mortgage protections nondisclaimable will cause lenders to charge higher interest and will make the purchase of housing unaffordable to low-income families.

The counterargument is that enforcing installment land contracts allows the imposition of a penalty for default on the loan that is greater than necessary to protect the lender's legitimate interests. This policy will hurt poor people more than higher-income persons since poor persons are more likely to default on their payments. If this means that interest rates go up, making home ownership unavailable to low- or moderate-income families, this problem should be addressed by other public policy remedies, such as subsidy programs for home ownership for low-income families. The way to help poor people is not to allow market participants to exploit them. This argument is similar to the argument for minimum wage legislation: It may cut back on employment for poor people but the alternative is to enable employers to exploit poor people by getting their labor and paying them less than is needed for them to live on. The way to help poor people is to pass minimum standards legislation and construct other programs to help those who are thereby excluded from the market. Further, it is not clear that outlawing installment land contracts will have the effect of significantly raising interest charged on loans; since mortgage laws allow the lender to foreclose on the property and recover costs and the unpaid loan, the mortgagee's legitimate interests are adequately protected by mortgage laws. Thus, this result may not hurt poor people at all.

Note 4. *Consider what the situation would look like if the buyer were treated like a renter or tenant. If the monthly payment to the lender is near the fair rental value of the property, isn't the only difference between a renter and a buyer the amount of the down payment? Or is there also a*

difference in the sense that the buyer is entitled to treat the property as her own, renovating the property and making structural changes as she sees fit, and thus she develops expectations based on considering the property as her own? Is this what makes the difference? Or does the buyer have no right to develop a personal attachment to the property given the seller's right to end the agreement if the buyer defaults?

The purpose of this question is to encourage students to think about the differences between a buyer/borrower under an installment land contract and an ordinary tenant or lessee under a term of years or periodic tenancy.

The argument that installment land contracts are fundamentally unfair has some intuitive appeal; it arguably allows a penalty, goes further than necessary to protect the lender's legitimate interests, and effectively gets around applicable usury laws through charging an effectively very high rate of interest for the loan. On the other hand, those who rent property and are evicted when they default on rent payments are arguably in the same position as the borrower under an installment land contract. The tenant makes a security deposit, sometimes of several months' rent, and then makes a monthly payment, and obtains no equity in the building. Effectively, the tenant may pay the mortgage payments for the landlord who then obtains the equity in the building. If this is not unfair, why is the installment land contract unfair?

One could respond to this argument by suggesting that there is something inherently unfair about ordinary landlord-tenant arrangements precisely because the tenant makes the payments and the landlord obtains all the equity. However, the opposite response is that the fact that the landlord obtains all the equity is justified (1) by the fact that the landlord is providing a service (maintaining the building); (2) the landlord deserves the equity because the landlord was willing to make a large down payment in purchasing the property; and (3) the landlord took a risk that the fair market value of the property would go down—a risk that the tenant never had to take. If this argument is persuasive then it *is* more unfair to enforce an installment land contract that effects a penalty than it is to evict a tenant who failed to pay the rent. The tenant and the buyer/borrower under an installment land contract are not similarly situated.

B. Equitable Mortgages 1002
***Koenig v. Van Reken* (1979) 1002**

This case raises questions similar to the questions raised in other cases where the issue is whether to rely on the formal statement in the agreement between the parties or on the circumstances of the parties' relationship which indicate that the actual expectations of the parties deviated from the formal terms of their agreement. Thus, relevant analogies include the cases on easements by estoppel, implication and necessity, the cases on whether a reasonableness requirement should be implied into leases which allow subletting only with the landlord's consent and the cases concerning the question of whether commercial tenants have good faith duties to operate, and the cases on the estoppel and part performance exceptions to the statute of frauds.

Note 2. *But what, exactly, is the ultimate standard to which the factors are relevant? Does the court in* Koenig *find that the parties intended to create a security arrangement rather than a sale, or is the intent of the parties irrelevant? What is the rule of law promulgated by the court in* Koenig*?*

The court in *Koenig* does state that "[a]lthough no set criterion has been established, the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties. Such intention may be gathered from the circumstances attending the transaction including the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale." The court, however, seems to rely primarily on the "financial embarrassment of the grantor and inadequacy of consideration" as

indication that the parties did not *intend* to enter into an absolute conveyance. Is that reliance on coercive circumstances indicative of an intent to finance or the reality of the Van Reken's leverage over Helen Koenig? If this case is really about a kind of unconscionability standard, that seems intent defeating, but for very good consumer-protection reasons.

If the parties [in Johnson v. Cherry] *had signed a contract stating that the "transfer of this deed is intended to be a sale and not a mortgage", would the case have come out any differently? Should it?*

On one hand, the ultimate criterion could be the intent of the parties. If this is the ultimate criterion, we want to look at the parties' relationship, their oral and written communications, and their mutual understanding of the agreement to determine whether or not a deed that appears to transfer title was intended only to pledge the property as security for a loan. A clause that states, "this conveyance is a sale, not a mortgage" would be enforceable (assuming the seller fully understands what this means!) because it clearly indicates the intent to effectuate a conveyance rather than a financing arrangement that grants a security interest in real property. If the borrower understands that she is giving the property away and that she has no enforceable expectation of getting it back, then the court should enforce the intent of the parties and leave the title with the person to whom she voluntarily transferred it.

On the other hand, the ultimate criterion may be fairness to the borrower and unconscionability of the arrangement. If this is the case, the intent of the parties is *partly* relevant; we want to know if the grantor of the deed intended to recover her property once the loan was paid off. At the same time, the intent of the parties is irrelevant in the sense that we intend to regulate the terms of the agreement to limit the amount of interest charged on the loan and possibly to enable the borrower to get her property back after default. Even if the grantor wanted to take the chance that she would not be able to pay off the loan and would lose completely her ownership rights in the house, we will not let her. Under this interpretation, the doctrine of equitable mortgages effectively makes most of the protections underlying mortgage legislation nonwaivable. If installment land contracts are unenforceable, and mortgage protection is nondisclaimable, then a transfer of a deed that looks on its face to be a conveyance but is intended to secure a loan, will be treated in the same manner, granting the borrower the right to recover the value of the property that exceeds the unpaid loan and perhaps the right to redeem the property.

Problem. *A bank acquires title to a house at a foreclosure sale. It wants to get around all rules about mortgages, installment land contracts, and equitable mortgages, so it adopts the simple device of asking mortgagors to waive the protection of the mortgage statute. The bank sells the property to a buyer for a purchase price of $250,000, subject to a financing arrangement with the bank. The buyer makes a $25,000 down payment with the bank, which lends the rest of the purchase price to the buyer. The buyer grants a mortgage to the bank. The mortgage contract has a waiver clause:*

> *Mortgagor agrees to waive the benefits of the mortgage statute. If Mortgagor defaults on any payments due under this mortgage, Mortgagee has the right to retake possession of the property without a foreclosure sale and to keep any payments already made.*

The state mortgage statute merely recites that "all mortgages shall be subject to the provisions of this act." It has no language specifically stating whether the protections afforded by the statute are disclaimable or waivable by the mortgagor. Should the mortgagor have the right to waive the protections of the mortgage statute?

This problem replays many of the same issues involved in the question of whether the buyers under installment land contracts should be given the nonwaivable protections of the mortgage statute. It also replays almost all the issues addressed in the problem of whether the implied warranty of habitability should be disclaimable. For a review of some of the standard arguments and counterarguments on making contracts terms compulsory, see Chapter 10.

§5 The Recording System 1005
§5.1 Recording Acts 1005
A. Recording Act Fundamentals 1005
B. How to Conduct a Title Search 1007
C. Types of Recording Acts 1008
D. Types of Notice 1010
E. Who Qualifies for Protection under the Recording Acts? 1010
§5.2 Chain of Title Problems 1012
***Sabo v. Horvath* (1976) 1012**

The recording system illustrates several principles. First, it dramatically demonstrates the concept of *relativity of title.* While a holder of an unrecorded deed may hold good title as against the seller, the holder may lose possession to a subsequent bona fide purchaser who records her deed first. The question in litigation generally is not whether the plaintiff has *good* title, but whether the plaintiff has a *better* title than the defendant. Second, as with the estoppel and part performance exceptions to the Statute of Frauds, the recording cases that limit the extent of the search of the recording office that must be performed by the buyer illustrate judicially-created exceptions to statutes that do not, on their face, include any such limitations. Third, they illustrate the conflict between predictability and justice. Although race statutes are arguably the most formally realizable or predictable, they are almost uniformly rejected because they are viewed as arbitrary and unjust; they allow bad faith purchasers to prevail. Notice and race-notice statutes arguably are more just, but they obtain justice at the cost of reducing predictability since they depend on a judgment about whether or not the buyer had notice of the earlier conveyance—a factual question whose resolution is likely to be uncertain. Fourth, they ordinarily require a comparison of the interests of two innocent parties who were injured by the defrauding seller. In most cases of this type, someone will be unjustly harmed; there is no way to avoid injustice. At the same time, one party is likely to "more innocent" than the other in the sense that the failure to record (or to take precautions to ensure that the recording adequately puts others on notice) and the failure to look for and find all possible encumbrances constitute a kind of contributory negligence.

Quick review: *What type of recording act does Alaska have?*
Alaska is a race-notice jurisdiction.

Note 3(b). *Here is a second example.* O *conveys to* A*, who does not record.* O *then conveys to* X*, who has notice of the earlier conveyance to* A. X *records her deed; then* A *records her deed.* X *conveys to* Z*, who has no notice of the earlier conveyance to* A. *In a contest between* A *and* Z*,* Z *would prevail because the deed from* O *to* A *was recorded too late. Can you see why?*

To parse the hypothetical:

O to *A* (*A* does not record).
O to *X* (with notice of conveyance to *A*).
X records the *O* to *X* deed.

A records the deed from *O* to *A*.
X conveys to *Z* (with no actual notice of the deed from *O* to *A*).
A sues *Z*.

Under a notice or race-notice statute, *A* would prevail over *X* since *X* purchased with notice of the earlier conveyance to *A*. However, as between *A* and *Z*, *Z* will prevail. *Z* prevails because *Z*'s search will cover the period (1) between the time *X* bought the property and the closing when *X* conveyed to *Z* to see if *X* conveyed any other interests in the property as well as (2) between the time *O* bought the property and the moment when the deed from *O* to *X* was recorded to see if *O* conveyed any interests of the property. Since the deed from *O* to *A* was recorded after the deed from *O* to *X* was recorded, and *Z* will not look for conveyances by *O* after this period, *Z* will not find the deed from *O* to *A*; it was recorded too late. On one hand, this result unconscionably allows *X* to defraud *A* since *X* has transferred title to *Z* knowing that *A* was the lawful owner. On the other hand, the result is partly *A*'s fault since *A* did not immediately record the deed. As between the "innocent" purchaser *Z* and the negligent purchaser *A*, *Z* will win. *A*'s only remedy is to sue both *O* and *X* for fraud.

Note 5. *Should the advent of electronic recording systems, which are much easier to search than paper records, change the application of elements of the recording acts that balance due diligence and the costs of search, such as the* idem sonans *standard for constructive notice and the wild deed doctrine?*

It is well worth the time to have your students look at how electronic records are kept, if they are, in your jurisdiction. The traditional index search is still important to understand, but is arguably increasingly outdated as a method of searching title in light of the growing use of electronic recording systems. Newer systems are not perfect, of course, and title companies (and data companies that work with title insurers) tend to keep extensive records that may extend back to before current records were digitized. Nonetheless, this is an important transformation that the courts have only begun to internalize.

Note 6. *Does the disappointed mortgagee have any claim against the debtor who listed the wrong address for the mortgagee?*

Perhaps the mortgagee has a claim for negligence, since the mistake was certainly unreasonable and proximately caused substantial harm to the mortgagee's property interest. This claim could be satisfied by attaching whatever *other* property the debtor owned.

Note 7. *Why aren't buyers on constructive notice of any deeds recorded under the names of predecessors in interest? What justifies limiting the required search to time periods associated with the chain of title? Have the courts interpreted the meaning of "notice" in recording statutes, or have they rewritten them by creating an exception for situations not contemplated by the legislature? If you believe the courts have created an exception, are the courts justified on the grounds that the legislature could not have intended to require an unlimited search, or are the courts practicing illegitimate judicial activism and ignoring the plain language of the statute?*

This question revisits the issue central to the part performance and estoppel exceptions to the Statute of Frauds, and the doctrines of easement by implication, easement by estoppel and constructive trust. Each of these doctrines represents judicially-created exceptions to an apparently rigid statute. On one hand, the creation of exceptions to clear statutes violates the legislative intent and is antidemocratic. It is not the court's job to rewrite a bad law. On the other hand, a canon of interpretation cautions against interpreting statutes to reach absurd results the legislature could not have intended. Creating equitable exceptions may fine tune the statute to achieve the goals it was

intended to achieve by the legislature. There is arguably no better way to misread a statute than to read it literally.

Problems. *Determine how the following cases would be resolved in jurisdictions with (a) a race statute; (b) a notice statute; (c) a race-notice statute?*

1. O *to* A *(*A *does not record).* O *to* B *(*B *has notice of the earlier conveyance to* A*).*
B *records.* A *records.*
B *sues* A *for title.*

Race: *B* wins because she recorded first.
Notice: *A* wins since *B* had notice of the prior conveyance and thus cannot prevail over a prior grantee who bought without notice, no matter who records first.
Race-notice: *A* wins since *B* had notice of the prior conveyance, and the first to record wins only if they had no notice of the prior conveyance.

2. O *to* A *(*A *does not record).* O *to* B *(*B *has no actual notice of the earlier conveyance to* A*).*
B *records.*
A *records.*
B *sues* A *for title.*

This problem is the same as #1, except that *B* had no notice of the prior conveyance.
Race: *B* wins since *B* recorded first.
Notice: *B* wins since *B* bought without actual or constructive notice.
Race-notice: *B* wins since *B* bought without notice and recorded first.

3. O *to* A *(*A *does not record).* O *to* B *(*B *has no actual notice of the earlier conveyance to* A*).*
A *records.*
B *records.*
B *sues* A *for title.*

This problem is the same as # 2 except that *A* recorded before *B.*
Race: *A* wins since *A* recorded first.
Notice: *B* wins since *B* bought without notice of the prior unrecorded deed from *O* to *A*; it is irrelevant that *A* recorded first.
Race-notice: *A* wins since, although *B* bought without notice, *A* recorded first, and both lack of notice and recording first are required to prevail over a prior unrecorded interest.

4. O *to* A *(*A *does not record).* A *to* B *(*B *records).*
O *to* Z *(*Z *has no actual notice of deed from* O *to* A*;* Z *records).*
B *records deed from* O *to* A.
B *sues* Z *for title.*

Race: *Z* wins in contest with *B* because the deed from *O* to *A* was recorded too late; the deed from *A* to *B* is a wild deed that *Z* could not find out about and thus is not bound by; *Z* wins even though *B* recorded before *Z*.

Notice: *Z* wins for the same reason; *Z* had no actual or constructive notice of the conveyance from *O* to *A* since the deed from *O* to *A* was recorded too late (after *O* conveyed to *Z*).

Race-notice: *Z* wins for the same reason; *Z* had no notice of the conveyance from *O* to *A* and because of the wild nature of *B*'s deed, it is irrelevant that *B* recorded first.

5. O *to* A *(*A *does not record).* O *to* X *(X has notice of conveyance from* O *to* A*).*
X *records.*
A *records.*
X *conveys to* Z *(*Z *has no actual notice of deed from* O *to* A*;* Z *records).*
A *sues* X *and* Z *for title.*

In a contest between *A* and *X*:

Race: *X* wins since *X* recorded first.

Notice: *A* wins since *X* had notice and is therefore unprotected by the statute.

Race-notice: *A* wins since, although *X* recorded first, *X* had notice of the prior conveyance to A and thus cannot prevail.

In a contest between *A* and *Z*:

Race: *Z* wins because the deed from *O* to *A* was recorded too late, after the transfer from *O* to *X* and the deed from *O* to *X* was recorded and thus *Z* could not have discovered the conveyance from *O* to *A*; *Z* prevails even though *A*'s deed was recorded before *Z* bought since *Z* would never have looked that far forward for a deed from *O*.

Notice: *Z* wins for the same reason.

Race-notice: *Z* wins for the same reason.

6. O *to* A *(*A *does not record).* O *to* X *(X has notice of conveyance from* O *to* A*).*
A *records.*
X *records.*
X *conveys to* Z *(*Z *has no actual notice of deed from* O *to* A*;* Z *records).*
A *sues* X *and* Z *for title.*

This problem is the same as #5 except that *A* recorded before *X*. (*A* is joining *X* to ensure there is no potential claim on *X*'s part in the quiet title action, but *X* has conveyed to *Z*).

In a contest between *A* and *Z*:

Race: *A* wins since *A* recorded before *X* and therefore *Z* would find it, since the period of the search is from the date *O* obtained title until the date a deed out from *O* is recorded.

Notice: *A* wins since *Z* was not a bona fide purchaser; although *Z* had no notice of the deed from *O* to *A*, *Z* was on *constructive notice* since a search would have revealed the deed from *O* to *A* because it was recorded before the deed from *O* to *X*.

Race-notice: *A* wins since *Z* was not a bona fide purchaser and was on constructive notice of the earlier conveyance from *O* to *A*.

7. O *to* A *(*A *does not record).* O *to* X *(*X *has no actual notice of conveyance from* O *to* A*).*

X *records.*
A *records.*
X *conveys to* C *(*C *has notice of conveyance from* O *to* A*;* C *records).*
A *sues* C *for title.*

In a contest between *A* and *C*:
Race: *C* wins since *X* recorded before *A*, and thus has the power to convey title to *C*.
Notice: *C* wins even though *C* had notice of the earlier conveyance from *O* to *A* under the *shelter doctrine;* since *X* had no notice of the conveyance from *O* to *A*, *X* obtained good title and would prevail in a contest with *A*, and under the shelter doctrine has the power to convey good title to *C* despite *C*'s notice that *O* conveyed to *A* before conveyed in *X*.
Race-notice: *C* wins since *X* bought without notice and recorded before *A* and the shelter doctrine thus gives *X* the power to convey title to *C* even though *C* knows about the earlier conveyance from *O* to *A*.

§5.3 Fraud and Forgery 1018
Brock v. Yale Mortgage Corporation (2010) **..... 1018**
McCoy v. Love (1980) **..... 1021**
§5.4 Marketable Title Acts and Other Ways to Clear Title 1024
§5.5 Title Companies and the Recording System 1025
§5.6 Title Registration 1025

The recording acts do not operate in a vacuum and the materials in the remaining sections of this chapter illustrate the role of equity in continuing the mitigate some of the consequences of the formalism of recording, some problems that fall outside the acts (forgery), as well as other title management systems (marketable title, title insurance, and registration). One way to approach this material is ask how each modifies the baseline rules in the recording acts and how alternative systems might be better or worse in managing title risk.

Note 2. *Why do you suppose courts refuse to protect bona fide purchasers from forged deeds?*

The purpose of this section is to highlight the difference in the treatment of fraud and forgery. Forged deeds arguably represent a major exception to the policy of protecting bona fide purchasers who buy with no notice of prior property interests. First, this result may be justified because protecting a purchaser under a forged deed would encourage unscrupulous persons to steal property from existing owners by forging deeds and selling the property from under the existing owner; these frauds will be encouraged since bona fide purchasers will be secure that they obtain good title despite the fact that a prior deed was forged. The problem here is worse than the situation where an owner conveys the same property to two different persons because this type of fraud is easier for the first purchaser to prevent and easier for the second purchaser to catch. It is easy for the first purchaser to prevent because she can generally protect herself by promptly recording her

deed. It is easier for the second purchaser to catch because inquiry into who is occupying the property will, in at least some cases, place the second buyer on at least inquiry notice of the prior conveyance. In contrast, it is arguably harder to protect yourself from forgery.

Second, in addition to the argument that forgery is harder to prevent and protect yourself from than double-dealing, there is a moral argument that a purchaser who undertakes a reasonable deed search and who promptly records her deed immediately after the closing will obtain good title to the property as against all other takers of whom she has no notice; her interests will *usually* be lost *only* if she negligently fails to immediately record her deed or negligently fails to do a title search. Thus protecting the subsequent bona fide purchaser is usually not unfair to the first purchaser since the first purchaser is partly to blame for the loss of title because of her own negligence. In contrast, when a deed is forged, an owner of property may lose title to a subsequent bona fide purchaser when that owner has promptly recorded and then done nothing wrong; she is completely innocent.

The counterargument is, first, that creating an exception for forgery means that bona fide purchasers *cannot* rely on the records in the registry of deeds, or on the oral representations of the seller, but are perpetually under the vulnerability of discovering, after the purchase, that a prior deed was forged. If the goal of the recording system is to protect bona fide purchasers, then this exception will substantially undermine that goal, thereby creating a disincentive to buy property and inhibiting alienability. Second, this result is usually not unfair to owners since they should have a duty to look after their property to ensure that it is not being taken over by a trespasser.

Note 3. *Given the possible difficulties in distinguishing between fraud and forgery in some cases, does the distinction make sense?*

The distinction makes sense *if* one believes the arguments in favor of protecting owners from forged transfers of their property outweigh the arguments in favor of protecting bona fide purchasers. If this is the case, it may make sense to draw a line between fraud and forgery in order to protect innocent owners from loss of their property through forgery. This distinction could perhaps be made more predictable if the distinction were based not on the formalistic conceptual distinction between fraud and forgery but on the policy differences between the two situations. As explained above, in the analysis of note 2, the difference may lie in the fact that victims of fraud are arguably partly responsible for their predicament because of their own negligence while victims of forgery are not so responsible. The question may then be whether the victim was contributorily negligent. If so, the bona fide purchaser should prevail; if not, the victim of the fraud/forgery should prevail.

12. Fair Housing Law.....1027

Themes

1. *Property, social welfare, equality, and liberty.* This casebook includes a substantial amount of antidiscrimination law, both concentrated in particular chapters (discussions in Chapter 1 of public accommodations laws, in Chapter 6 of exclusionary zoning, and in this chapter of fair housing laws) and scattered throughout the book (discussions in Chapter 2 of the dispossession of American Indian nations and the limited property rights associated with labor in the home; in Chapter 3 of slavery and possession by museums of American Indian human remains; in Chapter 7 of racially restrictive covenants and of covenants limiting property use to "single families" and racially restrictive conditions in future interests and trusts and restraints on marriage; and in Chapter 8 of issues of gender equality in family property arrangements). The book contains expanded treatment of antidiscrimination law for several reasons.

First, antidiscrimination law is important in its own right. In this day and age, law students should not be able to graduate from law school without at least an introduction to antidiscrimination law. Moreover, unless it is introduced in the first year, students are likely to get the message that it constitutes a specialized subject that effects a minor gloss on basic concepts of property, tort, contract, and criminal law and that it is a specialized area of practice. In our view, the opposite is true. Antidiscrimination law is crucial to almost every area of legal practice, including employment, housing, public accommodations, insurance, municipal services, banking, environmental law, and family law. In addition, rather than a minor gloss on basic rules, antidiscrimination principles require substantial revision of our understanding of the basic policies underlying particular fields of law.

