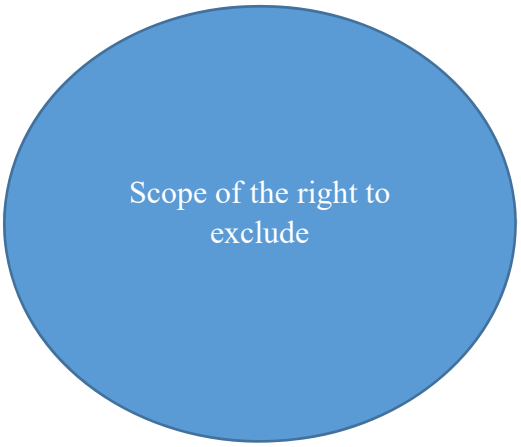
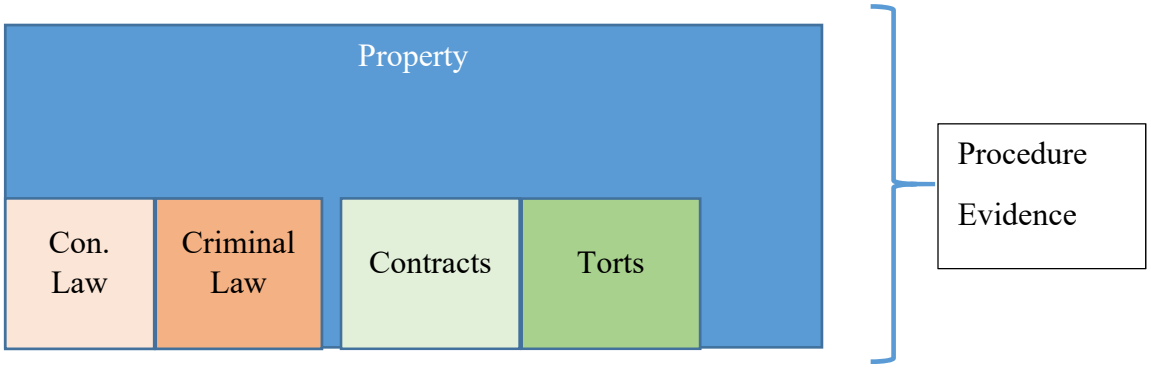
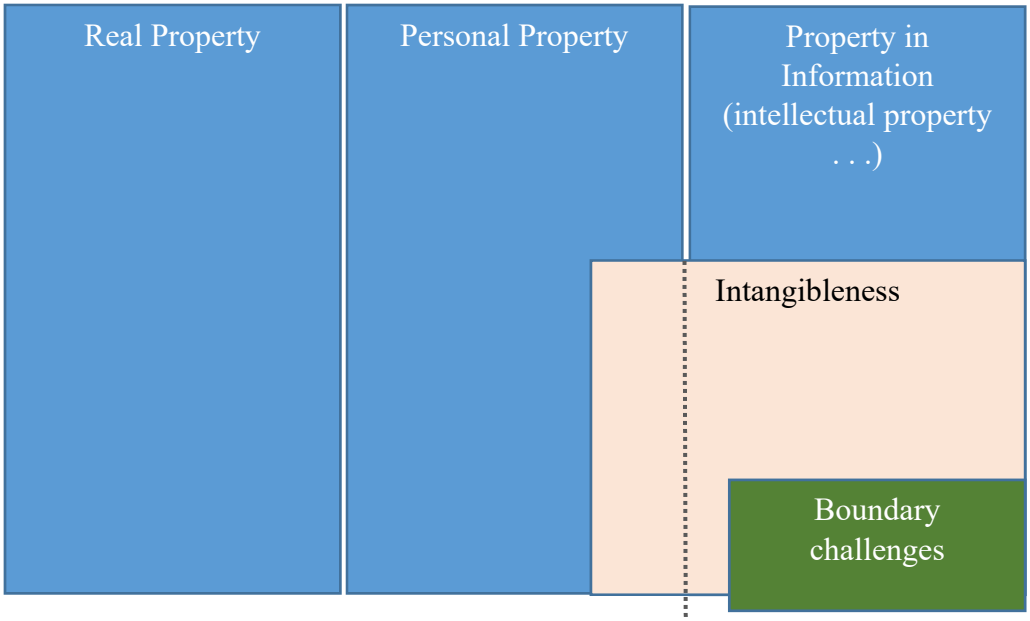
Module One – Ownership