Second, antidiscrimination law offers a useful and complicated context for increasing attention to statutes and statutory interpretation in law school classes in the first year. This is important in terms of the core skills that law students must develop, but also a critical corrective to the view of the traditional first-year curriculum that subjects such as property and contract are exclusively or even predominantly common-law topics.

Third, antidiscrimination law and policy offer substantial assistance in helping students understand the policies underlying technical property law rules underlying servitudes and the estates system, such as the rule against perpetuities and the rule against creation of new estates and limits on restraints on alienation. There is a deep analogy between antidiscrimination law and the rules governing the estates system. These rules are arguably all intended to regulate private property use and transfer to ensure that power over valuable resources is not unduly concentrated in the hands of a few, to ensure that property is available to satisfy current individual and social needs, to ensure widespread and equal access to the marketplace, to move power downward from large landholders to individual property owners to enable individuals to exercise autonomy and liberty. This broad-brush characterization of the policies underlying the estates system obviously overgeneralizes and overlooks crucial distinctions among these policies and conflicts between them. At the same time, it is crucial to understand that antidiscrimination rules do not represent unusual exceptions to basic policies; rather, they are analogous to the basic policies that underlie and define property rights as they have historically been structured in United States law. In short, property must be limited so as to ensure that everyone has a right of access to the marketplace in order to promote equality norms and to ensure individual liberty.

2. *Statutory and regulatory interpretation.* Most of the topics in this chapter concern issues of statutory and regulatory interpretation. An extended excerpt of the *Fair Housing Act* is included at the beginning of the chapter to give students practice in reading a statute of this type and to give teachers a source from which to construct new hypothetical problems if they so desire and an extended excerpt of the U.S. Department of Housing and Urban Development's recent rule on discriminatory effects, 24 C.F.R. §100.500, is included as well. A variety of specific elements of

statutory and regulatory interpretation are covered. First, the materials cover both federal and state statutes. The chapter focuses on federal fair housing statutes, primarily the *Fair Housing Act* of 1968, as amended by the *Fair Housing Amendments Act* of 1988, 42 U.S.C. §§3601–3631, but several others as well, including *Civil Rights Act of 1866*, 42 U.S.C. §§1981-1982; *Title VI* of the *Civil Rights Act of 1964*, 42 U.S.C. §2000d *et seq*.; §504 of the *Rehabilitation Act of 1973*, 29 U.S.C. §794; and the *Equal Credit Opportunity Act*, 15 U.S.C. §§1691-1691f. Some state fair housing statutes are covered, especially when they prohibit forms of discrimination that are not covered by federal law, including, sexual orientation, marital status, some types of family status, and some forms of economic discrimination.

Second, many of the cases address the meaning of discrimination. The materials address separately all of the specific forms of discrimination covered by both state and federal laws, including race, sex, sexual orientation, family status, disability, and economic discrimination. The reason for this comprehensive treatment is that the meaning of discrimination varies in each of these areas; different questions of interpretation and implementation exist in each context. Covering this material in depth allows teachers who wish to do so to explore both the nature of discrimination and the practice of statutory interpretation in depth. Specific language is used in different parts of these statutes to describe the prohibited forms of discrimination. Sometimes fair housing laws simply make it unlawful "to discriminate in the sale or rental . . . [of] a dwelling because of a handicap . . . ." 42 U.S.C. §3604(f)(1). At other times, specific acts are described, such as refusing to sell, 42 U.S.C. §3604(a), or publishing a discriminatory advertisement, 42 U.S.C. §3604(c). In addition, different bases of discrimination may include different requirements. For example, the meaning of discrimination "because of" family status and handicap discrimination is specified in detailed definitions, while race and sex discrimination are not as specifically defined. *Compare* 42 U.S.C. §§3602(k) and 3604(f), *with* 42 U.S.C. §3604(a), (b), (c), (d), (e).

Third, the materials cover exceptions or exemptions. Some types of discrimination are allowed under specific exemptions, such as the exemption from the familial status provision for housing for older persons, 42 U.S.C. §3607((b)(2), or the general exemption for owner-occupied homes with no more than four units, 42 U.S.C. §3603(b)(2).

3. *Constitutional rights.* A few cases concern interpretation of either the federal or state constitutions. Issues covered include privacy concerns and rights to create alternative family relationships, exclusionary zoning that effectively discriminates against poor families, and affirmative constitutional rights to state policies to prevent homelessness.

4. *Victim v. perpetrator perspectives (intent v. impact).* The materials cover both discriminatory treatment (discrimination motivated by racial or other inappropriate animus) and disparate impact or discriminatory effects claims. One theme is how to define what constitutes discriminatory conduct: What is intentional discrimination and what types of excuses or justifications will take conduct out of the realm of unlawful discrimination? This theme looks at discrimination from the point of view of the perpetrator; it focuses on the defendant's wrongful conduct. A second theme focuses on the effects of conduct that is not motivated by discriminatory purposes; this approach focuses on the effects of defendant's conduct on the victims of discrimination. Although disparate impact claims are well accepted in the housing area under federal law, the standards for making such claims are not.

5. *Private and public discrimination.* The materials in this chapter primarily focus on cases of "private" discrimination by housing providers in the sale or rental of property, given the substantive coverage of related exclusionary zoning materials in Chapter 7, but the chapter also addresses discriminatory zoning issues as well. In recent years, a significant number of reported cases involving the *Fair Housing Act* concern challenges to zoning statutes or variance or permit denials by public authorities. It is therefore important to understand this developing area of law. In addition, the acts that constitute discrimination in the zoning area differ from those that constitute discrimination by housing providers and exploring both contexts helps to flesh out the meaning of discrimination.

§1 Introduction to Fair Housing 1027
§1.1 Sources of Fair Housing Law 1027
§1.2 Fair Housing Act 1028
***Fair Housing Act*, 42 U.S.C. §§3601-3605, 3607, 3613, 3617, 3631.....1028**

The chapter begins with an extended excerpt of the *Fair Housing Act* to give students practice in reading statutes. Students can sometimes be intimidated by this much statutory text and, since the exercise of working through that kind of language engages (some) different skills than parsing appellate decisions, a few suggestions as to how to approach this material. First, it is important to be explicit with students about what they should be doing when they read through the statute. On way to approach this is to start with the statute's structure, which is to say how the various components interact, such as the definitions, the primary provisions, the exemptions and exceptions, the enforcement mechanisms, and the rest. You can then highlight the rich language of the statute itself, taking some time in class to ask students questions about phrasing and ambiguity, even over seemingly straightforward provisions.

Second, the chapter provides the raw materials for teachers who wish to construct hypotheticals that require students to read the statute carefully to determine how it applies. This can get students looking not only at structure and coverage, but also at how courts might approach resolving ambiguities in the language. For example, echoing a problem in the book, you can ask students the following trick question. (Perhaps prefacing the question by saying, "This is a trick question!".) A shopping center owner puts an ad in the newspaper stating: "Shopping center in white community looking for tenants." What part of the *Fair Housing Act* (*FHA*) does this violate? The answer is, of course, that it is not covered by the *FHA* since the *FHA* only applies to "dwellings." Sales and rentals of commercial property are covered by §1982 but not by the *FHA*. However, §1982 may apply only to discrimination the basis of race; thus the other grounds of discrimination, if prohibited at all, are likely to be prohibited only by state laws.

§1.3 Statutory Interpretation, Communications, and the Boundaries of the Fair Housing Act 1034
***Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* (2012) 1034**

Roommate.com is a particularly good vehicle to reinforce the centrality of statutory interpretation and ambiguities in the *FHA* because the Ninth Circuit uses so many standard tools of statutory interpretation in the case. The case comes out of a series of lawsuits by fair housing advocates against on-line housing search engines of various sorts that have formed something of a running battle since Congress passed the *Communications Decency Act* in 1996 (*CDA*). Section 230 of the *CDA* provides that internet service providers should not be treated as publishers or speakers of "information provided by another information content provider," 47 U.S.C. § 230(c)(1). That immunity, however, generally has not been extended to companies that themselves provide on-line content and one front in the on-going debate about how to treat sites like Roommate.com is how much editorial control or facilitation is required to show that a provider can avoid liability under § 230.

The *Roommate.com* case, however, takes a different approach to the dilemma of policing statements online that, if the Act applies, would clearly violate the broad terms of the *FHA*'s prohibition on discriminatory communication in 42 U.S.C. 3604(c), let alone the discriminatory housing decisions that follow such communication. The decision construes the statutory term "dwelling," which the *FHA* defines as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families," *id.* §3602(b), not to apply to roommate situations, interpreting a "dwelling" to "mean an independent housing

unit." In so doing, the Ninth Circuit begins (in a roundabout way) with *textualism*: what can be discerned from the plain language of the term "dwelling." Here the court concludes that it "makes practical sense to interpret 'dwelling' as an independent living unit and stop the *FHA* at the front door." The court then looks—vaguely—at a kind of *purposivism*, which is an approach to statutory interpretation that looks at the broad intent of the legislation as an aid to resolving ambiguity. This overlaps with, but is not the same as, resort to legislative history, although legislative history is a standard way of trying to understand purpose. The court here, however, points to no specific history and instead constructs a supposition about what Congress in the late 1960s could really have had in mind. Acknowledging that text and purpose do not conclusively determine the scope of the term "dwelling," and nodding to the canon of construction that would read remedial statutes broadly, the court finally turns to *constitutional avoidance*. Here the court cites both the general substantive due process right of intimate association and the particularly strong version of that right in an individual's home, focusing not only on gender norms but also on religious liberty in intimate association.

One way to approach this case is to focus first on whether the court applied each of the tools of statutory construction it relied on appropriately. In terms of textualism, there are certainly reasonable ways to read the word "dwelling" to include roommate situations without "awkward results," as the court puts it, and acknowledges before turning to constitutional avoidance. **Note 1** after the case poses the following question: "*The court does not address the element of the statutory definition of dwelling that applies the act to "any . . . portion" of a building. Does the opinion make that language irrelevant?*" This is meant to spur discussion of alternative textual approaches that might read "dwelling" on its face to include subparts of housing otherwise covered by the act, and you can push this question to other hypothetical situations that do not read dwelling to seal off a given housing unit. For example, what about a sublet or the assignment of a portion of residential space? That might be indistinguishable because of the relationship between the tenant and the subtenant/assignee (depending on how a roommate situation is structured), but should it be?

Next, the purpose question is not necessarily as conclusive as the court seems to suggest. It seems likely that if a member of Congress had been asked in 1968 (or today) whether the *Fair Housing Act* would require men and women to live together, it seems likely that the answer would be no. But that does not mean that the term "dwelling" necessarily excludes *all* roommate situations, which is the logical implication of the court's approach. You might also focus on the fact that other than provisions relating to disability and the familial-statute implications of housing for older persons, the *Fair Housing Act* generally draws no textual distinctions between its protected categories. Would students think differently about saying that the Act does not apply, categorically, to roommate selection if the issue involved race?

Finally, as to the associational rights at issue, is there a difference between finding a roommate through personal networks and finding one through a commercial venture like Roommate.com? What is the appropriate dividing line between commercial and non-commercial relationships in the housing context? These are not easy questions to answer, but the associational-rights issue is not as clear-cut as the court seems to think. Imagine switching race, national origin, or disability, for example, for gender and religion. Students might have a very different visceral reaction to the idea that freedom to choose your roommates should immunize people when they refuse to allow roommates of a different race or ability. And if students see no difference, that is worth exploring as well. (These textual and associational-rights issues are addressed in the second question in **note 1**: "*Would the same concerns hold if someone refused to accept a paying roommate — as a tenant, subtenant, or cotenant — because of that person's race? What about national origin, disability, or familial status? Does the text of the* Fair Housing Act *provide any reason to distinguish between protected categories?*".)

A second level of analysis in class can focus on tools of statutory interpretation that the Ninth Circuit did not deploy. One tool is to look at a statute's *structure* and the relationship between its components. Here, it might be telling that 42 U.S.C. §3603(b) and 3607(a) contain explicit

exemptions for owner-occupied housing and for housing provided by religious organizations. That is by no means a clear indication that roommate situations were meant to be included in the term "dwelling," but these provisions give some indication that when Congress wanted to carve out particularly intimate contexts or contexts that raised religious concerns, Congress was able to do so explicitly. Similarly, the Ninth Circuit briefly mentions the canon of construction that *remedial statutes should be read broadly*, but does not appear to give much weight, if any, to that canon.

This discussion can lead to a final, third layer of statutory analysis, which would focus on the *interaction* between the interpretive tools that the court deployed. The Ninth Circuit, for example, seemed to read the text to an interpretive draw and briefly mentioned the canon of construction that would read remedial statutes broadly, but then found the constitutional-associational avoidance concerns paramount. What meta-principle suggests that constitutional avoidance should trump remedial breadth in the case of textual ambiguity?

This discussion is reflected in the final question in **note 1:** *What indications are there in the text of the statute about how broadly or narrowly Congress intended the term "dwelling" to be interpreted? If the risk of trenching on a constitutionally based right of intimate association is one reason to read the term "dwelling" narrowly, as the court in* Roommate.com *concluded, are there associational interests that might suggest a broader reading of the* Fair Housing Act*?* You can point out that § 3601 states that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," which highlights the remedial breadth of the statute as well as the drafter's concern for avoiding constitutional infirmities in applying the statute. The associational rights question can illustrate that being kept out of a roommate situation—a right to be included—can raise important associational rights no less than a desire to keep out a roommate. Again, the focus of the court on sex and gender stereotypes risks obscuring this point in other contexts, such as race. If nothing else, the *Fair Housing Act* was designed to overcome legal barriers to integration and if personal preference under the banner of associational rights were always a trump to the right of those who are excluded by those preferences, the Act would be meaningless.

Note 2. *Why do you think the* Fair Housing Act *covers a broader scope of communications in § 3604(c) than its direct provisions on sale or rental of housing? Do you agree with Judge Easterbrook that the act's regulation of discriminatory speech as an independent basis for liability presents a conflict with the first amendment? . . . Are first amendment concerns about regulating discriminatory speech sufficient reason to read the* Fair Housing Act *narrowly? Are there arguments on the other side for reading the act's regulation of communications broadly?*

These questions can be used, first, to focus the students on the intersection between the *FHA*'s primary liability provisions in § 3604 and the fact that the §3603(b) exemptions do not apply to § 3604(c). This exception to the exemptions comes from the first sentence of § 3603(b): "Nothing in section 3604 of this title (***other than subsection (c)***)," (emphasis added), and it is easy for students to miss this convoluted interplay.

There are several reasons why the prohibition on communication might not apply to the exemptions in § 3603(b). The first is that one way to divide between commercial and non-commercial contexts is to look at whether someone is advertising. But § 3604(c) applies to non-commercial speech, at least on its face. Another reason might be that there is an independent harm that is inflicted by speech that "indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." It would follow that a liability provision seeking to provide a remedy for that independent harm can be applied to the kinds of intimate living situations carved out in § 3603(b) because the associational interests on the other side are only weakly implicated, if at all.

As to whether there are serious first amendment concerns about a provision that subjects those participating in housing markets to a prohibition against discriminatory speech, it is hard to

see why the discretionary policy choice that Congress made to carve out a space for discriminatory choices in those markets, through § 3603(b) necessarily elevates the speech rights of those granted the exemption. If it would not have been unconstitutional for Congress to apply the *Fair Housing Act* to owner-occupied and owner-sold housing, and it is hard to argue that it would have been unconstitutional to do so given that such provisions have long existed in state and local fair housing laws, then why would it be a particularly greater burden on speech rights to forego the exemption in terms of communication?

The arguments for reading the Act's regulation of discriminatory speech broadly can reflect concerns about the broad ancillary consequences of market communications. It may be difficult to bring *Fair Housing Act* cases, and ensuring that market information is not warped by discriminatory communications will not necessarily change the perspectives of people inclined to discriminate, but can set an overall framework for residential real estate that is more inclusive.

Note 3. *Does* Roommate.com *change whether expressions of these particular preferences are covered by the Act?*

If you apply the broad carve-out for roommate situations that *Roommate.com* articulates, then presumably the bulk of ads that had been understood in the Oliveri study to violate the *FHA* would not be covered.

Note 4. *How should fair housing advocates respond to this kind of subtle signaling? How, if at all, should the law address it?*

This question is meant to stimulate a discussion of alternative routes of advocacy beyond simply litigating under the *FHA* as well as the challenge of using blunt legal tools to respond to discrimination that may be hidden. There are a number of avenues that fair housing advocates have tried to counteract subtle discrimination and the signaling that often makes that subtle discrimination work. For example, some advocates focus on counteracting discriminatory or exclusionary signals with inclusionary messages, for example through affirmative marketing. Many federal subsidies, moreover, require affirmative fair housing marketing, and for extensive background on this, here is the link to the HUD handbook that covers the range of HUD-provided subsidies:

http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80251/.

For a good discussion of *Roommate.com* and similar cases, see Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? Or, the Trouble with* Roommates, 22 J. Affordable Housing & Community Development L. 111 (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470043.

Note 5. *Professor Fennell contends that even if the* Fair Housing Act *cannot be read to address discrimination on the part of those seeking homes — can you see why? — the* Civil Rights Act of 1866*, 42 U.S.C. §1982, applies to both sides of a housing transaction and thus should be interpreted to cover such discrimination, at least when it involves race*.

The argument that Lee Fennell makes in her article is that the racially biased housing choices of homeseekers may not be covered by the "housing refusal" prohibition in § 3604(a) – which makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race" or other protected category – because "in the typical case, a biased homeseeker does not make a particular dwelling unavailable to anyone because of race; rather, she makes it unavailable to everyone regardless of race." Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. Rev. 349, 390 (2017).

Problem 1. *A nonprofit is developing a transitional shelter to serve a variety of unhoused clients. The nonprofit plans to have one portion of the facility devoted to women with children who are facing economic disruption. Women in this situation often need short-term assistance. A separate portion of the facility, with its own entrance, will be dedicated to men who face more chronic challenges, at times involving mental illness and addiction. If you were representing the nonprofit, how would you evaluate any fair housing concerns with this proposed development?*

This is an opportunity to explore several questions. First, there is the threshold question whether a transitional shelter is covered by the federal *Fair Housing Act*, given the definition of "dwelling." The cases cited in note 2 discuss factors that are relevant to this analysis, such as whether residents have the ability to return to the facility regularly, whether their stay is time limited, how long residents stay, whether they receive mail and services at the facility, whether residents have designated sleeping areas or are housed in dormitory-style or open-plan rooms, how the facility manages personal property, and others. This allows students to explore not just what factors courts have cited, but what those particular factors are trying to discern. A further complication can come from *Roommate.com*'s constitutional avoidance approach: are questions of safety and intimate association sufficient to read "dwelling" narrowly in this context?

If the shelter is not considered a "dwelling" under the *Fair Housing Act*, students can also explore whether state or local fair-housing laws might apply as well as whether Title II of the *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000a, 2000a-6, or state and local public accommodations statutes that apply, if you've covered the materials in Chapter 1, §2.

Substantively, the question whether services can be divided in this way can lead to an exploration of how the *Fair Housing Act* might be read to prohibit policies that could be in the best interests of clients seeking social services. As a matter of practical lawyering, this might suggest caution, but also proactive strategies with the public agencies that would likely have sponsored this facility to gauge litigation and compliance risks.

Problem 2. *You are the lawyer for a newspaper that runs housing advertisements, some of which include pictures. Your client is worried about cases holding publishers liable for publishing advertisements with only white models. Does every advertisement have to include models of different races? Formulate a general policy for the newspaper on how to handle this issue to avoid violating the* Fair Housing Act.

This problem asks students to act in a counseling role, to advise a client to protect it from damages under the *FHA*. Issues to discuss include: (a) Does *every* ad have to include persons of several races or is it sufficient that pictures, published over time in the newspaper, do so? (b) Does the make-up of models in the pictures have to include members of several races, including Latinos or Hispanic-Americans and Asian-Americans in addition to Black persons? (c) Does the make-up of the persons in the ads have to mirror either exactly or roughly the make-up of the population in the vicinity? (d) Is it sufficient for an ad to include pictures of white tenants with a notation in large letters that the housing providers complies with all fair housing laws? (e) Does it constitute discriminatory treatment to use a picture with *only* Black models? (f) Is it sufficient to have a token Black person in an advertisement that otherwise consists solely of white models?

Problem 3. *Two men post an advertisement seeking a third roommate who will sign the lease (upon the landlord's approval). While interviewing potential roommates, they tell a recent immigrant from Mexico who applies that they do not want to live with him because of where he comes from. Are they entitled to the exemption in § 3603(b)(2)?*

This can be used to review some of the statutory questions raised by *Roommate.com*. The argument that they are entitled to the so-called "Mrs. Murphy" exemption is that § 3604 does not apply if a property has four or fewer units and it is owner-occupied. People controlling one apartment "own" one unit (which is less than four) and they live there. From a policy standpoint,

the exemption may be there because there was a thought that the landlord had privacy and associational interests in selecting people to live in his own home while a non-owner-occupied property or one with many units would not present that issue. Those privacy interests would be even stronger if one was talking about *sharing* a place rather than renting an adjacent separate apartment.

On the other hand, the wording of the exception states that it applies if the "owner actually maintain and occupies one of such living quarters as his residence" and describes the living quarters as persons "living independently of each other." The text seems to apply to the three or four-decker building that has the landlord living in one apartment and renting the others. It is not worded clearly to cover occupants seeking roommates. Moreover, and most importantly, tenants are not normally thought of as the "owners" of the property. Note that the definition of the term "to rent" in § 3602(e) also uses the word "owner" and clearly means the word to applies to the landlord, not the tenant. If that is the case, the exemption in (b)(2) may not be available. The main textual counterargument is to identify the tenant as the "owner" of the *leasehold* that is being held out for rent, thus putting the tenant within the bounds of the exemption in (b)(2). This then uses a technical meaning of the word owner rather than a lay person's meaning, making this an occasion to teach students that property lawyers often talk about "owning" a lease or an easement or mortgage, meaning owning the package of rights that goes along with an interest less than a fee simple. In that sense it is quite traditional to think of tenants as "owners" of the possessory rights in a term of years, for example.

Of course, all of this is then subject to the question whether the definition of "dwelling" that the Ninth Circuit articulated in *Roommate.com* exempts these roommates entirely from the reach of the act. Here, it may be helpful to review whether the associational and privacy concerns that were so central to the court's decision should apply to national origin discrimination whether there is no indication of gender (or religious) objections to living together.

Problem 4. *Does § 3604(c) apply to a Facebook posting for a roommate? A real estate broker's Twitter feed? What else might you need to know to answer this question?*

As a general matter, § 3604(c) is clearly broad enough to cover any means of communication and this is an opportunity to discuss whether any kind of social media or other technological advance might ever fall outside a prohibition that covers "any . . . statement." This can also lead to a broader discussion of the application of statutory language enacted in one context—traditional real estate advertising but also word of mouth as it prevailed in 1968—to a new context where the concerns are the same, but the technology may be vastly different.

As to what else you might need to know, note 3 in this section discusses the *Communication Decency Act*'s carve-out for internet service providers. If the broker's Twitter feed is merely channeling statements made by others, there may be an argument that such re-tweeting might constitute "information provided by another information content provider" under the *CDA*.