Constitution
Legislature
Administrative Agency
Judge
Jury
Property Owner







State v. Shack

The right to exclude that is normally applicable to the landowner does not apply when all of these conditions are met:

1. The person seeking entry is an . . . aid worker . . . or, more broadly?: any non-profit worker
2. The land is closed, it is not held open to the public
3. On the land there are migrant workers . . . or, more broadly: disadvantaged persons
    a. To whom the Federal government has targeted aid??
4. The persons in element 3 live on the land controlled by the landowner

Eyerman – other ways to coordinate use

Law: Historic/landmark preservation; building codes; zoning; deed covenants; easements; nuisance (source of law for each?)

Planning: subdivision plat; creation of municipalities; creation of special districts

Smith

A primary emphasis for the core of property as an *in rem* system of rights is exclusion. But a sometimes-needed adjunct emphasis is a governance strategy.

Exclusion "strategy" – based on signals from borders/boundaries around the resource

- Want to respond to transaction costs, which can be significant
    - In rem is a shortcut over many contracts, so having the institution of property is more efficient than many *in personam* relations
    - "the number is limited" – we want standardized property forms for efficiency in information transmission about rights in resources – this is the *numerus clausus* principle (disfavor idiosyncratic property rights)
- Want to have owners/users generate information about possible future uses of the resource

Governance "strategy" – needed for problems of coordinated use among differing owners

- Niche, used when needed
- Spillover
- Scale
- An example from the facts of Hinman: a "governance" rule given by the government saying that if you operate an airport on your land you must keep the edges of the runway at least 1,000 feet from your property line.

Module Two – Subject Matter

Some key policy points about property rights in information

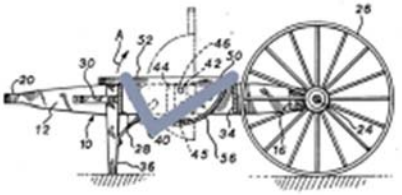
1. The public goods nature of information (non-rival, non-excludable).
2. Free riding can dampen incentives to invest in creating information; need an incentive just strong enough to support generating the information in light of the other market motivations to generate it.
3. Access to information protected by property rights is an important concern.
4. The concern over access leads to a second reason to limit the scope, scale and duration of rights (the first reason being to calibrate the incentive to generate the information).
5. With intellectual property and information law rights, boundary or border problems are particularity acute.
6. There are alternative policy justifications for systems of rights in information, such as a Lockean or personhood approach.
7. Information as input into other creative processes
8. Network value in information (for example: a standard file format)
9. For trademark protection in particular, reducing consumer's search costs is one of the primary policy drivers for the system, including the idea the competitors police each other (via trademark infringement lawsuits) in a marketplace to keep marks/brands representative of each company as a source of supply.

Patent claim versus real property "metes and bounds" description

Peripheral claiming – an analogy to "regular" property law

Claim 1	Label
1. A wheelbarrow . . . comprising	
a frame having two . . . rails . . . and at least one cross brace . . .	frame [10]
an axle . . .	axle [24]
a wheel . . . [with] minimum diameter of 30 inches	wheel [26]
a pair of mounting brackets . . . mounted . . . intermediately . . .	brackets [42, 44]
a box having a semicylindrical closed bottom, upstanding side walls having a C-shaped bottom edge . . . Including a pair of axially aligned pivot posts . . .	box [50]
a support . . .	support [36, 38]

JONES sells 140 acres and 36 poles of land in HAYES County on WEST Fork to SMITH for 200 dollars. Land bounded as follows....:
- Beginning at the mouth of a branch at an ash stump
- thence up the creek S 20 poles to 2 beach
- thence east 41 poles to a small walnut in Arnett's line
- thence north 50 east 80 poles to a linn hickory dogwood in said line
- thence north 38 poles to an ash
- thence west 296 poles with Potts's line till it intersects with Tolly's line
- thence south 30 west 80 poles to a whiteoak and sugar
-thence east 223 poles to beginning....



Module Three – Allocation

Possible stories about how property arises

Conquest

Discovery

Creation

Arises as a system to help manage a resource (Demsetz, OHs 47-49)

Possible answers for hypothetical about awarding parking spots based on which employees say they are the most unhappy

Not a good method because it doesn't "hide" the unhappiness

Reduces morale?

Rewards the wrong thing, expressing unhappiness rather than working to be happy at work

Hard to quantify and measure – the standard of unhappiness or happiness is subjective; this type of a reward system might be better off with an objective measure, such as "FitFir" – first in time is first in right.

As a highly subjective measure, does it create an incentive to lie?

Other, perhaps better ways (?), to award the parking spots: (i) good work performance; (ii) FitFir; (iii) bribery of the deciding manager (objective, but with a host of other problems).

Module Six – Adverse Possession

"Hostile" element

Color of title – typically a document evidencing a transaction

Claim of right

States of mind

Knowledge – purity or honesty of the mistaken knowledge; effect of doubts as to the certainty of known ownership

Belief – purity or honesty of the mistaken belief; effect of doubts as to the certainty of believed ownership

Intent – some states need an intent to take the land, "Maine" rule in note case Mannillo v. Gorski (this is above and beyond the coverage of the note case on pages 218-219)

Objective manifestations of state of mind

Not "with permission"

Three moves in the law from Mannillo v. Gorski

Choose "Connecticut" rule that you don't need intent to take

This makes it easier for adverse possessor to prove the hostility element of the quite title action

Also reduces what would otherwise be an incentive to lie about intent?

Make "open and notorious" element harder for adverse possessor to prove by requiring actual knowledge of true owner

In the niche case of a small boundary line encroachment, arising from honest mistake, even when open and notorious element can't be met, equity effects a forced sale of the land from the true owner to the encroacher / adverse possession claimant

Modules Nine and Ten – Estates

Starter Problem

O to A for life, then to B if B survives A

State of title at the time of the conveyance:

A has a life estate

B has a contingent remainder in fee simple absolute

O has a reversion in fee simple absolute

Starter Concepts

words of purchase (grantee)

words of limitation (nature of estate)

examples: "and her heirs"; "for life"; "and the heirs of her body"; "for 10 years"

additional limitations

Assessment of state of the title at the time of the grant versus assessment with post-grant new facts, changes to circumstances, fulfilment of conditions, etc.

Words of limitation are not words that identify a party to the conveyance. Thus, in this conveyance:

O: to A and her heirs

"and her heirs" is not a party.

A and a second entity, "A's heirs," are not taking as co-owners.

Other Principles[1]

1. Someone must always own (be seized of) each freehold estate in land.

2. Courts should interpret property interests so as to give effect to the creator's intent where that intent is not inconsistent with the law (public policy) [. . .]

3. The law should promote the free alienability (transferability) of property interests, a consequence of the statute *Qui Emptores* in 1290 (18 Edw. I).

4. The law favors "productive use" of property.

Each of these Central Operating Principles (COPs) developed to support the Crown's exercise of its absolute ownership of England and its need to exercise political control over all of that country. Initially, they developed from intended and unintended consequences of the unique feudal system of land ownership or tenure that William the Conqueror and his successors imposed. However, as the strength of that system eroded over the centuries, these principles proved useful to new property owners and new societal needs. They have long outlived the system that first gave them currency because they continue to reflect the interests and desires of property owners, even as the nature of society and of property changes.

COP 2, COP 3, and COP 4 sometimes conflict with one another. A desire to give effect to the intent of a transferor long dead can frustrate the desire of the current owner to use or transfer property interests free of restrictions imposed by that earlier owner. The ways in which courts deal with the overlap between these COPs is responsible for much of the flexibility of modern American property law.

Reprise Q2 from Pg. 359

"to A for life, then to B or her heirs."