§2 Intentional Discrimination or Disparate Treatment 1043
§2.1 Intentional Discrimination on the Basis of Race 1043
***Asbury v. Brougham* (1989) 1043**

Asbury introduces the topic of discriminatory treatment under both the *Fair Housing Act* and §1982. It explains (1) the prima facie case, (including the types of evidence that can be presented to show the elements of the case), (2) possible defenses, and (3) the ways in which plaintiffs can show that the proffered reasons are pretextual.

Asbery can be a useful platform to ask students to outline the prima facie case for discriminatory treatment claims under the *FHA*. What does the π need to show to get to the jury? The π must show (1) that she is a member of a racial minority; (2) π applied for and was qualified

for rental or purchase; (3) Δ denied the opportunity to buy or rent; and (4) the housing opportunity remained available. When this prima facie case is shown by admissible evidence, the burden of production shifts to the Δ to present evidence of legitimate, nondiscriminatory reasons for failing to rent or sell to π. If Δ does not do this, or if Δ presents reasons that are not legally acceptable, π can win on the prima facie case if the jury believes the evidence warrants that conclusion. If Δ does present competent justifications for its conduct, π then has the burden of proof to show that the proffered reasons are pretextual. This can be done by (a) showing (through evidence of a tester or otherwise) that Δ acting inconsistently and did not follow the policies it presented as justifications for the failure to rent or sell; (b) showing that the reasons given at the time of the discrimination were different from the reasons given at trial, such that the reasons given at trial can be understood as post hoc rationalizations and are entitled to little weight; or (c) negating the facts, for example, by showing that apartments were in fact available when Δ said they were not available.

Note 1. *What reasons did defendant articulate in* Asbury? *Are they legitimate under the current statute as amended in 1988? How did the plaintiff attempt to show that the proffered reasons were not legitimate and non-discriminatory?*

The Δ in *Asbury* first claimed that no apartments were available; π's sister-in-law acted as a tester and found out that was not true. Second, Δ claimed that he did not rent apartments to families with children and that no townhouses were available; the tester discovered both that townhouses were available and that Δ had made exceptions to his policy of not renting apartments to families with children, thereby undermining the credibility of this justification as a nonpretextual reason for the refusal to rent. Third, Δ claimed that he did not rent townhouses to families with more than one child and he reasonably believed π had more than one child. Yet the evidence showed that Δ investigated and found out that π had only one child, yet still refused to rent to her. Note that under the 1988 amendments to the *FHA*, this reason could no longer be offered; the *FHA* now prohibits discrimination against families with children. Thus, this proffered reason would be insufficient and, π would prevail if she could prove her prima facie case. Fourth, Δ argued that he rented many apartments to Black families and thus could not be said to have discriminated on the basis of race. This argument does not negate the presence of racial discrimination; landlords may have their own individual "tipping points" and be willing to have a small number of families of color but not to exceed that number. The refusal to rent because of race at any point constitutes discrimination.

Note 4. *Are there remedies that might more effectively respond to structural barriers to fair housing enforcement?*

This question asks students to think through ways to be creative problem solvers more than litigators and try to articulate alternative avenues for responding to discrimination. A wide range of remedial avenues certainly *might* work to solve racial bias in ways that are not currently addressed by the enforcement and litigation focused provision of the *FHA*. One tool is called "debiasing," and it has been shown to be effective in counteracting implicit bias. One rationale for integration— at the community, school, or workplace level—has long been that social contact performs as a kind of debiasing, introducing people to individuals who counteract negative stereotypes. But a range of other, less structural debiasing techniques have been found to work as well, including exposing people to what Jerry Kang and Mahzarin Banaji call "countertypical exemplars," such as celebrities and authority figures. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision Of "Affirmative Action,"* 94 Cal. L. Rev. 1063, 1106 (2006). (Kang and Banaji contain a good general discussion of the evidence on debiasing.)

Problem 1. *The Supreme Court has yet to determine whether the appropriate standard in mixed-motive cases under the* Fair Housing Act *should be "but for" causation or the more lenient "a motivating factor" approach. Which standard would you adopt and why?*

Mixed-motive cases raise challenging questions about whether, and to what extent, any amount of discrimination is acceptable in a choice that involved multiple elements. As note 3 discusses, the Supreme Court has now suggested that a "but for" standard should be the default approach to federal civil rights statutes. Robert Schwemm, however, has documented that most federal appellate courts to address this question under the *Fair Housing Act* have instead focused on whether an unlawful reason for a housing decision was "a motivating factor" or similar formulation, thus holding a defendant liable if a prohibited reason in any way contributed to the decision. The arguments for but-for causation center on the concept that to be unlawful, a choice reflecting a protected category must be *the* causal factor. The arguments for the traditional approach that courts have taken in the *FHA* context is that decisions that include unlawful motivation are discriminatory even if other rationales played a part.

Problem 2. *A landlord who owns and lives in a two-story house rents the second floor as a separate apartment. She refuses to rent to a Black family. Does the family have a claim against the landlord under § 1982 or is the landlord entitled to discriminate under § 3603(b)(2)? What arguments can you make on both sides of this question? See* Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974);* Gonzalez v. Rakkas*, 1995 WL 451034 (E.D.N.Y. 1995) (§ 1982 claim available).*

This is a complicated statutory interpretation question that is meant to stimulate a discussion of the interaction between the *FHA* and §1982. A similar issue is discussed in the analysis of the federal public accommodations laws. The problem is that the *FHA* appears to *allow* discrimination in owner-occupied housing with no more than four units under its exemption provisions. If § 1982 applies, and such discrimination is prohibited, then all of the *FHA* is duplicative of § 1982 and thus the *FHA* was completely unnecessary. Such a construction of § 1982 would violate the canon that statutes should be interpreted in light of other statutes which regulate the same subject manner and that statutory language should not be interpreted to render it meaningless surplusage. Under this line of argument, it is necessary to interpret the *FHA* in a way that differentiates it from the *1866 Civil Rights Act*. One way to do this is to argue that § 1982 applies only to state action; it prohibits state statutes that impose disabilities on Black persons, but it does not require private housing providers to sell or rent to someone with whom they do not wish to contract. To the extent that *Jones v. Alfred Mayer* holds differently, it was wrongly decided.

The counterargument is that this interpretation is blocked by *Jones v. Alfred Mayer,* which applied § 1982 to discrimination by private housing providers; § 1982 was misinterpreted by the courts for 100 years until *Jones* was decided. *Jones* was correctly decided. Thus, the *FHA* was duplicative but necessary because the judiciary had wrongfully undermined the legislature by failing to enforce § 1982 by giving it an unduly restrictive reading. In addition, the legislative hearings clearly state that the *FHA* is intended not to supplant any other laws, including the *Civil Rights Act of 1866.* Even if it is the case that inclusion of the exemption was necessary to get the *FHA* passed, the Congress clearly did not repeal § 1982; repeals by implication should be avoided and, in this case, Congress did make clear that the *FHA* was not intended to supplant any other legal remedies available under other law. Further, the *FHA* is more specifically worded than § 1982 and may have been intended to clarify what kinds of actions constitute wrongful discrimination. In addition, the *FHA* is not duplicative because (1) it includes special remedies, including conciliation and possible enforcement by the Attorney General, which may be available only for housing covered by the statute; (2) the *Fair Housing Act* regulates many types of discriminatory conduct (such as sex discrimination) which are probably not covered by § 1982; and (3) if § 1982 is interpreted to require proof of discriminatory intent, the *FHA* is certainly not duplicative to the extent that it includes disparate impact claims.

§2.2 Sex Discrimination: Sexual Harassment 1054
***Quigley v. Winter* (2010) 1054**

It is useful to ask students to consider and articulate exactly why sexual harassment constitutes sex discrimination. One possible answer is that the landlord is treating a woman differently from men. In other words, π was targeted for this treatment because she is a woman; she would not have had to fear such treatment from this landlord if she were a man. The treatment is discriminatory because it reinforces patriarchy and sexual inequality by creating or attempting to create a power relationship between men and women that harms all women by making them vulnerable to such treatment. But what if the landlord were bisexual—an equal opportunity harasser, as it were? Could the landlord argue that no discrimination was involved since he treated all his tenants the same? This argument would not work, but it is complicated to explain why. It would not succeed for the same reason that the Supreme Court rejected the argument that enforcement of restrictive covenants was not discriminatory as long as the state courts would similarly enforce covenants among Black owners excluding white buyers. The court noted in *Shelley v. Kraemer* that equality is not achieved by indiscriminate imposition of discriminatory treatment. Under this view, sex discrimination occurs when an individual is subjected to wrongful harassment because of the victim's sex; the bisexual harasser victimizes women because of their sex and men because of their sex. An alternative rationale is that the characterization of sexual harassment as sex discrimination is substantially based partly on its use to reinforce patriarchy (a social system in which women are vulnerable to power exercised by men) since women are much more likely than men to be victims of sexual harassment and men are much more likely than women to be perpetrators.

Quigley is a useful case for exploring this landscape because it disaggregates different theories for finding that sexual harassment can be sex discrimination in housing. It begins with the question whether a "hostile housing environment" is a viable claim under the *FHA* and answers in the affirmative. It then turns to "quid pro quo" sexual harassment and lays out the elements for that claim. Finally, it discusses a separate coercion, intimidation, and interference claim under 42 U.S.C. § 3617. Each of these claims is based on a similar set of underlying facts, but requires different showings and can illustrate distinctive ways in which housing can be denied through sexual harassment.

Note 2. *Do you agree?*

The *DiCenso* court was apparently trying to differentiate conduct that constitutes sexual harassment from conduct that comprises legitimate social interaction. The criteria of whether a single incident occurred is an inappropriate way to do this. It would be useful to ask students to attempt to define what types of conduct constitute sexual harassment. How would they have drafted the opinion?

Would the plaintiff in DiCenso *have a remedy under § 3604(c)?*

This is a surprisingly hard question. On one level, it is clear that § 3604(c) applies on its face to any statement that expresses a preference, limitation, or discrimination on the basis of a protected class, which would seem broad enough to cover statements that might fall short of creating the housing equivalent of a "hostile environment." However, there must be some limits to the application of the statute to every statement that has a discriminatory impact on housing. This seems to fall on the side of the line of statements that more directly impact housing choices, but the fact that the *DiCenso* court did not find the statements sufficiently harmful to trigger liability under § 3604(a) again raises the question whether there should be a different standard for liability based on the denial of housing versus liability based on communications, including possible first amendment implications for banning speech where the underlying conduct is not illegal.

Note 3. *Can you think of a counterargument to this proposition? How might the exclusion of shelters for battered women impose a disparate impact on women as compared to men?*

This is meant to surface the reality that while domestic violence is not limited to violence by men against women, National Crime Victimization Survey data collected by the U.S. Department of Justice's Bureau of Justice Statistics regularly indicate that the majority of domestic violence is committed against women, at roughly three times the rate that men are victimized. *See, e.g.*, Jennifer L. Truman & Rachel E. Morgan, *Nonfatal Domestic Violence*, 2003–2012 (BJS 2014). A rule that assumes that there can be no disparate impact on the basis of sex given the gendered nature of intimate partner violence ignores this baseline question.

Note 5. *Can you see why attorneys' fee questions are particularly important in cases like* Quigley*?*

The ability to enforce fair housing laws through a "private attorney general" model depends in no small measure on attorneys' fee provisions to incentivize victims and their counsel. The more vulnerable the victim of discrimination, and the fewer resources they have, the more important becomes the ability to recover attorneys' fees. Moreover, the more complex and unusual the case—such as sexual harassment fair housing claim—the more important becomes that remedy.

Problem 1. *If a landlord excludes single males while renting to single females and married couples, has he engaged in prohibited sex discrimination?*

As with race discrimination, the fact that a housing provider rents to *some* members of a protected group is not a defense to a claim of discrimination. Individuals have their own tipping points; in addition, they may engage in multiple discrimination such that only a subset of a particular group feels the brunt of their conduct. Here π can claim that he is being treated differently than similarly situated women. On the other hand, the landlord can argue that she is discriminating on the basis of marital status rather than sex and this is not a protected status under federal law; thus π can only prevail if he can point to a state statute that prohibits marital status discrimination.

Problem 2. *If a landlord decides not to count alimony and child support in determining whether divorced women are qualified to rent, has the landlord engaged in prohibited sex discrimination?*

One question here is whether the landlord is singling out divorced women for this treatment (and would not take the same approach to men). If so, and the phrasing of the question suggests this is so, then that is discrimination on the basis of sex. Although students will not have explored disparate impact, it is worth previewing here the proposition that if this policy is phrased entirely in neutral terms, it may nonetheless constitute sex discrimination if the impact of the policy falls disproportionately on women, as is likely, and the landlord has no sufficient legitimate non-discriminatory basis for the policy.

Problem 3. *An owner of a house lives in the first-floor apartment and rents the top floor as a separate apartment. The owner sexually harasses the tenant, engaging in the same kind of outrageous conduct as the landlord in* Quigley v. Winter. *What legal rights does the tenant have?*

The π has no rights under the *FHA* because the dwelling is exempt under § 3603(b)(2). The π probably has no rights under § 1982 since the discrimination is because of sex rather than race. She may have claims (1) under a state or local fair housing statute or ordinance; (2) under a state consumer protection statute; (3) through common law remedies under the doctrines of constructive eviction, intentional infliction of emotional distress, or a separate tort of sexual harassment.

§2.3 Discrimination Based on Familial Status 1062
***Human Rights Commission v. LaBrie, Inc*. (1995) 1062**

Notes and Questions. *Do you agree with the court's initial approach or does a neutral statute that requires landlords to rent in violation of their sincerely held religious beliefs unconstitutionally infringe on the free exercise of religion?*

The question whether a sincerely held religious objection to a tenant's personal relationship choices is a legitimate basis for refusing to rent to an otherwise qualified tenant is obviously a very difficult clash of values, and one example of a larger set of such clashes that have been increasingly prominent particularly as businesses have challenges the contraceptive mandate in the *Affordable Care Act*. From the landlord's perspective, it is a violation of free exercise to be forced to support activities that offend one's religiously grounded moral beliefs and the necessity to engage in a commercial activity is not a reason to abandon such sincerely held views. From the prospective tenants' perspective, once a landlord enters the stream of commerce by offering housing for rent, the landlord must abide by all neutral laws that govern the market and cannot, among many other things, discriminate where the law protects a given status, such as marital status. The landlord can protect their religious beliefs by engaging in another line of business, but cannot invoke religion as a reason to discriminate if they choose to rent.

Problem 1. *A landlord refused to rent to a childless married couple when they refused to sign a document stating that they would not have children while living in the apartment and would move if the wife became pregnant.* Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445 (S.D. Fla. 1998). They sued the landlord under the* Fair Housing Act*, claiming discrimination because of familial status. The landlord contended that the couple is not covered by 42 U.S.C. § 3602(k) because they were not yet living with a child, and the woman was not pregnant. The prospective tenants contended, however, that they were "aggrieved persons" entitled to bring a lawsuit. The* Fair Housing Act *defines "aggrieved person" to include "any person who — (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." § 3602(i). Judge James Lawrence King ruled in favor of the landlord, ruling that plaintiffs were not "aggrieved persons" within the meaning of the* FHA *because their claimed injury did not bear a sufficient nexus to actual discrimination against members of a protected class. What is the plaintiffs' argument that the landlord did violate the* FHA*? What is the defendant's response? How should the court have ruled?*

The landlord can argue that they do not fit within the literal terms of the statute. The statute specifically defines "familial status" at § 3602 and the definition includes being domiciled with one's child, having written permission from the child's parent or guardian to live with the child, being pregnant or in the process of obtaining legal custody. A childless couple literally fits into none of these categories. Specifically providing that pregnant women are covered suggests that those who are not pregnant are not covered. Nor does the couple constitute an "aggrieved person" since no violation can be shown until one member of the couple becomes pregnant.

The couple can respond that the provision which extends coverage to pregnant women is not intended to be exclusive but expansive; it shows the broad intent of the legislation to protect families with children or who may have children. Under this view, landlords who seek to exclude children by any means from housing are violating the law; this is an illegitimate reason for refusing to rent. In addition, the definition of aggrieved person extends the statutory protection to someone who believes a discriminatory practice is about to occur. The speculative nature of this definition allows for an expansive interpretation of the statute to protect anyone who is denied housing because of a fear that they may have children.

Problem 2. *A lesbian couple applies for a foster parents license. Before they are licensed by the state, they notify their landlord of their intention to act as foster parents. The landlord objects and sues to evict them. The tenants argue that they are protected by the "familial status" provisions of the* Fair Housing Act *because, as foster parents, they would be the "designee" of the children's*

legal guardian (the state agency in charge of the child). See 42 U.S.C. § 3602(k)(2). The landlord contends that they are not protected by the statute since they have not yet been designated as foster parents and are not yet living with a foster child. Moreover, the landlord points to the qualification in the definition of "familial status" in § 3602(k), which states that "[t]he protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." The landlord notes that prospective foster parents are not "pregnant"; moreover, they are not in the process of "securing legal custody" since the state is the legal guardian of foster children and foster parents are mere "designees" of the state. Are prospective foster parents protected by the Fair Housing Act*? For one view, see* Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991) (holding that they are protected by the* FHA*).*

It might be argued that although foster parents are covered by the *FHA* since they are "designees" of the person having legal custody, *prospective* foster parents are not covered because they do not literally fit in the categories of persons who are pregnant or in the process of securing legal custody. A counterargument is that the term "legal custody" here should not be interpreted in a technical sense to mean the person with the ultimate legal authority (parent or the state) but any person who is legally entrusted with the daily care of the child, which could be a "designee" such as a foster parent. It would be anomalous for Congress to have excluded foster parents; it is difficult to conceive of a reason why Congress would prevent discrimination against families with children only to allow discrimination against children who are in the most vulnerable group of all. Interpreting the statute not to cover prospective foster parents would discourage people from becoming foster parents, serve no conceivable public policy goal that would have justified such a large exception from the statute, and therefore cannot be what the legislature intended.

Problem 3. *A landlord converts an apartment building to housing for older persons, evicting current tenants who have children. Are those tenants protected from eviction under the* Fair Housing Act*?*

One court has held that landlords are free to evict current tenants who have children if the landlord has converted housing to a senior citizens complex. *Colony Cove Associates v. Brown*, 269 Cal. Rptr. 234 (Ct. App. 1990). The court noted that the *FHA* provides that housing will not fail to comply with the requirements for housing for older persons just because some younger tenants continued to live in the complex after the conversion occurred. 42 U.S.C. § 3607(b)(3)(A). However, this provision *allows* the landlord to permit prior tenants to continue living there; it does not *require* the landlord to allow them to continue living in the complex. The *FHA* arguably protects the rights of older persons to live in complexes without children; this provision is an exception to the general rule that it is unlawful to discriminate against families with children. Thus, nothing in the federal law prohibits the landlord from evicting the family.

A counterargument would be to suggest that the court must draw a line between the competing policies of protecting children and protecting senior citizens. Protection of children is arguably the general rule, with senior citizens' complexes as a limited exception. Under this view, a landlord may refuse to accept children in order to develop housing for older persons, but a landlord has no right *to evict* tenants with children *for the purpose of creating housing for older persons.*

Problem 4. *In* Hudson View Properties v. Weiss*, 450 N.E.2d 234 (N.Y. 1983), a landlord sought to evict a tenant from a rent-controlled apartment on the ground that she had breached a term in her lease under which she covenanted not to allow anyone to occupy the premises with her who was not a member of her "immediate family." She lived with a man "with whom she [had] a loving relationship," but the landlord claimed that, because the couple was not married, the man was not a part of the tenant's immediate family. The tenant argued that the lease term discriminated against her on the basis of marital status. The court found that the man was not a member of the*

tenant's "immediate family" and that it would not constitute marital status discrimination to enforce the covenant. Do you agree?

From the landlord's perspective, this issue involves a question of contract interpretation which should focus on the probable intent of the parties. In ordinary language, "immediate family" generally refers to relationships based on marriage, blood, or adoption. Thus, the landlord is not breaching the lease. In addition, a refusal to rent might not violate the marital status statute if its provisions prohibit landlords from refusing to rent to single persons, but not from refusing to rent to unmarried couples.

From the tenant's perspective, the term "immediate family" is ambiguous and therefore should be interpreted so as to protect the interests of the consumer. The interpretation that would help the consumer is a broad interpretation of family. This result will promote the tenant's privacy interests without harming any legitimate privacy interests of the landlord's. If the lease is intended to prevent the tenant from living with someone with whom she is not married, it violates the statutory prohibition on marital status discrimination. For this reason, ambiguities in the lease should be interpreted to make the lease consistent with existing law.

§2.4 Discrimination Based on Sexual Orientation.....1068
***State ex rel. Sprague v. City of Madison* (1996).....1068**

Note 3. *The* Sprague *court found that the ordinance unambiguously applied to choices of roommates. Do you agree? Does the Ninth Circuit's decision in* Roommate.com *(see §1.3, above) suggest arguments on the other side?*

The ordinance prohibits refusing to "transfer, sell, rent or lease" because of sexual orientation. This language could be interpreted as transferring possession, not sharing the same space. Privacy interests might justify allowing individuals to choose their own roommates but not in allowing them to choose who occupies a separate apartment. An analogy could be made to sex discrimination where it is generally seen as justified for individuals to seek roommates of the same sex. The fact that the ordinance was amended after the decision in *Sprague* suggests that the city council never intended to regulate the choice of roommates. Moreover, *Roommate.com* suggests ways of reading fair housing laws narrowly to avoid conflicting with privacy and associational rights.

Problem 1. *A lesbian couple living in a 25-unit apartment building is often taunted by teenagers living across the street whenever the couple leaves or enters the building.*

a. Does the couple have a claim against the teenagers under the Wisconsin statute?

On one hand, the statute could be interpreted to apply only to landlord conduct. Since it talks about "refusing to sell or lease", the provision outlawing harassment must be read to apply to landlords or sellers. There is no separate provision comparable to 42 U.S.C. § 3617 which applies to the conduct of persons other than housing providers who coerce individuals in the exercise of their fair housing rights. On the other hand, if the purpose of the law is to make housing available, the court might focus on the general language which provides that "it is unlawful . . . [to harass] a tenant"; this is not textually limited to conduct of housing providers but applies to anyone.

b. Suppose the teenagers live in the same building on another floor. The couple asks the landlord to stop the abusive conduct; the landlord does nothing. Does the couple have a claim against the landlord for violating the Wisconsin statute?

The tenants have a much stronger claim here because they can appeal to constructive eviction law to argue that the landlord has the right to control the conduct of other tenants in the building and the landlord's failure to exercise this power effectively denies the tenants quiet enjoyment of their apartment.

Problem 2. *An owner of a three-unit building lives on the first floor with her six-year-old son and rents out the apartments on the second and third floors.*

a. She refuses to rent to unmarried couples because she believes that her religion would count it to be a sin for her to facilitate sexual relations outside of marriage. She has therefore refused to rent the apartments either to same-sex couples or to male-female couples who are not married. She has, however, rented the second- floor apartment to a gay man under a lease that prohibits him from having long-term visitors. When an unmarried lesbian couple seeks to rent the third-floor apartment, she refuses. Has she violated the law?