Equivalent to:

O to A for life, then to B if B survives A, otherwise to B's heirs

Equivalent to:

O to A for life, then to B if B survives A, otherwise to the class of persons that is B's heirs, reversion to O

[1] From Prof. Cyril Fox, University of Pittsburgh School of Law

Another example

"to A when A turns 35" [A is presently 20]

O has the possessory estate in fee simple subject to executory limitation

A has a springing executory interest in fee simple absolute

Clarification for future interests in a grantor

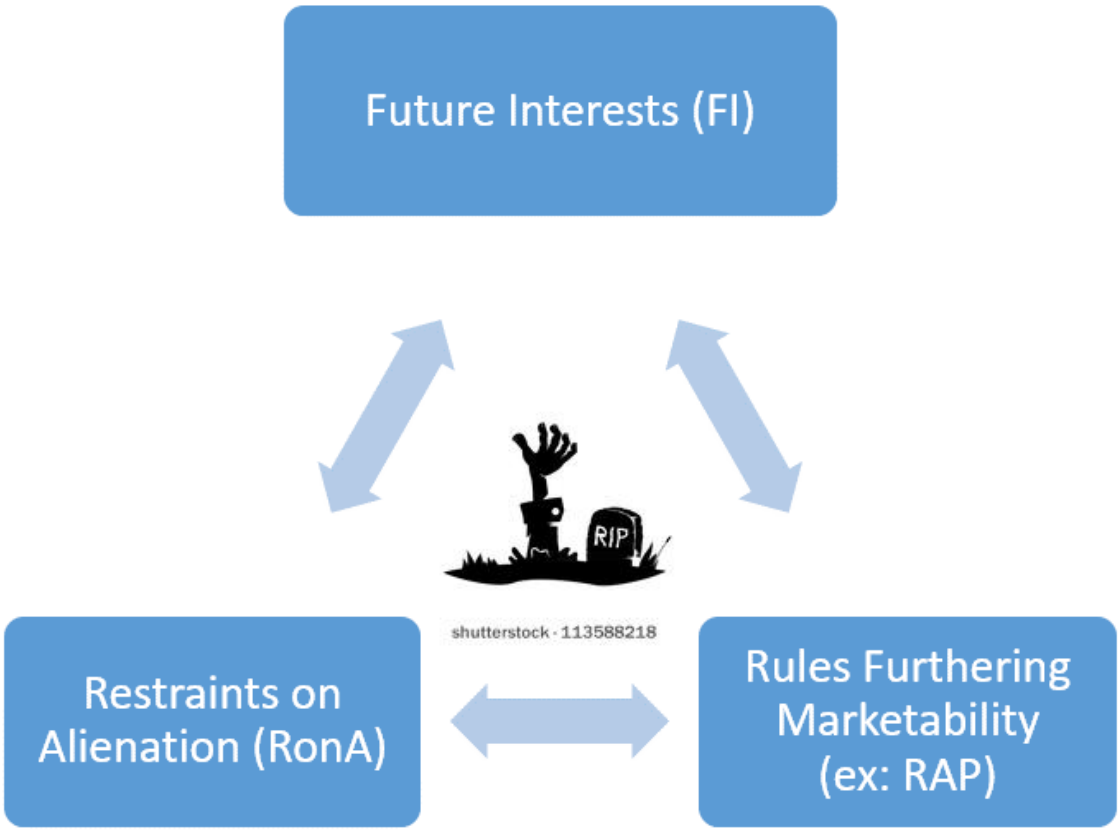
In reference to Q3, slide 102, module 10 slide deck, the answer that O has a reversion comes from traversing the chart on page 334 with the understanding that O's estate does not "cut short" the prior future interests.