The marital status issue is the same as that raised above in the materials about marital status discrimination. Is the discrimination here based on marital status or the conduct of cohabitation? The sexual orientation issue is related. The landlord can say that she is willing to rent to a lesbian tenant but not to a cohabiting couple; moreover, she does not discriminate on the basis of sexual orientation because she refuses to rent to unmarried couples, whether they are same sex couples or male-female couples. The tenants would argue that she is discriminating on the basis of sexual orientation because same sex couples do not have the choice of getting married; she is therefore imposing a burden on same sex couples that she is not imposing on male-female couples.

b. Now assume she rents the second-floor apartment to an unmarried male-female couple and offers the third-floor apartment for rent. She is willing to rent to individuals regardless of their sexual orientation and to male-female couples whether or not they are married. However, she will not rent to a lesbian couple or to a couple that includes a transgender partner and insists on a lease that would prohibit subletting and having long-term visitors. Although her religion is opposed to cohabitation outside of marriage, she does not feel it is a sin to rent to an unmarried straight couple. However, her religion strongly condemns same-sex sexual relationships, and it would violate her sincerely held religious beliefs to rent to a cohabiting same-sex couple. She also believes that people should conform to the gender they are assigned at birth. She is sued by a lesbian couple, one of whom is transgender, when she refuses to rent them the open apartment. Has she violated the law?

Again, she can claim that her refusal is based on conduct not status and that she will rent to lesbian persons or to transgender people but not to cohabiting couples. Alternatively, she can argue that she is justified in refusing to rent to a lesbian couple or couple that includes a transgender partner because the statute violates her religious beliefs and she is protected by either the first amendment or the state constitution from being coerced to rent her property to a same-sex couple or couple that includes a transgender person because the state interest in eradicating discrimination on the basis of sexual orientation or gender identity is not a sufficiently strong government interest as to justify imposing on her religious beliefs.

The counterargument is that she is discriminating on the basis of sexual orientation and gender identity because she rents to heterosexuals and to cisgender people but not lesbians or transgender people. In addition, her religious beliefs do not justify defying a regulation designed to promote equal access to the housing market. Such laws regulate the public world of the market and she is not entitled to import her religious views into this area when it will affect others by denying them equal access to housing. It is hard to see how her argument would prevail after *Employment Division v. Smith,* given the narrow realm given to the free exercise clause by the Supreme Court. However, the court might distinguish the areas of sexual orientation and gender identity to conclude that the state interest in regulating illegal drug use is greater than the state interest in regulating discrimination.

c. If the landlord insists that a state statute entitles her to refuse to rent apartments to LGBTQ individuals because such rentals would substantially burden her exercise of religion and that eradication of discrimination because of sexual orientation or gender identity was not a

"compelling state interest" within the meaning of the state religious freedom statute, how should a court evaluate that assertion?

It is hard to distinguish the two cases without judging the sincerity or centrality of the landlord's respective religious beliefs. If eradicating discrimination on the basis of sexual orientation or gender identity is not a compelling state interest, it is hard to see how eradicating discrimination against heterosexual couples would count as such an interest.

Problem 3. *Universities have traditionally assigned students to housing in single-sex dormitories based on the sex on the student's birth certificate. Do such policies discriminate against transgender students? Students who are gender non-binary? On what basis?*

This problem can spark a discussion about the bases for challenging gender-related discrimination. As a threshold matter, hearkening back to *Roommate.com* in §1.3, HUD has taken the view that dorms are generally dwellings under the *Fair Housing Act*, *see* 24 C.F.R. § 100.201 – Definitions, but has generally excused these kinds of same-sex living situations on constitutional avoidance privacy grounds, as the Ninth Circuit there alluded to. After *Bostock*, students should have a stronger argument that presumably be able to determine their own gender, and the question is what obligations the *FHA* imposes on universities to reflect that proposition.

§2.5 Source of Income and Other Economic Discrimination 1074
***DiLiddo v. Oxford Street Realty, Inc.* (2007).....1074**

A majority of states do not prohibit discrimination against recipients of public assistance or on the basis of the source of the tenant's income, nor does the federal *Fair Housing Act*. Source-of-income statutes, however, are becoming more common at the state and local level and they raise slightly different issues than the categories protected under the *FHA*. As *DiLiddo* illustrates, one question is how far participation in subsidy programs constrains the background discretion that landlords otherwise might have, one reason that some landlords are reluctant to participate.

Moreover, although some states, such as Massachusetts, and an increasing number of local governments prohibit discrimination against tenants who receive public assistance, it appears that no state prohibits landlords from setting whatever income requirements they wish for tenants whether or not those requirements can be demonstrated to be reasonably necessary to protect the landlord's financial security interests.

Note 2. *Why should Congress's decision not to mandate participation by private landlords in programs such as housing choice vouchers insulate those landlords from liability where the decision not to participate in a given market in fact has a disparate impact on the basis of race or another protected category?*

This is meant to prompt a discussion about the negative pregnant assumed by courts that look to housing programs as voluntary. On one hand, there is logic to the proposition that rendering illegal the choice not to participate renders the program functionally mandatory. On the other hand, the question whether choosing not to accept vouchers meets the standards for disparate impact on the basis of a protected category could be understood as logically distinct. If the consequence of applying disparate impact liability for refusal to accept housing subsidies is that many if not most landlords would have to participate, that result does not contravene any express intention of Congress.

Note 4. *What other legal tools might advocates draw on to respond to economic discrimination in housing, particularly where inability to pay denies housing altogether? See Chapter 1, §5.*

This is an opportunity to connect discrimination on the basis of source of income to the legal dimensions of homelessness, as discussed in Chapter 1.

Problem. *A single mother of two children with a federal housing choice voucher applies to rent an apartment from a private landlord in a small, five-unit building in which the landlord lives. The landlord tells her that he is sympathetic to her need for housing, and he gladly rents to a number of other women like her, but the voucher program involves too much red tape and is slow to make payments to landlords. As a result, he says, he cannot accept her application. What legal rights does she have to challenge this action?*

There is nothing in the federal voucher program that requires a landlord to accept a voucher, so there are two other sources of law that the woman might turn to. First, if there is a state or local law that bars discrimination on the basis of source of income, she may prevail against the landlord if the only basis for his refusal to rent is that there are too many requirements in the program. Second, she may be able to bring a federal or state fair housing claim if she can show that the refusal to accept otherwise qualified voucher holders has a disparate impact on the basis of a protected category, such as race, sex, or familial status. In that case, the landlord would be able to proffer a legitimate non-discriminatory reason, and some courts have been sympathetic to these kinds of arguments. *See, e.g.*, *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995) ("Owner participation in the section 8 program is voluntary and non-participating owners routinely reject section 8 voucher holders. We assume that their non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants and that we therefore cannot hold them liable for racial discrimination under the disparate impact theory."). However, it is questionable whether the inconvenience of participation is a sufficiently legitimate reason not to apply a disparate impact theory and a good argument can be made that, within reasonable limits, landlords should not be able to avoid the obligation to serve otherwise income qualified tenants if the reason for not doing so is paperwork and delay and the consequence of not doing so is a discriminatory effect on potential tenants. For more background on these arguments, and a review of the caselaw, see Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under The Federal* Fair Housing Act, 98 Geo. L.J. 769 (2010).

§3 Disparate Impact or Discriminatory Effects Claims.....1079
§3.1 HUD's Discriminatory Effects Rule.....1079

Note 2. *How does HUD's rule, codified at 24 C.F.R. § 100.500, resolve the variations between the standards adopted by various circuits?*

This is a prompt to evaluate the specific elements of the HUD framework in light of the significant variation the *Villas West II* court outlined. Among the variations of note, the Seventh Circuit in *Arlington Heights* focused in part on intent and the remedy sought, factors not a part of the HUD rule; the Second Circuit in *Huntington* adopted a burden-shifting framework that incorporated the *Arlington Heights* factors in the third stage; and the Third Circuit in *Rizzo* seems to have been closest to the formulation that HUD utilized in the rule. You could go deeper into the more minor variations but the critical point is that the courts of appeals had many distinct approaches and HUD has tried to knit that variation into a single approach.

Depending on whether your students have encountered the basic questions of deference to administrative agencies, you could also raise questions about whether an agency should be the right institution to resolve these kinds of inter-circuit doctrinal disagreements. The arguments in favor of that role include the rationale that Congress intended HUD to marshal its expertise in this area and that HUD has a more holistic view of how the Act operates in practice, given its internal adjudicatory authority and its enforcement role. Arguments against deferring to HUD include the proposition that questions of allocation of the burdens of production and proof in litigation are less in the province of agency expertise and more in the realm of how courts traditionally structure litigation.

Note 3. *The HUD rule's three-part framework:*

(c) *Under the HUD rule, if a policy or practice that has a disparate impact is legally justified, the burden shifts back to the party challenging the policy or practice to show that the "interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." In practice, how difficult is it for tenants and others challenging practices on a disparate impact theory under the* Fair Housing Act *to show that there are alternative policies that have a less discriminatory effect?*

This is meant to focus students' attention on the challenge of proving a negative under the articulation of the third stage in the HUD rule.

Problem 1. *A suburban municipality just outside a major city has a zoning law that limits construction to single-family homes on one-acre lots with a small commercial district for shops and restaurants. Multi-family housing, whether in townhouses or apartment buildings, is prohibited throughout the town. As discussed in Chapter 6, the Supreme Court of New Jersey held in* Southern Burlington County NAACP v. Township of Mount Laurel, *336 A.2d 713 (N.J. 1975), that the state constitution required municipalities to allow affordable housing to be built somewhere in the community of sufficient quantity to meet the town's "fair share" of the regional need for housing for low- and moderate-income families. Imagine you are in a state that has not adopted* Mount Laurel *and has no state statute that parallels the doctrine. A housing developer purchases land in the town, obtains subsidies from government and nonprofit sources, and seeks a variance or rezoning to enable it to build affordable multi-family housing. When the town denies the variance and refuses to rezone the land, the developer sues the town claiming that the zoning law violates the* Fair Housing Act *because excluding multi-family housing effectively excludes all affordable housing and this has a disparate impact on several groups protected by the* Fair Housing Act *that have a high percentage of families with low or moderate incomes, including race, sex, familial status, and handicap. Does the* Fair Housing Act *require every state to adopt some version of the* Mount Laurel *doctrine? What are the best arguments on either side?*

This is an opportunity for students to work through the logic under which exclusionary zoning could be problematic under a disparate impact theory. There is a good argument that because in many, if not most housing markets, denying the right to build multifamily housing would have a disparate impact on many groups protected by the *FHA*, the Act could be understood to have very broad application, functioning similarly to *Mount Laurel*. The arguments on the other side would focus on the institutional capacity of the federal courts to supervise the wide array of local land use decisions, especially in the absence of the kind of supervisory authority the New Jersey Supreme Court has been willing to assert under *Mount Laurel*.

Problem 2. *A Black woman with two children is denied an apartment in a landlord's building. She receives public assistance, and the landlord has historically refused to rent to recipients of such assistance. The woman brings a lawsuit claiming that the landlord's policy has an impermissible disparate impact on three protected groups: Black people, women (of all races), and children. As plaintiff's attorney, how would you persuade the court that the "no public assistance recipients" policy has a disparate impact on the basis of race, sex, familial status, or all of those categories, that is unjustified by any legitimate interest of the landlord? What would you argue as defendant's attorney to persuade the court that the policy is consistent with the* Fair Housing Act*? What rule of law should the court promulgate to implement the statutory language, regulatory interpretation, and policies??*

The prospective tenant would argue that children are twice as likely as adults to be living in poverty. Thus, a landlord who refuses to rent to welfare recipients has adopted a selection criterion for tenants that has a disparate impact on families with children. Unless the landlord can show that the refusal to rent to such families is rational and cannot be achieved in a less discriminatory manner, the refusal to rent violates the *FHA*. Because families receiving government

benefits have a guaranteed source of income, it might be argued that it is less risky to rent to such families than the working poor who could be laid off at any time and might not have access to unemployment benefits that would be sufficient to pay the rent.

The landlord would argue that the *FHA* is not directed at remedying poverty, but exclusionary practices directly or indirectly related to excluding members of protected groups. The landlord is perfectly willing to rent to families with children who are not receiving welfare. Nothing in the *FHA* prevents landlords from choosing to rent high-cost, luxury housing even though such housing may not afford equal access to members of all groups protected by the *FHA*. The choice of economic criteria for tenants is within the landlord's business discretion; this is a purely market decision. Rather than segmenting the market by created segregated housing, income criteria are the very essence of the way in which the market allocates resources.

Possible victims of economic discrimination include children (familial status), women and people of color. Because a greater percentage of children, women of all races, and Black- and Hispanic-Americans than adult white males are likely to be poor, it may be possible to argue that criteria imposed by either landlords or by local zoning authorities have a disparate impact on a protected group and therefore violate the *FHA* unless they can be shown to be rationally related to achieving a legitimate government interest which cannot be achieved in a less discriminatory way.

This argument is essentially the argument that was accepted by the *Huntington* court. However, it may well be that the courts will apply this theory to municipal zoning decisions but not to the income criteria set by private landlords. Public authorities may be thought to have duties to serve the general public while landlords have the right to determine the economic terms of their relationships with tenants, as long as they comply with minimum standards (implied warranty of habitability and compliance with the housing code) and do not arbitrarily exclude would-be tenants because of invidious discrimination. Income discrimination, in this view, is not illegitimate in the private market; it is the essence of how the market works.

Problem 3. *A group of Orthodox Jewish students sued Yale University to challenge its policy of requiring all students (other than married students or students over 21) in their first and second years to live in coeducational residence halls. They claimed that their "religious beliefs and obligations regarding sexual modesty forbid them to reside in the coeducational housing provided and mandated by Yale."* Hack v. President & Fellows of Yale College*, 16 F. Supp. 2d 183, 187 (D. Conn. 1998),* aff'd*, 237 F.3d 81 (2d Cir. 2000). They sought and were denied exemptions from the policy. The district court rejected their claim that Yale had violated the* Fair Housing Act*, noting that Yale had reserved rooms for each of the plaintiffs and had in no way denied them housing. Plaintiffs claimed that the housing offered was not of a type that they could accept because of their religious beliefs.* Id. *How could the plaintiffs argue that the university policy had a disparate impact on them because of their religion in violation of the* Fair Housing Act*? What is Yale's defense to this argument? How should the court have ruled?*

The plaintiffs would argue that this requirement, if enforced, would mean that they could not attend Yale. They would therefore have been excluded even if Yale did not intend to exclude Orthodox Jews. Moreover, the facts of *Hack* were that Yale allowed them to attend and to live off campus, as long as they paid for rooms on campus. This suggests that the school's interest was not substantial and that, even if it existed, it did not justify the imposition on the πs' religious beliefs.

Δ would argue that its policy is justified by educational reasons and that it is not obligated to comply with all its students' religious practices because deferring to those religious practices would fundamentally change its mission. It could not maintain a science department, for example, if it were disabled from teaching the theory of evolution. Co-ed dorms are an educational issue because the school wants to avoid the fraternity like atmosphere that might prevail if men and women lived separately.

Problem 4. *A landlord refuses to rent to tenants who do not speak English. A tenant claims that this policy constitutes national origin discrimination because it has an unjustified disparate impact on persons born outside the United States.*

a. Does the policy impose a disparate impact based on national origin?

b. If so, is it justified by a legitimate business interest?

It has a disparate impact because persons born outside the United States are more likely not to be English speakers. On the other hand, it could be argued that national origin is not coextensive with language; some people born in the U.S. do not speak English and many born outside the U.S. do speak English. It is therefore arguable that language is a category wholly separate from national origin. Moreover, landlords may well have a strong business interest in being able to communicate with their tenants. On the other hand, tenants who do not speak English can communicate through translators; it is not impossible for landlords to communicate with such tenants if they arrange for persons who can act as intermediaries. The landlord's interest is therefore arguably not substantial enough to count as an excuse for discrimination.

§4 Segregation, Integration and the *Fair Housing Act*.....1086
***MHANY Management v. County of Nassau* (2016)**

This section highlights the on-going reality of intentional discrimination and the inexorable connection between the phenomenon and the persistence of residential segregation. *MHANY Management* can provide insights into how individual land-use decisions in particular communities can ripple out to shape a region's housing markets—and discriminatorily limit the choices of everyone in that market.

The notes after *MHANY Management* provide further grist to discuss a fundamental tension in the *Fair Housing Act* between integration—to the extent that it can require explicit consideration of race—and non-discrimination. One take on the tension between integration is to give primacy to non-discrimination, which is how the Second Circuit in *Starrett City* came out. In this view, the *FHA*'s integration mandate is not only best, but also *only*, served by enforcing its non-discrimination provisions. But many approaches to remedying structural discrimination may require some consciousness of race (and other protected classes) to be effective. Indeed, another part of the *Fair Housing Act*, known colloquially as the obligation to "affirmatively further fair housing," has been interpreted by HUD to require planning and outreach efforts to support integrated communities and reduce segregation, even where there is no evidence of present discrimination. This only applies to how HUD and its grantees administer programs related to housing and urban development, so does not cover private providers who do not receive federal subsidies, but its reach is extensive, nonetheless.

Problem 1. *You are counsel to the U.S. Department of Housing and Urban Development and HUD is considering ways to reform how it approaches the* Fair Housing Act*'s mandate to the federal government to affirmatively further fair housing. How would you design achievable policy interventions to advance that mandate, and what legal challenges do you anticipate in response?*

This is an opportunity to explore the power and limits of an approach to structural racism in housing markets that center on HUD funding. For example, the primary remedy for failing to meet funding requirements—including around fair housing—is to forfeit that funding, but that may have exactly the opposite effect as intended. That said, facilitating linkages between planning and fair housing outcomes is an important role for HUD to play at the national level and HUD has greater capacity to provide data and planning tools than most local jurisdictions subject to the *FHA* mandate.

Problem 2. *Your client is a real estate broker with the following questions.*

a. The broker tells you that, although she has no illegitimate racial animus, her customers do. If she shows potential buyers houses that she knows sellers will refuse to sell to them because of the buyer's race or ethnicity, she is wasting her time. Her competitors do not do this, and it simply costs too much to pursue sales that are not going to happen. If the owners who engage her services ask her not to show their houses to members of a particular race, and she complies with this request, has she violated the Fair Housing Act*?*

Yes, she has. A student of Professor Singer's who worked for a broker in New York City reported to him that the student's employer had given him this explanation for the broker's steering practices. The fact that housing owners refuse to rent or sell for discriminatory reasons itself violates the *FHA*, and it is no defense to a claim against the broker. Theoretically, there should be no competitive disadvantage in refusing to steer since all brokers are covered by the *FHA* and now face substantial damages for violating the law. At the same time, discrimination by housing providers remains a very serious problem, and many victims who could litigate do not do so. Nonetheless, any competitive harm to the broker does not constitute a legal justification for that broker's participation in steering practices.

b. A buyer expresses a preference for living in an area that is predominantly white and asks the broker to explain the local racial balance in different neighborhoods. Can the broker answer this question?

Probably not. Brokers are not allowed to steer buyers and answering this question constitute a form of steering.

c*. A buyer wants to live in an "integrated" community. Can the broker give the buyer information about which neighborhoods are "integrated"?*

This is tricky because it appears to be benign compared to the situation in (b) above. One can argue that it is different from (a) because the benefits of integration are exactly what the *FHA* is all about. On the other hand, it may appear to authorize brokers to make race a criterion in what housing they show and the Supreme Court in recent years has sought rules that are "neutral" in the sense that race is formally kept out of policy decisions.

§5 Housing Discrimination Against Persons with Disabilities..... 1100

§5.1 Reasonable Accommodations..... 1100

***Janush v. Charities Housing Development Corp.* (2000) 1100**

A significant fraction of *Fair Housing Act* cases currently involve disability-related claims. *Janush* is a good illustration of litigation that raises a reasonable accommodation argument. As the court points out, to make out a *prima facie* claim under a reasonable accommodation theory, a plaintiff must show that (1) she suffers from a handicap as defined in 42 U.S.C. § 3602(h); (2) defendant knew of the handicap or should reasonably be expected to know of it; (3) accommodation of the handicap "may be necessary" to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendant refused to make such accommodation. This is, classically, a "fact-intensive, case-specific determination," as the court further notes, and courts tend to focus on questions such as cost to a defendant.

It is worth pointing out to students that inherent in the nature of the claim is a balancing of interests, given that the statute explicitly requires a "reasonable" accommodation. You might ask students how courts should go about determining what is "reasonable" – purely from a defendant's standpoint? Only in terms of costs and burden? If this is a kind of cost/benefit calculus, how should a court weigh the benefit to a plaintiff (which may be hard to monetize) against the cost to the

defendant? Are questions of fundamental fairness and the broader remedial goals of the statute relevant in assessing the reasonableness of the accommodation?

Problem 1. *A mobile home park charges its residents a fee of $1.50 a day for the presence of long-term guests and $25 per month for guest parking. A tenant whose daughter's health condition requires a full-time attendant argues that the owner violated the* Fair Housing Act*'s reasonable accommodation provisions by refusing to waive the charges for her attendant. The Ninth Circuit has held that the regulation would violate § 3604(f)(3)(B) if it had an "unequal impact" on persons with disabilities and resulted in an "exclusionary effect" so long as the financial impact on the landlord was not "unduly burdensome."* United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413 (9th Cir. 1994). Do you agree with this formulation of what § 3604(f)(3)(B) requires? Assume that the financial burden to the landlord is minimal and that enforcement of the policy will not cause the tenants to move. Should accommodation be required under the terms of the statute?*

The court's formulation suggests that only "exclusionary" policies should be invalidated; this arguably violates the *FHA* goal of providing equal housing services to persons with disabilities. No special burdens can be placed on persons with disabilities and reasonable accommodation may need to be made by altering policies.

Problem 2. *A tenant living on the first floor of a three-unit building of three stories is in a car accident and is paralyzed from the waist down. He wants, at his own expense, to install a ramp to enable him to enter the front door without assistance since his wheelchair could not negotiate the steps to the front porch. Without such a ramp, he cannot return home. The small front yard will be largely taken up by the ramp if the ramp is installed. The landlord objects to the installation of the ramp on aesthetic and economic grounds. She can demonstrate that the market value of the property will decline from $200,000 to $180,000 if the ramp is installed. The tenant argues that he will pay to have the ramp removed if he moves out of the apartment. Is the landlord required to allow the tenant to install the ramp? See* Rodriguez v. Montalvo*, 337 F. Supp. 2d 212 (D. Mass. 2004) (presumptive* Fair Housing Act *duty to allow tenant to affix permanent ramp to back entrance of building when landlord gave no proof that it would cause financial harm).*

Tenant argues that the landlord will suffer no financial burden and that the alteration is thus a "reasonable modification" under § 3604(f)(3)(A) since the tenant promises to pay to restore the condition once the tenant leaves the building. The landlord will argue that the change is not reasonable since it will probably decrease the market value of the property by taking up part of the front lawn and thus would impede the landlord's ability to sell the property for its previous fair market value.

There may be an argument here that the exemption in § 3603(b) applies: "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." The question is whether the landlord lives there, but the other requirements seem to be met by the hypothetical.

§5.2 Integration and the Example of Group Homes for Persons with Disabilities 1106
***Familystyle of St. Paul, Inc. v. City of St. Paul* (1991) 1106**

Note 1. *Do you agree with this reasoning? What arguments would you make on the other side?*

The argument on the other side is that Judge Easterbrook is painting with far too broad a brush and almost entirely discounting the value of placing group homes in traditional single-family neighborhoods. A better analysis would have been to ask not whether there were sufficient alternatives, but rather whether the relaxation of the single-family occupancy requirement was

justified. It may be that a four-unit building would do sufficient harm to a particular neighborhood's character that a variance would not be justified, but such buildings can be made to blend aesthetically and it is not clear—other than a desire not to allow group homes—what purposes are served by an occupancy requirement if decoupled from the physical footprint of the development.

Note 3. Familystyle *justified the spacing requirement, not as an effort to achieve integration, but as necessary to promote the mental health of group home residents. Is this sufficient to distinguish it from* Horizon House*? Is* Familystyle *consistent with* Starrett City*? If not, which case is correctly decided?*

It can be argued that *Familystyle* is inconsistent with *Starrett City* for the following reason. *Starrett City* held that the *motivation* for exclusionary practices is irrelevant; it does not matter that the exclusion is benign, in the sense that it is intended to achieve the legitimate social goal of promoting integration. When the goal of promoting integration conflicts with the goal of preventing discrimination, the policy of preventing discrimination prevails. In *Familystyle*, a group is prevented from using a particular parcel in order to promote integration; yet the effect is to deny persons with disabilities the same rights as others to choose to occupy and use a particular parcel. If the cases are inconsistent, the question arises which goal should prevail—antidiscrimination or pro-integration? The argument for the result in *Starrett City* (the antidiscrimination norm prevails) is that housing rights should not be premised on the extent of prejudice; excluding Black families in order to prevent "white flight" does precisely this because it limits the housing rights of Black families by reference to the level of tolerance in the white community. A related, but different, argument in *Familystyle* would be that the goal of integration is arguably a pretext for discrimination. The ordinance in that case was intended, not to promote integration, but to limit the places where group homes can be established in order to "protect property values" and preserve a safe and desirable neighborhood. These goals are discriminatory because they are premised on the notion that a concentration of persons with disabilities is undesirable. As in *Starrett City,* the rights of persons with disabilities to choose where they will live cannot be circumscribed by the existence of prejudice in the surrounding community.

The counterargument is that *Familystyle* and *Starrett City* are distinguishable. *Starrett City* was limited to consideration of the tipping phenomenon; it prohibited excluding people for the purpose of encouraging white families to stay in the neighborhood. The ordinance in *Familystyle* is not premised on a fear of flight of neighborhood residents, nor is it premised solely on the goal of promoting integration. Rather, the purpose is a public health goal of promoting mental health. Public authorities can reasonably determine, as a medical matter, that treatment of persons with mental illness will be better if they are integrated into the community rather than isolated in institutions. Rather than constituting discrimination, the ordinance promotes equality by granting the special services needed to help persons with disabilities to survive and to obtain adequate treatment; indeed, it would constitute discrimination to deprive persons with mental illness of the best treatment setting.

Problem 1. *Suppose the City of St. Paul experiences a sudden influx of immigrants from the Global South. To integrate these immigrants into the community more effectively, the city council passes an ordinance prohibiting all immigrants from buying or renting homes or apartments on the same block as another immigrant family. Under the reasoning of* Familystyle*, would such an ordinance be enforceable under the* Fair Housing Act*? Suppose the ordinance prohibits all Black families from living next door to another Black family as a means to combat racial segregation. Does this violate the* Fair Housing Act*?*

This question is intended to highlight the problems with the reasoning in *Familystyle.* If integration, by itself, is a sufficient reason for exclusionary zoning, then an ordinance that limited housing available to Black families in order to disperse them throughout the community would be

acceptable. However, such an ordinance would clearly violate the *FHA*. It could therefore be argued that *Familystyle* was wrongly decided because it authorizes public laws that limit the rights of persons with disabilities to choose where to live.

The counterargument is that the goal of the ordinance in *Familystyle* is not integration, but mental health. Granting treatment to persons with mental illness may require special treatment, including, for example, integration into a community setting. Under this line of reasoning, race and disability discrimination are not comparable. Although an ordinance limiting where Black persons could live would violate the *FHA*, the ordinance at issue in *Familystyle* does not violate the *FHA* because it is related to the goal of providing treatment.

Problem 2. *An organization buys a house to set up a group home for mentally disabled persons. Opposition to the group home develops in the neighborhood. In response to community pressure, the city amends its zoning ordinance to require that all facilities housing more than four unrelated persons together have one parking space off the street for every two residents. The city council justifies the ordinance by noting that unrelated persons are more likely to have separate cars, whereas family members may share a vehicle and that residents in group homes need more parking for supervisors, visitors, and doctors. Moreover, the city is relatively built up and most houses do not have off-street parking. Streets are quite congested, and parking spaces are hard to find. The effect of the ordinance, however, is to make it financially impossible to set up the group home in the city. The organization sues the city, arguing that the new ordinance violates the* Fair Housing Act. *What arguments could you make on behalf of the plaintiffs? On behalf of the defendant city? What should the court do?*

The πs will argue that the ordinance was motivated by the prejudices of the community residents rather than legitimate zoning goals. Courts have held that intentional discrimination by public officials can be shown when those public officials bow to community pressure that is discriminatorily motivated. In addition, πs will argue that the ordinance has a disparate impact on persons with disabilities since they are more likely than others to live in group household arrangements. Because the ordinance has a disparate impact, the city has the burden of showing both a bona fide, legitimate governmental interest served by the regulation and that this interest cannot be achieved in a less discriminatory manner. The city can achieve its goals in a less discriminatory manner by granting permits to park on the street and limiting the number of permits for every household in the city in a similar manner.

The Δs will argue that the city has legitimate goals in preserving adequate parking and that the city officials cannot be automatically assumed to have been motivated by the prejudices of residents. The fact that some residents voice discriminatory motives at public hearings should not disable public authorities from passing legitimate land use regulations. The Δs will also argue that there is no less discriminatory way to achieve its goal of fairly allocating parking space in the city. It is rational to conclude that the inhabitants of multifamily dwellings will either have more cars than residents of single-family homes or are likely to receive more visitors than other persons and thus additional parking requirements are appropriate.

§6 Fair Lending 1111
M & T Mortgage Corp. v. Foy (2008) 1111

Foy can illustrate that antidiscrimination is not only a statutory question, but is also part and parcel of equity. This can spark a discussion about the institutional advantages and disadvantages of invoking equity to address issues such as lending discrimination. Courts are not limited to the narrow political compromises that mark much civil rights legislation, even legislation as sweeping as the *Fair Housing Act*, which only applies to certain protected categories and contains a number of exemptions. Courts are also empowered to do justice for the parties and for

a lender to invoke the authority of the court to foreclose, as Chapter 12 illustrated, is a very serious step to take with what can be an individual's most significant property. However, the evidence may be limited and a court may not have the resources that administrative agencies do to assess the structure of a market. One interesting aspect of the *Foy* case is the way the court relied on research by the Federal Reserve to ground its analysis, showing something of a hybrid approach.

Note 3. *What other tools can advocates for fair lending use to respond to discriminatory lending practices, if aggregate litigation is now more difficult?*

This question is meant to open up a conversation with students about using legal tools as a platform for advocacy even when direct litigation is challenging to bring. For example, advocates have used data provided under the *Home Mortgage Disclosure Act of 1975* (*HMDA*), 12 U.S.C. §§ 2801-2810, to bring commercial pressure to bear on lenders who evince discriminatory lending patterns.

Note 4. *What business justifications might Morgan Stanley offer for why the mortgages it purchased were beneficial to consumers rather than harmful, or were otherwise legitimate? If the plaintiffs in* Adkins *were then to attempt to prove "that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect,"* id.*, what would their best arguments be?*

Lenders often point to arguments in favor of the democratization of credit in light of the greater risk that lenders believe certain low-income borrowers pose. The argument is essentially that the only way to provide access to credit for those borrowers is to offer that credit on terms that compensates the lender for additional risk, and that compensation can take the form of higher interest rates and more onerous terms.

The argument on the other side is that lenders have an obligation to ensure that borrowers have a reasonable likelihood of repaying the debt they are incurring and that lenders are often in a better position to assess that structurally than borrowers may be. This is where the regulatory structure that the Consumer Financial Protection Bureau is developing under the *Dodd-Frank Act* is heading and it makes eminent sense to set a basic minimum standard of ability to repay. If that has the effect of making credit more limited, it also mitigates the impact of predatory lending. In addition, the externalities for neighborhoods that have more owners of a particular race may also be a harm inflicted by the practice of reverse redlining, reducing property values for the neighborhood and causing an impact, not only on the borrowers but on the neighbors as well.

Moreover, lenders have an obligation to ensure that the loans they are making are not discriminatory and there is no reason that that obligation should be limited to the individual harms. The externalities that arise from concentrated housing market collapses are foreseeable and predictable, and a lending institution marketing to a community on terms that are likely to lead to that kind of collapse—particularly where borrowers may have few, if any, other avenues for obtaining credit—must bear responsibility.

The concern on the other side is that causation is impossible to prove in a context in which there was broad macroeconomic collapse. Without some limitation of liability, every economic downturn will cause liability for lenders who have already suffered the direct consequences of their lending practices in terms of market discipline, which is to say that they have already taken significant losses on the very loans that advocates are pointing to. Moreover, to hold lenders entirely responsible for choices made by borrowers is to deny those borrowers' autonomy.

Problem. *A mortgage lender allows its loan officers to use subjective criteria unrelated to a borrower's objective credit characteristics, such as credit history and income, to impose discretionary charges and interest mark-ups that increase the cost of borrowing money. Although application of these subjective criteria has a disparate impact on Black persons, banks defend these policies as necessary to their business model of assessing risk by careful consideration of the*

qualifications of borrowers and the likelihood that they will default on the loans. Does this practice violate the FHA *and* ECOA*? Suppose the lender targets a relatively less well-off neighborhood to market subprime loans, leading several years later to massive foreclosures and decreases in the market value of all land in the neighborhood. Does this practice violate the* FHA *and* ECOA*? What risks would be posed, practically and legally, if instead the lender moved to lending standards based entirely on quantifiable criteria such as credit scores?*

The lender will argue that it cannot be required to give loans based on mechanical criteria and that some subjectivity must be allowed to weed out borrowers that are deemed unlikely to pay back their loans. The counterargument is that such subjective policies cannot be tolerated if the evidence shows that they operate in a discriminatory fashion.

13. Takings Law.....1123

Themes

This chapter is devoted to takings law, both the traditional power of eminent domain as well as the doctrine of regulatory takings. It is intended to shift attention from common law and statutory definitions of property rights and regulation to the rules limiting the ability of legislatures and perhaps courts to alter property rules (or to do so without just compensation).

Chapter 13 has several primary themes:

(1) *Fundamental rights.* It is important to emphasize to students that there is a big difference between defining property as a common law or statutory matter and defining property rights as a matter of constitutional law. There is a good argument for teaching takings law toward the end of the course so that students have a sophisticated awareness of the complexity of property doctrine and the need to limit property rights to protect both the property and personal rights of others. Students are often too eager to constitutionalize principles they hold dear; they often use the phrase "it is unconstitutional" to mean that something is unfair, without sufficiently considering the relation between the legitimate lawmaking power of democratically elected legislatures and the legitimate limits on this lawmaking power set by judges. Constitutional property rules limit the ability of legislatures to redefine property. These rules are thus interstitial in nature; they do not occupy the field. Rather, they allow substantial changes in property rules and interpretation of them by lawmakers in the legislature and courts but set outer limits on the changes that can be made. These outer limits generally protect fundamental rights against oppressive government action. Constitutional property rules therefore do not promote simple fairness; indeed, they may allow a great deal of unfairness, as perceived by some observers. Because there is substantial disagreement about what is and is not fair, the courts do not and should not constitutionalize all property rules. Instead, they protect *core* interests associated with property institutions; those core interests may be conceptualized as fundamental rights to protection from specific types of government conduct.

(2) *Rules and standards.* Some of the debate about regulatory takings law takes the form of arguing about whether it is possible to make the law more coherent and rule-like. Some scholars and judges argue that the multi-factor balancing test the Supreme Court has adopted is complicated, hard to apply, and indeterminate; they hope to replace it by a more determinate standard. On the other hand, other scholars and judges argue both that the multi-factor test is relatively predictable in application and that it is impossible to create a rigid rule that can legitimately identify, once and for all, the kinds of changes in property rules that can and cannot be accomplished without paying compensation.

One way to understand takings law is to focus on the way it is applied in practice, rather than the standards used to justify results. On this view, takings law may be characterized as containing a few hard-and-fast rules defining situations in which compensation is required (forced physical invasions, abrogation of core rights such as the right to pass on fee simple property at death, complete deprivation of economic value). The opposite understanding focuses on the flexibility of takings law, which after all contains both a multi-factor analysis and an ultimate question of distributive fairness (i.e., whether this loss is one the individual property should rightly bear for the good of the community).

(3) *Legal reasoning.* The chapter addresses persuasive ways to argue for and against the conclusion that a regulation effectuates an unconstitutional taking of property. These arguments

are based on existing case law as of 2021. They must be used in conjunction with precedential analysis and analogical reasoning in the takings area. Thus, the arguments obtain their persuasive force partly by tying them to particular fact situations found in prior cases. In analyzing particular cases and problems, it is therefore important for students to attempt to find the most powerful precedents on both sides and the factors that would be deemed most helpful to each side.

(4) *Justified expectations.* One key element of takings law is the attempt to protect individuals from unfair infringement of their justified expectations. The problem is figuring out what expectations are justified; extensive changes in law are to be expected in order to promote the general welfare but certain kinds of changes either cut into what the courts view as "core" property rights (and therefore cannot be accomplished without paying compensation) or, if applied retroactively, unfairly surprise actors who invested substantially in reasonable reliance on existing regulations. This is also an aspect of takings jurisprudence that intersects frequently with due process and the Supreme Court has, at times, split over whether justified expectations are best protected through the lens of takings or due process.

(5) *Efficiency.* There are now a set of standard arguments for and against the premise that requiring just compensation—for traditional exercises of the power of eminent domain as well as regulatory takings—promotes efficiency. In general, those who argue for compensation suggest that governmental lawmaking bodies will make better decisions if they have to compensate those injured by the decision; if the cost is greater than the benefit, the regulation will be abandoned. Thus, only Pareto superior legislation will be passed, i.e., legislation whose benefits outweigh its costs *and* whose costs are compensated such that the victims of the legislation are no worse off than before. In general, those who argue against compensation suggest that market actors will overinvest in projects that are socially harmful if they believe that legal changes that prohibit their activity will not be made retroactive; in contrast, allowing regulatory laws to be made retroactive encourages market actors to take into account both negative externalities and the possibility of future regulation in determining whether their project is socially, as well as privately, cost-effective.

(6) *Distributive fairness and anti-discrimination policy.* Another important—perhaps the most important—way to understand the takings clause is that it promotes distributive fairness by prohibiting the state from placing the cost of programs that benefit the public as a whole on specific individual property owners unless placing the cost on those property owners is justified (as it may be if the regulation is intended to prevent those owners from harming others). The central question is one of distributive justice: Is this a burden the individual property holder should have to bear for the good of the community? An alternative, and more controversial, way to characterize takings law is that it prohibits discrimination against particular property owners; a taking of property is discriminatory because it wrongfully singles out individuals for different treatment and thus denies them equal rights to hold property.

Note that the teaching notes below refer to a variety of cases in explaining particular issues. Some of those cases appear later in the chapter than the case being discussed. This is because it is important to make analogical and precedent-based arguments in takings, and it is helpful for you to know the full array of cases in the area to fit a particular fact situation into the takings landscape.

One final note, for long-time adopters of the casebook. In the Eighth Edition, we have worked to streamline the discussion of regulatory takings and have moved the discussion on justifications for takings law to a new concluding §4, as much of the discussion pertains to eminent domain generally as well as regulatory takings.

§1 Eminent Domain....1124
§1.1 The Eminent Domain Power and the Condemnation Process....1124
§1.2 Public Use....1125
***Kelo v. City of New London* (2005)....1125**

One way to teach *Kelo* is by using **problem 2** and doing a big moot court in class. When Joe Singer teaches takings, near the end of the semester, he chooses five to seven students who were among the best in the class to act as judges, pretending to be the New Jersey Supreme Court. Their job is to decide the case and run the class. He then divides the class into two panels, one arguing for the homeowners and the other arguing for the city. The students know about this beforehand and the Chief Justice either asks for volunteers or calls on two to four of the plaintiffs to make the argument on their side. The judges then ask questions as a regular court might do and anyone on that panel can answer. The class then shifts to the other side. The judges then leave for five minutes, decide the case and re-enter the class to give their ruling. What is fun about this is that the class members are trying to convince, not judges in some distant court, but the actual students sitting in front of the class. It helps them tailor their arguments to the questions the judges ask and since they know something about their classmates, their approaches to law as well. Students love doing this and get a lot out of it.

Note 1. *Are there reasons to take a narrower view of public use in the power to take property by eminent domain than the full reach of the police power to regulate? Conversely, are there actions that the government might not be able to take through its power to regulate that it might, nonetheless, justify as public use for purposes of condemnation?*

These questions are intended to spark a discussion about whether the eminent domain power is, or should be, coterminous with the police power. As a doctrinal matter, the Supreme Court has left very little space between these two sources of governmental authority after *Kelo*, but *Kelo*—or at least Justice Kennedy's concurrence—suggests that there might be some questions of justification that are of particular concern in the condemnation context.

The argument in favor of taking a narrower view of public use than the power to regulate is primarily that dispossession, even with compensation, is inherently a more serious intrusion on property rights than all but the most extreme regulation. Because fair market value can fail to take into account important personhood and autonomy interests on the part of owners, the state should have a correspondingly high obligation to act only for important public purposes.

On the other hand, the fact that owners are compensated means that there might be a range of actions, particularly those that impact more fungible property, that we might be more comfortable with the state undertaking precisely because there is a compensation requirement. As between the power to regulate, which is rarely found to be so significant an interference with property rights as to require compensation, and the power to condemn, some owners might prefer the full measure of the market value of property.

Note 2. *If the New London city council had passed legislation taking the property at issue in the case as part of the city council's ordinary business, but without a separate planning process, would that have made the taking more vulnerable to a public use challenge? Should it?*

One interesting subtext in *Kelo* is Justice Stevens' reliance on a planning rationale to justify the breadth of public use, but there is no textual or really doctrinal basis for requiring any particular process before condemnation can be justified as public use. These questions then can help students focus not just on an issue of dicta and holding, but more fundamentally on the standard of review and the question of deference. If, in a due process challenge to a law passed by the city council, a

court would defer and uphold the statute if there is any conceivable rational basis for the legislation, why should the public use clause require anything more?

On the other hand, taking property may be evidence of the political vulnerability of the owners whose property is being taken. One need not go as far as arguing that owners in that situation meet the *Carolene Products* footnote four criteria of being a discrete and insular minority to recognize possible political-process failure. If so, it may be easier to argue that ordinary judicial deference should be tempered.

Note 3. *Is there a principled way to distinguish between exercises of the power of eminent domain that seek to alleviate harm and those that seek to improve conditions or otherwise confer a benefit? Is there a reason to limit the power of eminent domain to harm prevention?*

This is a teaser for the discussion of the harm/benefit distinction in the regulatory takings context in *Lucas* and it is worth briefly addressing with students. The Court has repeatedly grappled with whether harm-preventing is a sufficient rationale to obviate a compensation requirement. In *Lucas*, in an opinion joined by Justice O'Connor, the Court eschewed the harm/benefit distinction as ultimately meaningless but in Justice O'Connor's dissent in *Kelo*, in a dissent joined by Justice Scalia, she relied heavily on that very distinction for delineating the boundaries of public use.

Note 4. *Would public housing, which is publicly funded but open only to a limited number of qualified tenants, be an acceptable "public use" justifying eminent domain under Justice Thomas's standard?*

In his dissent, Justice Thomas argued that the "most natural reading of the [Public Use] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." It is not clear how far Justice Thomas would push the boundaries of the conception of open to the public, and this question can get at the ambiguity of a seemingly bright-line rule. What does it mean to have "a legal right to use" property? What if a park is only open during daylight hours? Or what if, conversely, the public has the right to use the property for a very narrow purpose, such as an easement? You can build a conversation around rules/standards here, or just probe how hard it might be to find a clear dividing line under Justice Thomas' formulation.

Problem 1. *The city's plan in* Kelo *was for the New London Development Corporation, a private nonprofit, to own the land and enter into long-term ground leases with private parties, who would then develop and own the buildings. Imagine instead that New London had decided to develop the Fort Trumbull property itself and become the landlord for the occupants of the planned residences, offices, and retail facilities. Because the government would still own the entire property outright, it would no longer be transferring to a private party, except as landlord. Would this be more or less offensive than the transfer to private parties in* Kelo*? Why do you imagine the city did not do this?*

On the one hand, it would satisfy the formalist instinct to say that public ownership is at the core of public use. That is one way to read the portion of the statement in Justice Thomas' dissent that highlights government ownership. But if the standard privileges public ownership, that merely shifts the question to one of legitimate governmental *using* of property, rather than legitimate *taking* of property. If a local government leases publicly owned property to private interests for economic development purposes, is this any different? It would seem to satisfy the dissenters in *Kelo*, arguably, but in many respects is functionally indistinguishable.

As to why the city did not take this path, the most likely reasons have to do with development incentives to leverage private investment and the comparative expertise of the private sector as developer and property manager. In other words, this change would address the concerns that public use requires public ownership, but would probably result in the condemnation costing more and being less likely to achieve the public purpose of economic redevelopment.

Problem 2. *The mayor of an economically struggling city announces that the city will condemn four blocks of property to build a baseball stadium. The plan was developed in private negotiations between the mayor and the owner of a minor league team from a nearby town, which is seeking to build a stadium in a more central location with more luxury box seats. The city will own the stadium, but will rent it to the team, and the team will keep all ticket revenue. The city claims that the stadium will revitalize a depressed part of town, and that the rents, concessions, and taxes will benefit the city. Experts dispute this, presenting studies showing the academic consensus that baseball stadiums were largely losing economic propositions for the places that built them. Nevertheless, the city council passes the deal.*

(a) Assume the state constitution is worded the same as the U.S. Constitution. Should the state supreme court allow the taking by applying the standard applied by the majority opinion in Kelo *or should it find the taking not to constitute a public use under the state constitution by applying some other standard, and if so, what should it be?*

This case allows the students to effectively re-argue *Kelo* and present the arguments on both sides without being bound by precedent. As in the *Kelo* opinions, the argument for finding no public use is that there is neither public ownership or use after the taking and that the property is not blighted so the transfer of title from *A* to *B* cannot be justified as remedying a problem with the property. The transfer of property from one private owner to another, it is argued, does not constitute a "public use" or a "public purpose" for the taking. There is something unseemly about evicting one owner from the property because another owner would use the property in a better way. This, after all, was what happened when the United States and prior colonial powers took property from Indian nations – not a practice we should be perpetuating.

The counterargument is that economic development is indeed a public purpose and that is all the takings clause requires. Only Justice Thomas argued that it actually required either public ownership or use – an odd conclusion because it would allow the redevelopment to go forward if it were accomplished in a socialist fashion with the city retaining title and making it public housing and publicly owned businesses. If promoting economic development is a legitimate public purpose for governmental action generally (this does not exceed the police power of the states), it is surprising to find it not a legitimate public purpose merely because the taking of property is involved. If it is thought be wrong to take the property of *A* and give it to *B*, then no property can be taken if the goal is to change land use patterns for a particular area and everyone is bound to the uses established by those who built property a hundred years ago or more if owners refuse to sell. This may have the effect of lowering the standard of living for everyone in the community and preventing increased taxes that could pay for police, fire, and school services.

(b) Assume now the state constitution allows takings of property for transfer to another private owner only if the property is "blighted." A study finds that 37% of the properties in the area are vacant, 27% of the homes are in fair condition, and 19% are in poor condition. while only 17% are in good condition. No construction permits had been granted in the area over the prior five years, as opposed to 4,725 permits issued for the rest of the city. What standard should the court adopt to define "blighted property"?

The facts here might allow a "blight" finding based solely on the vacancy and "poor conditions" facts. On the other hand, if that is all that is needed to find the property to be blighted, then almost any problem in the economic market in a local community might qualify as blight. There is no dispute that property that is dangerous or dilapidated is "blighted" but it is a much more assertive position to claim that any property that is being underutilized can be taken by the state at its whim. The question is what the legislature intended the "blight" condition to mean; how serious

does the problem have to be and does it have to be some physical condition of the land or does lack of economic use (or underutilization) count as "blight."

Problem 3. *The owner of a landmarked 1929 grand Art Deco movie house listed on the National Register of Historic Places in the heart of a bohemian neighborhood in a small city recently sold the property to an evangelical church, sparking significant controversy in the surrounding community. Noting that state law grants cities the power to acquire property to ensure historical preservation, as well as the power to acquire property to develop "recreational" facilities, the city is contemplating using eminent domain to take the movie house. What are the best arguments on behalf of the city that it is authorized to act and that the use of eminent domain will meet the standard the Supreme Court articulated in* Kelo*? What are the best arguments on behalf of the church in opposition? How would you resolve the conflict?*

This is an opportunity to discuss whether community objections to the owner/operator of a given property can justify the use of eminent domain, as well as the interplay between the proffered reason for a taking and what might actually be motivating a governmental entity to act. In the real conflict on which this problem is based, the Adventure Church, an affiliate of the Foursquare Gospel church, was seeking to purchase the iconic Tower Theater in the Tower neighborhood of Fresno. Neighborhood arts and LGBTQ activists opposed the sale, with one organizer arguing that "an evangelical church buying the landmark [was akin] 'to the Republican Party buying the Castro Theatre in San Francisco and transforming it into an indoor shooting range.'" Diana Marcum, *Backlash in Fresno as Evangelical Church Tries to Buy Tower Theatre, a Bohemian Landmark*, L.A. Times, Feb. 28, 2021. A debate on this problem could surface the use of eminent domain to exclude unpopular uses of land and whether there might be a free exercise claim or a claim under the *Religious Land Use and Institutionalized Persons Act* (*RLUIPA*), 42 U.S.C. § 2000cc *et seq.*, which is discussed at length in Chapter 6, §4.5.

§1.3 Just Compensation 1146
"Damagings" Clauses in State Constitutional Law 1150

Note on moving costs, consequential losses, and business goodwill. *The Supreme Court has refused to grant compensation for either goodwill or going-concern value on the ground that only the land and buildings are taken; the business is free to relocate elsewhere, where it may be as profitable if not more so. Any barrier to relocation is merely an incidental result of the taking of the land and is noncompensable.*

This can be taught in conjunction with discussions in other sections in the book (for example, the discussion of the limits of "property" as a definitional matter in *Moore v. Regents of the University of California* in Chapter 3, §1.4 and the treatment of goodwill in the context of marital property in Chapter 8, §3.3) to make the point that whether some "thing" or idea or otherwise is considered "property" by our legal system, both in constitutional law and in statutory and common law, can be heavily context dependent. One may be able to have property in business goodwill without controversy for purposes of conveying a business or using it as collateral, or even as an asset to be divided in a divorce, but not for compensation under the takings clause.

Note on statutory compensation. *Professor Nicole Garnett has argued that public agencies empowered to take property have incentives to avoid undercompensation, including financial penalties if mandatory negotiations with owners fail and an obligation to pay statutory compensation to displaced owners that can be substantially above the constitutional minimum. Such agencies, Garnett also argues, may avoid taking property that people are particularly attached to not because just compensation takes that subjective value into account, but because*

such owners are more likely to challenge the taking and create political sympathy. See Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 101 (2006). On the other hand, there is empirical evidence to suggest that agencies tend to undercompensate lower-valued property but overcompensate higher-value property. See Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green,* Forced Sale Risk: Class, Race, and the "Double Discount*," 37 Fla. St. U. L. Rev. 589, 632-38 (2010). How might these incentives shape the choices that public officials make about which public projects to pursue — and where?*

All things being equal, one would expect that takings would occur in communities that are politically and economically more marginal. A perennial question in debates about public incentives is whether public officials are sufficiently motivated by fiscal concerns to allow the "price" (in just compensation) to drive decision-making in a meaningful way. Some scholars argue that whatever signal such a price may send is outweighed by the noise of other motivations, including considerations of public interest and the political economy of any given takings decision.

Note on delineating the "property" taken. *In* Almota Farmers Elevator & Warehouse v. United States*, 409 U.S. 470 (1972), the U.S. government took property from a railroad company that it had leased to a grain elevator company that had constructed buildings on the property to use for its business. There was no question that the leasehold held by the tenant was "property" compensable when taken by the government or that the value of the improvements during the remaining years of the lease should be counted in determining the market value of the lease. But what of value of the improvements after the lease term, on the expectation of renewal?*

This question is largely answered in the text of the casebook but it is an opportunity to return to the theme, from *Kelo*, that not only subjective, but other individuated aspects of the value of a property not reflected in market price might not be compensated in a taking.

Note on partial takings. *Is granting an owner full value for property taken as well as the increase in value to any retained property from the taking a fair measure of compensation to an owner?*

This can highlight the risk that not taking into account the increased value of a parcel in determining compensation might over-compensate an owner facing a partial taking. Discerning whether an owner has obtained a special benefit is challenging, but not impossible, and the question can prompt discussion of windfalls as well as wipeouts.

§1.4 Expropriating Without "Taking" 1151
***Tee-Hit-Ton Indians v. United States* (1955) 1152**

The *Tee-Hit-Ton* case can be used to demonstrate the misuse of precedent, pressing the students on the question whether the Court correctly applied the holding in *Johnson v. M'Intosh.* But the case appears at the tail end of the arc of discussion about traditional takings law to make a different point: not all seizure of property is considered a taking. One way for the government to avoid takings liability, even for an action that would seem on its face clearly to be a taking, is to prevail on the proposition that the resource being taken is not "private property," in the terms of the fifth amendment. *Tee-Hit-Ton* concludes that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." But as the notes after the case make clear, this is by no means a foregone conclusion

Tee-Hit-Ton is also included to make several other points. First, questions about uncompensated seizure of American Indian property are not only questions about the distant past. Current issues of expropriation still arise in the form of claims that the federal government has

abrogated treaty provisions guaranteeing particular rights to American Indian nations and has interfered with or taken property rights that are not recognized by treaty or statute.

Second, the rule in *Tee-Hit-Ton* has never been overruled and is not well-known. Coming one year after the ruling in the famous case of *Brown v. Board of Education* affirming equality rights for Black persons, the *Tee-Hit-Ton* case arguably entitles the federal government to choose to grant a lower level of protection to the property rights of American Indian nations than to the property rights of non-American Indians. Note especially that all American Indians were made citizens of the United States in 1924; the import of the case is that certain types of property rights of American citizens will not be recognized. The fact that this rule of law is still part of United States law teaches us that the respect for property rights is conditioned partly on race; possessory interests of the original inhabitants are granted less protection than possessory rights of others.

Note 1. Tee-Hit-Ton *holds that Indian title is not property within the meaning of the fifth amendment's takings clause, and can instead can be abrogated by the United States without compensation. Only Indian title recognized by Congress through a treaty or statute constitutes property that cannot be taken without just compensation. What justifies this distinction between original Indian title land and "recognized" title?*

The special property rules governing the treaty rights and lands of American Indian nations and tribal members are complicated, technical, and belong to a specialized area of law. That said, the distinction is hard to justify. It is *still* the case that constitutional law in the United States grants less protection for tribal property than for non-Indian property. This disparity in treatment is not a relic or an aspect of the distant past; it continues today. It is still the law that property held under original Indian title (which probably includes property in reservations established by executive order) can be taken by the United States government without compensation. It is apparently still the law that even recognized title protected by a treaty or statute can be taken without just compensation if the property is exchanged in "good faith" for funds of "equivalent" value (not the same as "just compensation") if the federal government is exercising its "trust" responsibility to manage Indian lands.

In addition, the perceived legitimacy of the distribution of wealth and the rights of property holders rests on the notion that the process by which property rights originated in the United States was just—or at least, not severely unjust. Yet the historical record indicates that this may not be the case. The rights of first possessors were not respected; nor were they granted just compensation when their lands were taken. Indeed, United States presidents from Washington on justified the taking of Indian lands without just compensation on a variety of grounds, which included: (a) the Indians have more land than they need and (b) the non-Indians need access to the land; (c) the Indians were misusing the land by failing to adopt an agricultural economy and were therefore wasting a scarce, valuable resource; and (d) the Indians established no legitimate property rights because their property was shared, i.e., it was communally held and distributed and redistributed according to individual and tribal need rather than held by individual fee simple title. There is therefore some hypocrisy and irony involved in the takings clause; premised on the notion that property cannot be seized without just compensation, the takings clause protects ownership rights in land which was seized from Indian nations without just compensation.

Note 3. *What justifies the rule in* Sioux Nation *that when the federal government takes the recognized title lands of Indian nations, it is not liable for fair market value as long as it makes a "good faith" effort to grant "equivalent value"? Does the Supreme Court believe the U.S. government can be trusted when it deals with Indian lands but not when it deals with non-Indian lands? Is there any basis for such a conclusion?*

Sioux Nation demonstrates that in the twentieth century there was a partial major reversal from the rule that tribal property could be taken without compensation. If tribal property is

recognized by treaty or federal statute, then the U.S. cannot take it without compensation. At the same time, the Court held that, because title to Indian lands is shared between the U.S. and the tribe, the U.S. has residual powers (as well as "trust" responsibilities) toward tribal lands. Over time, the U.S. often managed tribal lands, displacing tribes as managers of their own lands. In such cases, the trust obligation imposes duties on the U.S. to manage tribal funds and lands appropriately. At the same time, recent case law (*Navajo Nation v. U.S.*) shows that tribes have no remedies for such mismanagement unless the U.S. physically takes over the land and manages it or a particular statute expressly grants tribes the right to sue for damages for such mismanagement. If no such statute exists and the U.S. "in good faith" manages tribal lands, then no takings claim can be brought even if the U.S. acts so as to take tribal lands. This "good faith" exception adopted in *Sioux Nation* is not one to which non-Indians are subject; if the U.S. takes their land, they have the right to just compensation not just good faith efforts at just compensation. It is hard, to say the least, to justify this distinction.

§2 Regulatory Takings 1158
§2.1 An Introduction to Regulatory Takings 1158
A Note on Regulatory Takings Procedures 1162

One source of confusion with respect to regulatory takings is that the term is used in two different ways, even occasionally within the same document. The technical definition of a regulatory taking is that it includes any taking for which the government does not itself acknowledge is a taking and accomplish using its eminent domain power, leaving the property owner to demand compensation in an inverse condemnation proceeding. Under this definition, even outright requisition of a house could be a regulatory taking if the government sought to accomplish this result without offering compensation first. The second definition is that a regulatory taking is a governmental action that restricts or interferes with the *use* of a property (or other property right, such as the right to exclude or the right to pass property to heirs at death) without legally acquiring the property. Both definitions are useful in understanding the doctrine, and in practice, the categories are related: in almost all (but not all) cases of legal acquisition, the government will acknowledge that a taking occurred and use its eminent domain power; and many (but by no means all) difficult cases under the regulatory takings doctrine involve restrictions on use rather than actual legal acquisition. Nevertheless, the government orders or facilitates some physical invasions without using the eminent domain power, and some physical invasions have traditionally not been held to be takings.

Mahon was the first federal case to hold that land use regulations may "take" property if they "go too far." Questions of rules and standards, the purpose of regulatory takings law, the denominator issue, the Court's confusing melding of due process and takings law all can be discerned in some way in *Mahon* and, arguably, continue to haunt the case law. As note 3 after *Penn Central* discusses, however, the specific result in *Mahon* has been substantially repudiated in *Keystone,* which upheld a very similar statute by a 5-4 vote. The majority in *Keystone* tried mightily to distinguish *Mahon,* but its attempt is close to laughable. The *Keystone* Court simply reached different conclusions regarding the public interest and denominator questions factors, perhaps relying on a different legislative record. The case therefore sets up the conflict between the police power and the takings clause. It also suggests that no bright line answer to the dilemma is possible; the issue involves "matters of degree" and the standard is "going too far."

§2.2 The *Ad Hoc* Test: Fairness and Justice.....1163
***Penn Central Transportation Co. v. New York City* (1978).....1163**

Penn Central remains the primary vehicle most courts employ to evaluate regulatory takings claims, with the predicate for most *per se* or categorical takings claims hard to establish, although this may begin to shift for physical-invasion cases after *Cedar Point Nursery*. One way to approach teaching *Penn Central* is to pair it with the introductory summary of *Mahon* §2.1 to see how each of the central questions that Holmes and Brandeis debated in *Mahon* are treated by the majority and dissent in *Penn Central*. Although it can be interesting to explore every facet of the doctrine and the broader themes outlined in the introduction to this chapter, it might be useful to narrow the discussion to three central themes, all of which appear in *Mahon* and recur in *Penn Central*:

Balance of public interest and private harm, or harm threshold. Justice Holmes's "too far" test can be read to be a *threshold* test (at some point, the harm that a regulation imposes on a property crosses a threshold and compensation must be paid, regardless of the public interests involved) or a *balancing* test (the magnitude of the harm must be balanced against the benefit to the public and only then can the question of compensation be decided). This conceptual divide is reflected in the three primary *Penn Central* factors, where the Court addresses both the economic impact of the regulation and its interference with reasonable investment-backed expectations (questions of the magnitude of harm) and then opens up the possibility of balancing against public interest in the third factor, character of the government action.

Harm prevention/benefit conferral. Just as Justice Holmes ultimately viewed the *Kohler Act* as purchasing a public benefit—elimination of subsidence—without having to pay for that benefit, so too does Justice Rehnquist in dissent in *Penn Central* view historic preservation as a public benefit that should be subject to the requirement that the owner receive just compensation. Conversely, Justice Brandeis in dissent in *Mahon* viewed the mandate to prevent subsidence in coal mining as a harm-preventing exercise of the police power that required no payment, and Justice Brennan took a similar view of historic preservation. This debate underscores the tension—which, as noted, will be on fullest view in the majority and dissent in *Lucas* in the next section—about the harm/benefit distinction and how much should turn on that issue in regulatory takings. One view, which Justice Scalia articulates most clearly in *Lucas*, is that this distinction is meaningless and essentially any public benefit can be recharacterized as harm prevention. But surely that, well, goes too far and the distinction is not entirely without meaning, even if there are marginal cases where the dividing line is manipulable. One variable to add here, as the notes on Holmes's correspondence after *Mahon* discuss, is whether the government is gaining a generalized benefit or is appropriating private property (without taking title) for *its own use*. One could argue that that variable pushed in favor of Penn Central, given that the city was gaining the benefits of the preservation of Grand Central station—in terms of tourism, commuting conditions, community identity, and the like—without having to pay for those benefits directly. Alternatively, one could argue that historic preservation is similar to other regimes that adjust the benefits and burdens of ownership in a community in a more generalized way, depending on what one thinks of the distinction between landmarking and zoning.

The Denominator, or Parcel-as-a-Whole, Issue. As the notes make clear, the denominator issue and the question of conceptual severance plays out in *Penn Central* in terms of air rights, essentially flipping the Holmes/Brandeis positions on subsurface rights in *Mahon*.

Problem 1. *How much should owners of property created through regulatory regimes be able to rely on the continuing nature of such programs?*

This problem reflects an increasingly important category of claims for compensation grounded in the continuing benefits of a public program, whether in the context of taxi medallions,

air rights, fishing quotas, or the like. As a technical matter, courts are generally reluctant to credit such claims in takings terms, acknowledging the discretion of the government to alter the nature of subsidies and programs that have the function of conferring a benefit as a result of having to manage scarcity. But this problem can be an opportunity to step back and explore the nature of justifiable reliance and the role of regulatory takings law to manage legal transitions. In the taxi medallion context, for example, jurisdictions such as New York City created long-standing legal monopolies, encouraged often low-income, marginalized entrepreneurs to take on significant debt to enter the market, and then left the holders of those medallions facing debt that could not be repaid when the city relaxed its rules and allowed transportation network companies such as Uber and Lyft to join the market without medallions.

Problem 2. *A scientific research company builds a facility to test chemical weapons in the middle of a busy city. The company has a contract with the U.S. Department of Defense to undertake the research. Word of the purpose of the facility leaks out to the general public. A referendum is placed on the ballot to amend the zoning ordinance to prohibit the testing of chemical weapons anywhere in the city. The company explains that the facility is perfectly safe; scientific experts agree that operation of the plant poses little, if any, danger of causing public health problems. Nonetheless, the public is frightened by the prospect of the facility and votes for the referendum. The company sues the city, claiming that enforcement of the amended zoning law would interfere with its vested rights and constitute a taking of property without just compensation. The multimillion-dollar facility is not structured for other kinds of scientific research and would have to be substantially rebuilt in order to convert to other research purposes; application of the ordinance therefore would destroy millions of dollars of the company's investment. The city responds that the amendment regulates a public nuisance and protects the community from any possible contagion from the facility. Does the regulation take the company's property rights? How should the case be resolved??*

The owner will argue that ordinance substantially interferes with reasonable, investment-backed expectations, causes a substantial diminution in value of the property, and cannot reasonably be understood as a public health measure since the potential harm is so small. The closest analogies are *Kaiser Aetna* and zoning cases that protect the vested rights of owners who build in reliance on existing zoning laws, some (although not all) of which invoke a constitutional basis for their holding. The owner invested millions of dollars in reliance on existing land use rules which cannot be changed retroactively without an exceedingly strong public justification of preventing harm. That strong justification cannot be made here. Although the city is free to apply its ordinance prospectively, it cannot retroactively destroy vested rights on such a flimsy showing of public necessity.

The city will argue that it has the power to prevent the substantial harm that would ensue from an accident at the facility. *Hadacheck*, *Mugler*, *Powell v. Pennsylvania*, and *Miller v. Schoene* all support this argument. Even under *Lucas,* the city has the power to wipe out all economic value (likely not the case here) as long as it is preventing a common law nuisance. Storing hazardous chemicals on a site in a city fits nicely into traditional nuisance law and would very likely constitute an enjoinable nuisance. As the Three Mile Island and Chernoble disasters teach us, people make mistakes and problems that were never supposed to happen can happen. The city government has the power to prevent such harm, prospectively or retroactively. The owner's investment-backed expectations were unreasonable since the owner cannot acquire a vested right to place others at substantial risk. Although the risk appears to be small, it is nonetheless present, and the voters have the right to pressure their public officials to protect them from that small, but present, risk of harm. Although the building loses much of its value, it can be converted to another use or demolished. The property has not been deprived of any economically viable use.

Problem 3. *Massachusetts passed a law requiring tobacco companies to reveal the components in their cigarette products. Such disclosure was intended to ensure that potential users knew what ingredients they would be ingesting. However, those ingredients were also trade secrets, and the First Circuit held the state law to constitute a taking of property without just compensation.* Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002). What are the arguments on both sides of this case?*

Trade secrets are certainly property, *Ruckelshaus v.Monsanto Co.,* 467 U.S. 986 (1984), and the company has enormous investment-backed expectations in those trade secrets. On the other hand, the regulation is designed to protect the public health, not to mention welfare and safety by disclosures that will better enable consumers to determine whether they want to consume the products in the first place. So this case presents a fundamental conflict between the character of the government action (regulation to protect public health) and protection of investment-backed expectations (in trade secrets).

Problem 4. *A law school owns a student center and dormitories designed by a famous architect. Although designated as a historic monument, the student center is too small for the current student body; its internal spaces are cramped and are unsuited to current university architectural standards. Moreover, the school has expanded both its student body and its faculty by about 50 percent, making the facilities inadequate for its current purposes. The school wants to expand its physical facilities and would like to demolish all these buildings to create a modern student and dormitory center. However, designation of the buildings as historic monuments prevents the change and requires the school to maintain the properties as is. What is the school's argument that the historic preservation law effects an unconstitutional taking of property? What is the state's response? If you were on the Supreme Court, how would you rule and what would you say in the opinion?*

This question invites the students in fairly concrete way to re-argue the *Penn Central* case. Although it is unlikely *Penn Central* will be overruled entirely, given its coronation as the main precedent in the field in cases such as *Lingle*, it is entirely possible that the Court will look for ways to narrow its application. The fact situation is a good one to explore the distinction between property uses that harm the public and those that confer benefits on the public. Although Justice Scalia made fun of this distinction in *Lucas,* the fact is that the individual reactions to historic preservation laws may hinge on whether people view changes to historic properties to be a form of harm to the public that can be the legitimate subject of intrusive and expensive regulation.

§2.3 "Per Se" Takings Claims 1178

The law in this area—both regulations that deprive an owner of all economically viable use and the next subsection on physical invasions—is somewhat confusing. The notes are intended to provide some structure to both the doctrinal landscape and the advocacy techniques that are crucial to understanding how particular cases will be analyzed by the lower federal courts and by state courts. One way to understand the law is that the Supreme Court has attempted to identify particular kinds of cases that raise particularly significant concerns in takings terms. They include forced physical invasions, total abrogation of certain core property rights, and total deprivation of economically viable use.

However, each of these categories has exceptions; none of them automatically constitutes a taking. Owners may be required to submit to forced physical occupation by existing tenants; some core property rights (such as the right to alienate) may be abrogated if there is a sufficiently strong public interest (such as conservation of an endangered species); and even total deprivation of economically viable use is constitutional after *Lucas* if the regulation prevents the owner from

committing a nuisance. A second way to understand the law in this area is through the three-factor test. The notes explain the most common ways in which the three factors are analyzed in practice and suggest the situations in which a taking is more or less likely to be found.

A. Deprivation of All Economically Viable Use 1178
***Lucas v. South Carolina Coastal Council* (1992) 1178**

It is useful at this juncture to review (or raise, if you haven't covered it yet) *Miller v. Schoene*, to highlight to students that all property rights must be limited to protect the property and personal rights of others. Property rights could not fulfill their traditional functions if owners were constitutionally free from any regulation of them; granting absolute rights to one owner would effectively allow that owner to destroy the property rights of others. The definition and regulation of property rights inevitably involves the state in limiting property rights; it cannot be that all such limitations constitute "takings" of property. In addition, *Miller* suggests the "nuisance" exception to the takings clause, recognized in *Lucas*. Even a total deprivation of economically viable may be appropriate without compensation if the regulation legitimately prevents the owner from harming others. At the same time, *Miller* cannot mean that any regulation is constitutional as long as it can be conceptualized as protecting someone else's property rights; almost any regulation can be so characterized. Thus, a more searching inquiry is needed to determine whether the burden is one that an owner should fairly bear for the good of the community.

Lucas, while purporting to create a rigid rule (requiring compensation when an owner is deprived of all economically viable use unless the regulation prevents a common law nuisance), arguably adopted a test that effectuates a flexible standard. This is so for two reasons. First, the Court does not decide how one is to choose the segment of property which is to serve as the "denominator" in the fraction; in other words, one can only tell how much of a property interest has been taken if one can define the property interest that serves as the measuring stick. Zoning laws that prevent building over three stories take 100 percent of the air rights above that level, but may only reduce the market value of the parcel by 20 percent. If an owner of a 100-acre parcel is prohibited from building on one acre, this may be justified as a set-back measure which reduces the market value of the entire parcel by only two percent; however, if that owner sells that one acre, the new owner is arguably deprived of 100 percent of the value of the parcel because of the building ban. Determining the appropriate unit of measurement will be difficult and cannot reasonably be answered by resort to a rigid rule. Note the different notions of what the denominator might require in the majority and dissenting opinions. Footnote 24 of the majority opinion suggests that it may be shaped by "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land," a suggestion that would accord with *Mahon*'s protection of Pennsylvania's support estate, while the Blackmun and Stevens dissents express more doubt about an objective way of determining the denominator.

Second, it is not clear what the background principles of law exception means. Do state courts have carte blanche to change the common law of property by defining an activity as a nuisance? For example, could a state court hold that it constitutes a nuisance to alter an historic landmark because this will lower the value of other property? What about other common law doctrines, such as the public trust doctrine for lands beside navigable waters, or the natural flow doctrine for surface water? Some have argued that *Lucas* in fact encouraged courts to do just that. *See* Michael Blumm & Lucus Richie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005). Or will the Supreme Court place limits on the ability of the state courts to declare a particular property use to be a nuisance?

Consider what happens on remand in *Lucas.* If the state supreme court holds that development of beach front property which contributes to erosion of the shore line constitutes a public nuisance under state common law, will the Supreme Court simply defer to this judgment or will it review the finding to determine whether the court has exceeded the scope of the nuisance exception? For some justices' opinion on this question, see footnote 28 in the *Lucas* opinion, in which the Court declares in dicta that the exception permits an economic wipeout "only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found" and *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), in §2.4.B of this chapter, in which a plurality opined that an erroneous judicial determination regarding the extent of property rights could constitute a judicial taking.

In *Pennell,* the court held that a rent control ordinance that contains a tenant hardship provision does not effectuate a taking per se. What would happen if a city applied the ordinance to allow a reduction of the rent beyond what was required by the other factors in the ordinance because of a hardship to the tenant? On one hand, the Supreme Court could adopt Justice Scalia's analysis and hold that this effectuates a taking without just compensation. Under this view, the court simply did not see the *Pennell* case as ripe. On the other hand, by requiring a factual presentation, the Court suggested that it might uphold the tenant hardship provision as applied. This interpretation seems more persuasive. If the tenant hardship provision would constitute a taking no matter when applied, as Justice Scalia argued, it can be struck down on its face because there is no need for further factual development. The fact that the Court determined that further factual development was required suggests that the provision would be upheld as long as the owner was ensured a reasonable return on his investment and not deprived of economically viable use for the property.

Note 2. Lucas *holds that even complete reductions in property value are not takings if the state's action merely enforces "background principles of property and nuisance law." Why does the majority hold that an economic wipeout is more acceptable as a result of such background principles than as a result of a newly enacted statute? And what do these background principles include? Is Justice Stevens correct that the decision "effectively freezes the State's common law," or can common law evolve in response to new harms?*

These questions are largely answered in note 2 in the casebook, and are intended to focus the student on the comparative institutional question that *Lucas* raises but does not answer. Why is it that the legal system should venerate the assessment of harms and benefits made by common law judges over legislative judgments of the same question? Justice Scalia seems to have a partially formed (or at least partially articulated) felt sense that common law judges are more legitimate for two primary reasons: first, that they are not subject to the kind of political manipulation that legislatures are and, perhaps more importantly to Justice Scalia, that the conception of harms and benefits he has in mind were formed early in common law development, so that they more legitimately inform the expectations of current owners. But shouldn't owners expect understandings of harms and benefits to evolve?

There is a democratic legitimacy argument, moreover, for taking into account legislatively enacted changes to property law in the nature of "background principles," even if there has to be some limit, of course, to the ability of the state to undertake legal transitions without compensation. One possible resolution to this conundrum may simply be time. Legislative changes may not instantly alter an owner's reasonable expectations or alter the *Lucas* calculus, but at some point, general recognition of a limitation over time may qualify a common limitation on the use of property.

Problem 1. *At the outset of the Covid-19 pandemic in 2020, the federal government, a number of states, as well as some local governments issued moratoria barring landlords from*

evicting tenants facing economic challenges. The details of each moratorium varied from jurisdiction to jurisdiction, but most set a period of time during which landlords could not initiate or complete an eviction. See U.S. Gov't Accountability Office, Covid-19 Housing Protections: Moratoriums Have Helped Limit Evictions, but Further Outreach Is Needed, *GAO-21-370 (2021). Moratoria thus generally did not alter the tenant's ultimate obligation to pay but delayed — in some cases significantly — the ability of landlords to regain possession of units as a remedy in the case a tenant failed to pay their rent. Tenants generally continued to owe any outstanding rent, although some moratoria converted unpaid rental obligations into consumer debt, requiring landlords to recover from tenants, but severing, at least during the operative period, the obligation to pay rent from the remedy of eviction. Landlords challenged eviction moratoria on a number of grounds including the argument that abrogating the right to recover possession during the period of the applicable moratorium constituted a taking for which just compensation was required. See, e.g.,* Auracle Homes, LLC v. Lamont, *478 F. Supp. 3d 199 (D. Conn. 2020);* Baptiste v. Kennealy, *No. 20-cv-11335-MLW, 490 F. Supp. 3d 353 (D. Mass. 2020);* Elmsford Apartment Assocs., LLC v. Cuomo, *469 F. Supp. 3d 148, 164-68 (S.D.N.Y. 2020).*

What are the arguments on both sides?

On the side of the landlords, one can argue that although the moratoria generally only delayed the remedies for violations of their property (and contract) rights, or channeled the resolution of those remedies to an alternative venue, a significant enough delay or alteration in the nature of enforcement renders the underlying right valueless. This is a variation of the argument that owners made against the temporary development moratorium in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), and the Court in *Tahoe-Sierra* made clear that such claims must be evaluated under *Penn Central*. It is possible that individual circumstances render the effects of the moratorium sufficiently serious to warrant finding a taking under the *ad hoc* test, although the threshold is high.

On the side of the tenants—and these are the arguments that most courts during the pandemic seemed to credit—it can be argued that delay in recovery, particularly during a public health emergency, is not so clear a violation of the landlord's justifiable expectations (let alone a *per se* violation under *Lucas*, given *Tahoe-Sierra*), that the government must compensate them. Moreover, the federal government as well as some states provided significant subsidies to landlords during the pandemic, and delayed obligations to repay primary expenses for landlords (most notably mortgages, in some circumstances). That means that it is not clear the extent to which temporary delays in the right to recover possession as remedy for nonpayment of rent actually created compensable harm.

Problem 2. *A developer who owns 50 acres of property subdivides it and sells 45 single-family homes on single-acre lots. One five-acre parcel remains but is designated as wetlands; under state law, the owner is prohibited from building anything on it. The developer sues the state, arguing that the wetlands regulation deprives her of any economically viable use for the five acres of wetlands; the diminution in value for this parcel is 100 percent. The state claims that the parcel represents 10 percent of the total area that the developer had owned and that since the developer had sold 45 homes, she was not deprived of economically viable use for her property. How should the court analyze this question? Is this a 100 percent taking of the five acres or a 10 percent taking of the 50 acres? Should the owner be entitled to compensation for her inability to develop the five-acre parcel?*

The owner will argue that the five-acre parcel has been deprived of any economically viable use and that wetlands regulations do not prevent the types of harms encompassed by traditional nuisance law. Under *Lucas,* the state must therefore compensate or forfeit the right to enforce its wetlands law. The owner would argue that once a large parcel has been subdivided, each lot constitutes a separate property claim under the takings clause. This result can be supported by

asking whether the particular physical unit of property would constitute a marketable package. This test can help determine the proper unit of analysis. Thus, a 15-foot setback requirement does not take a separate property right since that small a strip would not be marketable as a lot. Height restrictions are distinguishable; air rights are indeed marketable, but can legitimately be restricted to protect the reciprocal property values of neighboring owners. Height restrictions confer a reasonable balance of reciprocal burdens and benefits. Deprivations of the right to build on the land to protect wetlands do not ordinarily confer reciprocal benefits and burdens but will be unevenly visited on individual property owners.

The state will argue that the goal of the three-factor test is to determine the *actual impact* of land use regulations on *particular owners.* Thus, the relevant property unit is the whole parcel owned by a particular property holder at the time the regulation is put into effect. No owner has the absolute right to develop every inch of her own property. Since the owner has been allowed to develop 45 out of 50 acres, she cannot reasonably argue that she has not received a reasonable return on her investment or that her property has been deprived of economically viable use. In addition, since wetlands regulations are necessary to prevent severe public environmental harm, they are justified as police power measures and easily fit within the *Lucas* category of traditional limits on property use under the *sic utere* doctrine. Thus, the regulation could be enforced *even if* it resulted in a complete deprivation of economically viable use.

Problem 3. *In* Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), excavators discovered an American Indian burial mound made between 1,000 and 2,500 years ago in the middle of a lot owners' property. A state statute in effect when the developer purchased the land authorized the state archeologist to prohibit owners from disinterring human remains found on private land if they had historic significance. The state archeologist required a buffer zone around the mound, which prevented building a house on the lot. The court rejected the owners' takings claim, holding that the* Lucas *rule did not apply because the restriction on developing property where human beings are buried was part of the law of Iowa at the time the owner purchased the land and thus "inhered in the title." Because state law did not allow development in these circumstances, the owner could not have had a legitimate expectation of being able to so develop the property. The case is appealed to the Supreme Court. Should it affirm or reverse? It should be noted that state laws have traditionally regulated and required the preservation of marked cemeteries but only recently have states passed laws protecting older unmarked graves of American Indians. See Chapter 3, §3.1. Does this historical fact matter?*

The Supreme Court ruled in *Palazzolo* that the mere fact that the regulatory law was in effect at the time they purchased is not enough to immunize the state from a takings claim. The question then is whether the act constitutes a taking as applied to this parcel. Under *Lucas,* the owners could argue that their inability to develop the lot reduces its value to zero (or means that it has no "economically viable use") and that the destruction or removal of human remains never constituted a "nuisance" under prior law; that is why a statute was necessary to regulate this conduct. The owner could admit the significant public interest here but argue that the owner should be compensated by the public for protecting that interest when it reduces property value to zero. It is also unfair to subject an owner to regulations of this kind when the owner had no ability to determine that there were human remains on the property. Alternatively, there is a less intrusive way to regulate here; the law could require reburial of the remains elsewhere. This would protect the interest in human dignity and the right to develop one's property.

The counterargument is that the law has long regulated cemeteries to protect the sanctity of human remains. This law simply extends existing regulations to remains that were not part of clearly marked or designated cemeteries. There is no unfair surprise because of extensive cemetery regulations on the books already. The legislature also should have the power to determine that human remains should remain where they are, rather than requiring them to be reburied elsewhere.

B. Physical Invasions 1198
***PruneYard Shopping Center v. Robins* (1980) 1199**
***Cedar Point Nursery v. Hassid* (2021) 1202**

Note 1. Cedar Point Nursery *overrules this distinction and declares that all government-authorized rights of entry and occupation of property inherently constitute appropriations of "a right to invade," 141 S. Ct. at 2072, and are therefore* per se *takings. In all such cases, the Court makes clear,* Penn Central *"has no place."* Id. *Is there something distinctive about the right to exclude that leads the Court to place limitations on that particular element of property on a different constitutional plane than limitations on the right to use, at issue in many regulatory takings cases?*

This is an opportunity to explore whether limitations on the right to exclude should be treated differently than limitations on the right to use (or other individual property rights). The *Cedar Point Nursery* majority clearly subscribes to the proposition that the right to exclude is more sacrosanct than other property rights, but that is a contestable proposition.

a. Public accommodations. *If labor organizers in California demonstrate that many other third parties, such as suppliers, regularly entered the farmlands at issue, should the outcome be different?*

One question the *Cedar Point Nursery* exception for public accommodations raises is how to determine what constitutes a place sufficiently open to the public to merit exclusion from the Court's newly announced categorical rule. Clearly, a private business is not the same thing as a shopping mall, but it is still a locus that is regularly open to many elements of the public. As we explored in Chapter 1, there are arguments that when an establishment opens itself to the general public, it is making an implicit choice to be open to all, but that is not how the common law of public accommodations operates in most jurisdictions. The *Cedar Point Nursery* majority does not acknowledge that owners of property open to the general public often have the right to choose their patrons, subject to statutory limitations, and it is not clear how the lower courts will interpret this exception going forward.

c. Background principles. *How should courts determine which access rights are "traditional" and inhere in title? If courts recognize the need for access rights that advance the public interest beyond those privileges recognized at common law at the time of the Founding, is the continued development of the common law now limited by the obligation to compensate owners for any such newly recognized rights of access?*

The application of the background-principles exception to per se *liability for physical invasions also raises the question whether states retain any latitude to alter trespass law by statute without having to compensate owners. Recall that Justice Kennedy in his* Lucas *concurrence and then writing for the Court in* Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), suggested that legislative enactments as much as common law doctrine can become "background principles" of a state's law of property. Can legislatures rather than courts define the scope of property rights for purposes of challenges to changes in those rights?*

This is similar to the debate discussed above about background principles laid out in the notes after *Lucas*. Should the development of property law that "inheres in title" be limited to courts hearing common-law cases? At what point does a legislative limitation on property rights—whether to use, as in *Lucas* and *Palazzolo*, or to exclusion, as in *Cedar Point Nursery*—become a "background principle"? After *Lucas*, many courts read the background-principles exception to *per se* takings liability broadly, and it remains to be seen whether the same dynamic emerges after *Cedar Point Nursery*.

d. Conditional benefits. *Given all of these qualifications, is it fair to call* Cedar Point Nursery*'s physical invasion doctrine a* per se *test? What does the need to articulate so many seemingly open-ended and indeterminate exceptions suggest about the efficacy of categorical rules in regulatory takings law?*

This returns to a theme introduced at the outset of §2: to what extent are the Court's nominally categorical rules actually categorical? The Court in *Cedar Point Nursery* seems to be trying to shift from a standards-based approach to regulatory takings to a rule-based approach, but the sheer number (and indeterminacy) of exceptions to a seemingly bright-lined approach underscore the difficulty in doing so.

Note 2. *As noted,* Cedar Point Nursery *distinguishes* PruneYard *as a case involving property open to the public. Consider the cases described below, which require compensation for some physical invasions and allow uncompensated physical invasions in other circumstances. To what extent do cases allowing uncompensated physical invasions track the* Cedar Point Nursery *exceptions?*

Cedar Point Nursery puts into play long-standing Supreme Court precedent involving limitations on the right to exclude and the Court seems to be signaling the renewed importance of that right, even in contexts—such as landlord-tenant law—where limitations have long been accepted. *Cf. Alabama Ass'n of Realtors v. Dept. of Health & Human Serv.*, 141 S. Ct. 2485, 2489 (2021) (noting that an eviction moratorium that prevents landlords "from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude").

Note 3. *In* Cedar Point Nursery*, how should the lower courts evaluate the compensation due, if any, for the specific physical invasion the Court found was imposed in the case, which is the right to enter agricultural land for up to three hours per day, 120 days per year, for up to one hour before work, one hour during lunch breaks, and one hour after work, with prior notice to the employer, for the specific purpose of communicating with farm workers about their rights pursuant to the* California Agricultural Labor Relations Act of 1975*? How much less is the farmland at issue worth subject to such an easement? If no compensation is due, is there a violation of the takings clause?* Cf. *Joseph William Singer,* Justifying Regulatory Takings, *41 Ohio N.U. L. Rev. 601, 643 (2015) (arguing that despite* Loretto*'s iconic status, the case did not actually involve an unconstitutional taking).*

One intriguing implication of evaluating limitations on the right to exclude under a regulatory takings framework is that it may not be all that expensive—or indeed cost more than a nominal amount—to actually compensate for the right at issue. The highly particularized right at issue in *Cedar Point Nursery*, for example, is not the same thing as a permanent easement for the general public, and the "market" price for so limited an intrusion may be minimal. Professor Singer takes this question one step further. Citing the IOLTA cases, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998), Professor Singer argues that

> If the cable boxes did not reduce the fair market value of the property in *Loretto*, then no compensation should be due. The Takings Clause does not prevent takings for public use; it only requires compensation when that happens. No compensation owed, no "taking." That suggests that, despite its iconic position in regulatory takings law, there actually was no unconstitutional taking in *Loretto*.

41 Ohio N.U. L. Rev. at 643.

Note 4. *As should be evident by now, most takings cases asserting claims of physical occupancy involve real property. What about personal property?*

This can prompt discussion of what might be different about cases—and there are cases—involving personal property. How are the interests at stake different? Does the proposition that the state regulates personal property more or differently than land shape the doctrine?

Problem 1. *Assume that a state supreme court interprets its law of trespass to allow access to migrant farmworkers by nonprofit providers of services funded by the government, even though such a privilege might not have been recognized by common law courts at the time of the adoption of the takings clause in 1789. See* State v. Shack*, 277 A.2d 369 (N.J. 1977), Chapter 1, §1. Or that a state supreme court interprets its law of custom to allow beach access, changing a prior understanding of the state's common law of property.* Cf. Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J. dissenting to the denial of certiorari) (noting that the State of Oregon may have changed the law of custom to create novel public beach access rights and arguing that if so, such an interpretation of state law would potentially contravene the takings clause). May an owner now assert that such state common law rights of access constitute* per se *takings under* Cedar Point Nursery*? What are the best arguments on each side? Would your analysis be any different if, in each instance, the state proceeded by statute instead of common law decision making?*

This is an opportunity to review the primary themes in the notes after *Cedar Point Nursery*, highlighting the nature of changes to common-law property doctrine and whether the "background principles" exception to *per se* liability applies to legislative change (and how).

Problem 2. *The federal* Fair Housing Act *prohibits discrimination in the sale of real property and provides for injunctive relief. See Chapter 12, §1. Consider an owner subject to this law who refuses to sell her house to a Black family. The family sues, and the court orders the owner to sell the property to them for its fair market value. The court order effects a physical occupation of the property by strangers. Is this case distinguishable from* Cedar Point Nursery*?*

The Court in *Cedar Point Nursery* attempts to distinguish civil rights law, giving *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) a *cf.* citation with the parenthetical that describes the cases "rejecting claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking." This less-than-full-throated invocation of civil rights law—in public accommodations and fair housing—raises the question of what is different about racial and other discrimination from labor access. One could return to the harm/benefit distinction and argue that preventing discrimination is a fundamentally different state interest than allowing organizers to obtain the benefits of access to private property. But that distinction requires importing into the question whether a physical invasion is a *per se* regulatory taking the kind of means-ends fit question that the Supreme Court seemed to eschew in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

Problem 3. *A New Jersey statute grants low-income elderly persons and persons with disabilities a protected tenancy of up to 40 years after an apartment building is converted to a condominium.* Senior Citizens and Disabled Protected Tenancy Act*, N.J. Stat. §§2A:18-61.22 to*

2A:18-61.39. This means that the landlord cannot evict such a tenant even if the landlord intends to occupy the unit herself or make it available to a member of her family. This statute was upheld against a takings challenge in Troy v. Renna*, 727 F.2d 287 (3d Cir. 1984). Assume a takings challenge to the law now reaches the Supreme Court. A landlord wishes to evict a tenant so the landlord can move into the apartment herself. The tenant has a disability and therefore the statutory right to remain for up to 40 years. Does the New Jersey statute take the landlord's property without just compensation?*

The landlord would argue that *Yee* correctly limited its holding to situations in which the owner was able to recover possession of the property and convert it to a use other than residential rental property after a reasonable period designed to enable the existing tenants to relocate. First, while it is true that the landlord initially invited the tenant to occupy the property, and regulation of the relationship may legitimately prevent the landlord from evicting the tenant under certain circumstances (for example, when the landlord violates the implied warranty of habitability), there comes a point at which regulation turns into a transfer of core property rights from the landlord to the tenant, constituting a taking of the landlord's property. A forced, permanent physical occupation is established, not only when an owner is forced to allow occupation by a third party but when a voluntary right to possess for a *limited* period is turned into a *permanent* right of occupancy. Effectively, an anti-eviction law that prevents the owner from occupying the property herself converts a term of years into a conditional life estate, granting the tenant the right to possess the property for her entire life as long as the tenant pays a reasonable rental fee. This type of law effectively transfers the bulk of the landlord's reversion to the tenant. Regulation of the landlord-tenant relationship is permissible but such regulations cannot extend to depriving the landlord of any right to recover possession of the property. Nor can they substantially transfer reversionary rights from the future interest holder to the owner of the present estate, under the reasoning of *Babbitt v. Youpee*.

Second, the landlord would argue that it has a fundamental right to "go out of business." Forcing the owner to remain in a particular business (managing residential rental real estate) necessarily violates the takings clause by coercing the owner either to perform a particular job or sell the property to an owner who is willing to fulfill this role. It would constitute an unconstitutional deprivation of liberty without due process of law to force an individual to work at a particular occupation; it is similarly unconstitutional to coerce an individual to do so by conditioning ownership of property on a duty to manage a particular business. This is an unconstitutional condition, similar to that imposed in *Nollan* (which held that an owner could not be coerced to grant an easement of access to the public in order to obtain a permit to expand and repair a house); it forces the owner to choose between participating in a particular occupation (residential landlord) and owning a particular piece of property. Because it conditions ownership of property on an unconstitutional condition, it effectuates a taking of property without just compensation by depriving the owner of one of the core rights associated with property ownership, i.e., the right to go out of business and devote the property to a different use.

Third, even if the state could constitutionally require an owner to keep operating a business, as in *Nash,* it cannot constitutionally prevent an individual from evicting a tenant for the specific purpose of moving into the property and establishing it as the landlord's home. The state may be able to require *commercial* landlords to continue renting property to existing tenants or to sell the property to an owner who will do so; in either case, the owner's only interest is financial or investment-oriented. Since this interest is fungible (it can be fully satisfied by the payment of money), the owner's interests are completely protected by the ability to sell the property on the open market to a buyer who is willing to continue operating the property for residential rental purposes. In these cases, the owner is free to "go out of business" and is fully compensated for doing so by selling the property. However, when an owner wants to move into the property herself

or to allow a close family member to do so, the state is interfering with a *personal,* as opposed to an investment interest, which cannot be fully satisfied by a payment of money. The interest is not fungible, since there may be emotional and personal reasons for wanting to live in this home. Preventing an owner from using her own property as her home cuts too deeply into core property rights and constitutes a taking of the owner's property for the benefit of the tenant. It makes no difference if the tenant has been living in the property for 30 years. Any expectations the tenant has of continuing to live in the house are just that—expectations, not property rights. If the tenant wants to buy the landlord's house, she can offer to do so; otherwise, she has no right to take the landlord's house from him when the landlord wants it back for his own home.

Fourth, even if the ordinance does not constitute a taking of property under the physical occupation test, it requires compensation under the three-factor balancing test. The character of the government action is extraordinary; rather than a mere regulation of the landlord's obligation to an existing tenant during the lease term, the law transfers the bulk of the landlord's reversion to the tenant, authorizes a permanent occupation of the premises, prevents the landlord from going out of business, and deprives the landlord of the right to use the property for the landlord's personal purposes. The law substantially interferes with the owner's investment-backed expectations by preventing the owner from going out of business and using the property for other purposes. Whether or not the law causes a substantial diminution in value must be determined from the facts of the particular case. However, it may be argued that, even if the diminution in value is small, the other two factors strongly support a requirement that compensation be paid.

The tenant's attorney would argue, first, *Yee* holds that what matters is the initial invitation; preventing eviction of the tenant does not constitute a "forced" physical invasion but a regulation of an ongoing relationship which the landlord voluntarily entered into upon leasing the premises. The landlord's position requires drawing a line between anti-eviction acts that allow one-year occupancy by the tenant and those that allow longer occupancy; there is no way to draw a neat line here. The better distinction is between forced occupations by third parties and voluntary occupation by a tenant. Allowing the tenant to remain does not in any way transfer the landlord's reversion to the tenant; the landlord retains the right to collect a reasonable rent and the landlord will be able to recover possession when the tenant leaves.

Second, the landlord is perfectly free to "go out of business" by selling the property and using the proceeds of the sale to invest in another business. No unconstitutional condition has been imposed. *Nollan* held that the state could not impose a condition unrelated to the purpose of the regulatory scheme. Here there is a direct relation between landlord-tenant regulation and the anti-eviction act; the purpose of landlord-tenant regulation is to protect consumers of rental housing services from exploitation by landlords with superior bargaining power. Preventing eviction by the landlord is legitimate because it both protects the landlord's investment interest and the tenant's personal interest in maintaining the tenant's home. The regulation shapes the legitimate contours of landlord-tenant relationships and does not impose an obligation which landlords should not fairly have to bear.

Third, even if the regulation required the landlord to keep the apartment available for rental housing use, thereby forcing the landlord to rent the property to a stranger, it would not constitute a forced physical occupation. What matters is the initial invitation to the public to rent the property for housing purposes; once the owner decides to devote the property to this purpose, the state can protect the owner's interest in receiving a reasonable return on his investment while protecting the public interest in preventing a loss of rental housing in times when there is shortage of affordable housing. In such cases, the landlord's reasonable investment-backed expectations are protected (since the landlord is allowed to charge a reasonable rent and to sell the property to a buyer who will use it for rental purposes). Nor does an anti-eviction program impose obligations that landlords should not have to bear. A landlord of residential housing who converts it to another use arguably

exacerbates the problem of homelessness by decreasing the supply of affordable rental housing; prohibiting conversion of such housing to other uses prevents the owner from imposing negative externalities on the public. Preventing the property from being used for commercial purposes (or other non-rental purposes) does not, by itself, constitute a taking of property. *Euclid v. Ambler Realty* upheld zoning laws that limited property to particular uses against a takings challenge, as long as the property retained economically viable use.

Fourth, the state is empowered to choose to protect the tenant's existing personal interest in continued access to her own home in preference to the landlord's interest in establishing a home under the principle of *Miller v. Schoene* that the state is empowered to choose between incompatible property interests when they clash with each other. While this result does prevent the owner from moving into her own property, she is able to sell the property and use to proceeds to establish a home elsewhere, and this result arguably protects the investment interests of the landlord while protecting the personal interests of both landlord and tenant.

Problem 4. *Most states now have restraining order statutes that allow victims of domestic violence to obtain emergency injunctions on an ex parte basis (meaning without prior notice to the other party) to exclude from the home a household member who has allegedly beaten or otherwise assaulted them. See, e.g., Wis. Stat. §813.12 (judge or family court commissioner may temporarily or permanently order a respondent in a domestic violence case to avoid the victim's residence). Assume an unmarried heterosexual couple has lived together in the man's house for five years. He begins to beat her, and she obtains a restraining order excluding him from the house. The order stays in effect for three months while she looks for a new place to live. He brings a lawsuit claiming that, because the title to the house is in his name and the couple is not married, she has no property interest in the house; to exclude him from his own home, even for a short period of time, without a criminal conviction, constitutes a taking of property without just compensation. Is he right? What arguments could you make on both sides? How would you resolve the issue? Cf.* Cote v. Cote, *599 A.2d 869 (Md. Ct. Spec. App. 1992) (no taking where husband accused of domestic violence was barred from the marital home during the pendency of a divorce proceeding, on the ground that the husband still derived some benefit from the home in the form of not having to provide for an alternative home for his wife during that period).*

The argument for the π owner is that he is the title holder, and that, because the parties are not married, Δ has no marital property rights in the house under community property or equitable distribution statutes. Nor is she a tenant. She is a mere licensee, and while the state may require him to allow her to occupy the house while she finds a new place to live, the state has no right to force him to rent the property to her when their relationship ends. *Yee* protected the rights of *tenants* to continue to live for a time, as long as the landlord had the right to recover the property after a reasonable period calculated to allow the tenant to find a new place to live. While the state may require an owner to vacate his property for a limited period when he has engaged in or threatened to engage in violence against another household member, the state cannot transfer the owner's possessory rights to a mere licensee without paying compensation. The voluntary relationship crucial to the court's reasoning in *Yee* was a landlord-tenant relationship, whose central term is a transfer of possessory rights in return for periodic rental payments; in contrast, a mere license is not sufficient to constitute a voluntary transfer of possessory rights sufficient to establish the "invitation" which triggers an obligation on the part of the landlord to allow continued occupancy. In short, the occupant is a mere licensee with no property rights of any kind, pursuant to either a lease, or an easement, or a marital relationship. Preventing an owner from occupying his own house constitutes a transfer of possessory rights from him to the occupant and constitutes a forced, physical occupation of property like that in *Loretto.* Unlike the shopping center in *PruneYard,* this

situation involves personal interests of the landlord in possession of his own home, and therefore does not justify a right of access on the part of the non-owner.

The Δ would argue that the statute does not effectuate a forced physical invasion, but rather, regulates the relationship between the parties. The fact that there is no formal lease or marriage does not mean that Δ has no protected, or protectable, property right in continued occupancy under state law. The Δ may have possessory rights under the common law of real property, through the doctrines of easement by estoppel or constructive trust, or the common law of property division applicable to unmarried couples. In addition, the domestic violence restraining order statute itself arguably creates a protected tenancy on the part of the Δ. Since π allowed Δ to continue living on the premises after passage of the statute, π had no reasonable expectation that he would be perfectly free to evict her if he violated the terms of the statute. Since π has voluntarily opened his property to Δ, π has waived some of his property rights; the state is empowered to regulate the relationship between the parties to prevent domestic violence and to choose to protect the victim of the violence by allowing her to have continued access to her home without fear of further violence. The π has forfeited his property rights in a manner analogous to the situation involved in drug forfeiture statutes. Just as the state can constitutionally condition property ownership on the owner's not using the property to facilitate illegal drug sales, the state can condition property ownership on not committing abuse against others one permits to live on the premises. Rather than a forced physical occupation, the statute regulates the relationship between the parties and protects an innocent possessor from a violent owner who sacrificed his occupancy rights by his own acts.

§2.4 Other Special Cases.....1218
A. Deprivation of Core Property Rights.....1218

Note on the right to pass on property at death. *Was it fair for the Supreme Court to uphold the legislation that created the problem of fractionated shares (the* General Allotment Act*) but to strike down the legislation passed to correct the problems created by the act? If the original allotment policy effected an unconstitutional taking of tribal property, should this have affected the result in* Babbitt*?*

This is a hard question. Students often assume that if the original allotment legislation was unconstitutional that subsequent legislation designed to remedy the problem must be constitutional; however, this does not follow. Rather, both statutes may be unconstitutional. When the state unconstitutionally takes property from one person and vests it in another, the owner may be able to sue to have the transfer declared to be an invalid taking of property and have her property returned. However, if enough time passes, or if the new owner invests in reasonable reliance on the law which purported to divest the original owner of title, the new owner may obtain vested property rights which cannot be taken without pay (*cf. Babbitt*), if the court views it as a taking, even if the court *now* views the original legislation which created the current problem as also constituting a taking of property. Two wrongs do not make a right.

The counterargument is that current owners have no legitimate expectations of continued ownership if their rights are dependent on an unconstitutional taking of property from someone else. Under this view, the legislature is always free to transfer ownership back to the rightful owner. Moreover, the legislation in *Babbitt* arguably protected the legitimate interests of current owners by substantially protecting their property rights. After all, those owners had a life estate, and their descendants had no vested property rights at all; the owner could have chosen to devise the property to someone else entirely. Finally, the owners' expectations in *Babbitt* were arguably illegitimate because their property rights were not fee simple interests. The Court could have held that the right to pass on property at death is not such an important right when the property is not held in fee simple; allotted property is not fee simple property, but is held in trust by the United States for the

benefit of tribal members, is subject to an enforceable restraint on alienation and is regulated by tribal law.

Note on right to alienate property. *Is* Andrus v. Allard *consistent with* Babbitt*?*

It would seem that the right to sell property is as important as – or more important than -- the right to pass it on when one dies. On the other hand, personal property has always been subject to greater regulation than real property under the takings clause. The law has long made illegal the possession and sale of certain substances, such as illegal drugs. Moreover, one could argue that the right to pass on property at death is arguably more central than the right to alienate property; after all, restraints on alienation have always been enforceable in a variety of circumstances while total limits on devisability or inheritability have arguably only applied to property interests that were held for a term, such as leaseholds or life estates.

Note on right to be free from unreasonable and substantial interference with use. *Should the court's ruling be affirmed or reversed?*

Bormann found that a right to be protected from nuisances has always been a part of a property owner's rights. Deprivation of this right could severely affect the market value of property, as well as its usability for ordinary purposes. The counterargument is that, if anything is subject to change, it is the law of nuisance. What constitutes an unreasonable interference is something that changes over time. If the legislature can find something to be a nuisance that was not a nuisance before, it should be able to determine that owners are free to develop their property without being liable for nuisance to neighboring owners.

Note that *Lucas* suggests that there are limits to the state's ability to redefine nuisances to declare something a nuisance that was not a nuisance before and *Bormann* is the obverse of that case. The holding is paradoxical because it classifies a deregulatory law (one that frees owners to use their property as they like) as a regulation taking pre-existing property rights.

B. Vested Rights and Retroactivity.....1220

Is due process a better constitutional framework than the takings clause for evaluating state actions that retroactively upset investment-backed expectations? What are the arguments on both sides?

The argument for preferring due process as a frame for retroactivity analysis is that the state clearly has the authority to impose retroactive liability but must do so rationally, and due process is a better vehicle for evaluating that rationality. For a regulatory taking, one must presume public use, which the Court has made clear is coterminous with public purpose, so the inquiry turns on questions of the magnitude of the harm and the character of the government action.

On the other hand, regulatory takings law seeks to divine circumstances in which the government can legitimately act but must, in all fairness and justice, compensate those whose property interests are harmed in that action. Arguably, a takings frame thus makes more sense if a small group of owners is being asked to bear a burden that should be borne by the public as a whole.

Problem 1. *Is Justice Scalia right that the Oregon Supreme Court misapplied the English doctrine of custom, or is the issue the definition of the Oregon doctrine of custom? Is the Ninth Circuit's approach in* Robinson *a better way to assess the latitude of a state supreme court to define customary rights? What are the arguments on both sides?*

This question highlights issues about federalism and the authority of the state to define property law that are inherent in the interplay between the fifth amendment/fourteenth amendment and the traditional authority of the states to define property law. This is a variation on the general

question of the role of the state as definer and defender of property rights, but underscores that in many areas of constitutional property law, the Supreme Court takes the position that the fifth amendment is not an independent source of the definition of property. Of course, because the nature of what constitutes "property" varies between the due process clause and the takings clause, it cannot be the case that state law fully defines the scope of property for purposes of the federal Constitution. Reflecting *Stop the Beach Renourishment*, however, we might think differently about this question if the state (by judicial decision or by statute) had previously defined a property right and the state supreme court then reversed that settled definition.

Problem 2. *In* Mann v. Georgia Department of Corrections, *653 S.E.2d 740 (Ga. 2007), the Georgia Supreme Court held that a state statute prohibiting registered sex offenders from living or working within 1,000 feet of any facility where minors congregate constituted a taking of property as applied to a sex offender who was forced to move after a child care center opened a facility within 1,000 feet of his home. The court noted that "it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected."* Id. *at 755. Moreover, the effect of the statute "is to mandate appellant's immediate physical removal from his . . . residence." The court noted "the strong governmental interests that are advanced by the residency restriction" on sex offenders, but also found that the law effectively allowed "private third parties" to establish child-centered uses and thereby "force a registered sex offender . . . to forfeit valuable property rights in his legally-purchased home." Was the case correctly decided?*

The issue is interesting because it held that owners had a right to live in their homes. After all, the regulation did not require the owner to sell; it required him not to live (or work) in the property. Thus, the state could have argued that the property was not "taken" because the owner could rent the property out at fair market value. The case is also interesting because it protected the rights of persons who already owned property but did not protect the right to establish a home elsewhere. A different constitutional principle (such as double jeopardy or cruel and unusual punishment or due process) would be needed to ensure that there is some place that sex offenders are allowed to live.

On the takings issue itself, the court's analysis focused on the fact that the regulation forced the offender to move and that may economically require sale of the property. On the other hand, if the property is sold, the owner will receive fair market value, so what is the compensation that is due in this situation?

The state will defend the law because it is a law designed to protect the public by regulating where sex offenders live and it only incidentally may lead to a sale or rental of the property; the reduction in fair market value is low since the owner can sell the land. The counterargument for the owner is that a purchaser assumes that he has the right to live in his own house; to take this right away retroactively is extraordinary, both interfering with investment-backed expectations and of a character akin to confiscation.

Problem 3. *In the 1960s, the federal government promoted the construction of low-income housing by private developers by providing mortgage insurance that allowed the developers to obtain funds from private lenders for 40-year low-interest mortgages. In return, the developers consented to extensive government regulation of the properties. The terms of the mortgages provided that they could be prepaid without government approval after 20 years and that doing so would lift the restrictions arising from the regulations. In 1990, to stop a mass withdrawal of properties from the program through prepayment, Congress enacted statutes that effectively nullified the prepayment right. Although Congress reinstated the prepayment rights in 1996, in* Cienega Gardens v. United States, *331 F.3d 1319 (Fed. Cir. 2003), the Federal Circuit held that*

the developers had a vested property right to "buy out" of the program. The repeal of this right constituted a temporary taking under the ad hoc test for the four plaintiffs for whom the trial court had made findings of fact. However, when on remand the trial court held that the measure took property of the other developers, the Federal Circuit reversed, holding that the court had to consider the impact of the measure on the value of the property as a whole, the benefits that the developers received from participation in the program, and the extent of reliance on the prepayment option. Cienega Gardens v. United States, *503 F.3d 1266 (Fed. Cir. 2007). How should the court on remand analyze the question of whether denying prepayment rights constituted a taking of property that interfered with the owner's reasonable investment-backed expectations? See* CCA Associates v. United States, *667 F.3d 1239, 1244-48 (Fed. Cir. 2011).*

The government argues that the law is like a rent control law or a change in the housing code or warranty of habitability that regulates an ongoing relationship to provide protection for consumers. Moreover no estate in land or core property right is taken by the legislation. The owners (developers) argue that this kind of retroactive legislation is unfair and interferes with their investment-backed expectations. They forwent market rates in exchange for the subsidies *and* the right to go to market rates later. To undo the deal now when it has already been consumated is to breach a contract between the government and the lenders and to take their rights in the land which they had been promised.

Problem 4. *A state adopts a statute extending the rule against perpetuities to possibilities of reverter and rights of entry on the ground it never made any sense to strike down an executory interest in a third party under the rule against perpetuities while enforcing an identical possibility of reverter held by a descendant of the grantor. If the statute applies to conveyances made prior to the effective date of the statute, would this constitute a taking of property without just compensation?*

If the rule applies retroactively to future interests created before the regulatory law goes into effect, then it takes an established estate away from existing owners. Under the old rule, the owner of the possibility of reverter had a right to take title under the conditions specified in the deed or will or trust document; under the new rule, that right is destroyed and title stays with the present estate owner regardless of the condition. The law has turned a defeasible fee into a fee simple absolute. This would seem to violate the rule of *Babbitt v. Youpee* that one cannot turn a fee simple into a life estate; this hypothetical simply does the reverse. The "right to pass on property at death" is arguably less of a central property right than "ownership of a possibility of reverter" which after all is a traditional estate in land.

The counterargument is that future interests that are contingent on events that may never happen, are ephemeral, and that no strong expectations of future ownership can be premised on them. In some cases, they are akin to the right of survivorship in a joint tenancy which can be destroyed easily by severance. In addition, the common law has a long tradition of regulating future interests to promote the alienability of land, so the imposition of a new restriction is not a surprising move. There is an average reciprocity of advantage because all benefit from limiting future interests by the improvement in the real estate market and the improvement in alienability of many parcels of land.

Problem 5. *Assume a community property state has a law that allows courts to grant alimony on divorce. The law divides property acquired during the marriage equally and in a mechanical fashion, with half going to each spouse. The legislature adopts a statute providing for "equitable distribution of the property" acquired during the marriage on the ground that mechanical division does not account for a number of factors relevant to the property distribution, as the overwhelming majority of states now recognize. A court awards a wife 60 percent of the*

property acquired during the marriage rather than 50 percent pursuant to its determination that this is the most equitable result. The husband argues that the statute cannot be constitutionally applied to marriages that were celebrated before the statute was passed; to do so would constitute a taking of 10 percent of the property from the husband to be transferred to the wife. How should the case be decided? Cf. In re Marriage of Heikes*, 899 P.2d 1349 (Cal. 1995) (statute allowing a divorcing spouse to be reimbursed for the value of separate property used during marriage to purchase community property jointly owned by both spouses cannot be constitutionally applied to divorces filed before passage of the statute).*

The law fundamentally changes property rights, but on the other hand, family property (especially marital property) has always been highly regulated to protect the interests of the more vulnerable party to the relationship which traditionally was the wife. To disable the legislature from changing family law creates a constitutional barrier to disestablishing property rules that favor men over women and thus constitute forms of sex discrimination. In addition, the moment at which the rights flowing from marital property would vest is not clear. Is it at the time the marriage took place, as the husband argues, at the time the property was acquired, or at the time the divorce proceedings are initiated or finalized?

§2.5 Takings Statutes 1227

§3 Exactions and Unconstitutional Conditions 1229
***Dolan v. City of Tigard* (1994) 1229**

Note 4. *How would you evaluate inclusionary housing ordinances such as the one at issue in* California Building Industry Association*, supra? What are the arguments on both sides?*

One question exactions raise is what the relevant interest is that the doctrine is protecting. If the doctrine is understood as a general application of the unconstitutional conditions doctrine, then presumably any condition on a discretionary land-use approval is subject to the nexus/rough proportionality analysis. That is Justice Thomas' approach and the Court continues to look for vehicles to resolve this issue. On the other hand, if exactions is a doctrine that polices a certain kind of risk that arises from individualized determinations, and the risk of corruption that flows from that individualization, then it might make sense not to apply *Nollan-Dolan* to general legislative schedules that proactively set the terms of appropriate development, as the California courts have generally done.

Note 5. *In* Koontz*, however, the Court applied* Nollan-Dolan *to a permit application that the state would have been entitled to deny outright. Does* Koontz *change Justice Scalia's analysis in* Monsanto*?*

Before *Koontz*, there was an active debate in the lower courts and among scholars about how far the *Nollan-Dolan* exactions doctrine might extend. There was a strong argument that the Court had originally meant it to apply only to physical exactions, an understanding that was bolstered by dicta in *Lingle*. *Koontz*, however, seems to settle that debate (for now) by holding that the *Nollan-Dolan* framework applies very broadly, not only to physical exactions but to linkage requirements more generally, even if purely financial. It still remains very much to be seen how *Koontz* will be applied by the lower courts, but the case carries the potential to expand exactions liability and chill local-government action that might run afoul of the "nexus" and "rough proportionality" requirements.

One way to approach this case is to focus on whether *money* is different for purposes of the takings clause and, if so, why or if not, why not? If there is nothing distinctive about money,

then aren't all taxes takings? Or are taxes not takings because they are prospectively applied to new income earned under a system in which such obligations to contribute to the common wealth are understood to be a background principle of property law? The majority tries to sidestep this issue by arguing that the monetary exaction at issue was tied to the parcel but is that convincing? Before *Koontz*, the Court had seemed to draw a distinction between governmental actions that effectuate the taking of a specific source of funds—such as the bank account in *Webb's*—but *Koontz* rejects that limitation.

There are other constitutional limitations on the power to tax but courts are now likely going to have to spend much more time trying to decide whether a local ordinance that calls for the payment of money is a tax or an exaction, given that the standards (and the burdens of proof) are very different for challenges to taxation than to an exaction.

Problem 1. *Imagine that you are counsel to a local agency charged with reviewing a permit application for development that did not meet existing state requirements, but that could do so with some modifications to mitigate the impacts of the development. After* Koontz*, what advice would you give your client about whether and how to negotiate permit conditions? If you were representing the developer, how would you approach such negotiations?*

Local land use agencies will have to be more cautious after *Koontz* about the risk that a court will interpret non-final negotiations over mitigation conditions as giving rise to exactions. At some point in negotiations, a developer may be able to say that even a proffer on the part of a local government places an unreasonable (and hence potentially unconstitutional) condition in exchange for some discretionary permission. As noted in the chapter, in most contexts, potential takings plaintiffs must reasonably exhaust the local land-use process, unless doing so is futile, but *Koontz* could be read to carve out an exception to this requirement. On the other hand, if this logic is taken too far, local governments will simply stop negotiating mitigating conditions.

From the developer's side, it is useful to get students to understand that even though an owner may have the right to raise a constitutional claim, most developers are repeat players (the plaintiff in *Koontz* appears not to have been), which creates incentives to negotiate in good faith with local governments.

Problem 2. *Suppose Barbara James, the public assistance recipient in* Wyman*, had characterized the home visits as a taking of her property rights rather than a violation of the fourth amendment. Is* Wyman *covered by* Monsanto *or by the* Nollan-Dolan *line of cases? Is welfare simply a "government benefit" rather than a vested property right or does the condition in Wyman constitute a physical invasion of property (the home visit)? How does the Supreme Court's analysis of the* Nollan-Dolan *line of cases in* Cedar Point Nursery v. Hassid*, §2.3.B supra, impact the resolution of this question?*

The state would argue that government benefits (welfare) are governed by *Monsanto.* They are not traditional property rights and the state can condition them on recipients giving up certain privacy rights. James would argue that the right to be free from invasion of her home is a core real property right (see *Loretto)* and that *Dolan* would prohibit coercing her to give up this right in exchange for a discretionary government benefit. *Cedar Point Nursery* suggests that the argument for applying *Nollan-Dolan* in this situation is likely to get a receptive hearing.

§4 Justifying Takings Law.....1245