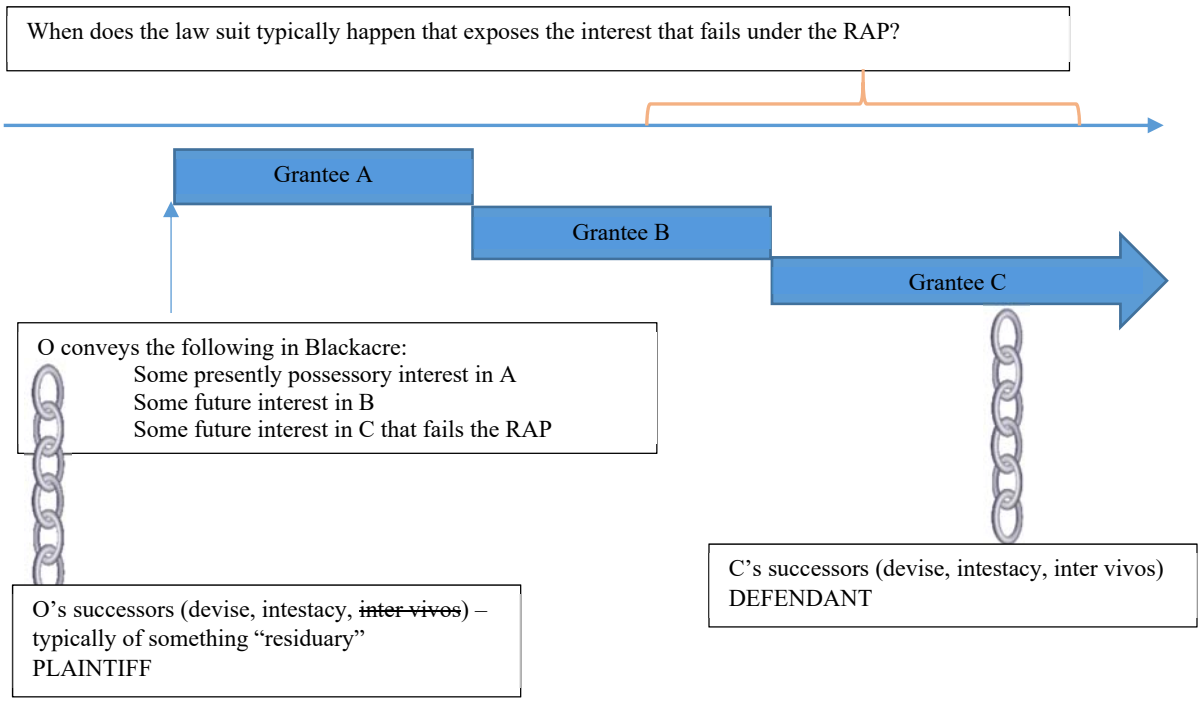
This leaves, however, the question about why O might not have a "right of entry" because there are words of condition in that prior estate.

To simply the analysis for the class, we will further specify that either a "right of entry" or "possibility of reverter" are only future interests in a grantor when the words creating such appear in a conveyance as part of an interest that is immediately presently possessory at the time of the interest.

If you don't have what is given in the paragraph immediately above, the only estate left for O to have a future interest is the "larger estate" that is the reversion.

Module Eleven – Preserving Marketability

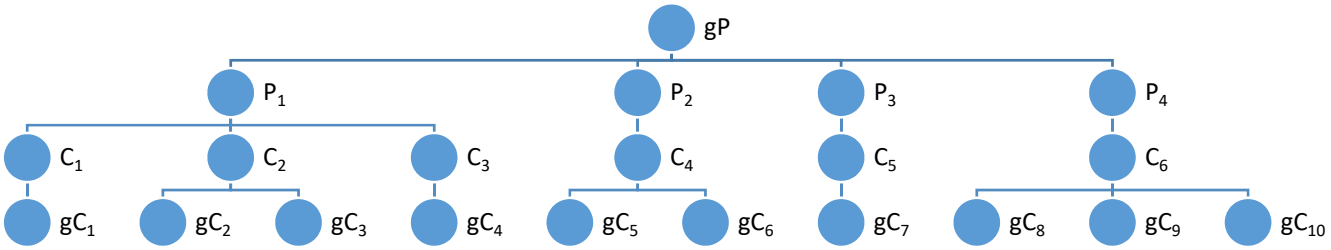



When does the law suit typically happen that exposes the interest that fails under the RAP?
Grantee A
Grantee B
Grantee C
O conveys the following in Blackacre:
Some presently possessory interest in A
Some future interest in B
Some future interest in C that fails the RAP
O's successors (devise, intestacy, ~~inter vivos~~) – typically of something "residuary"
PLAINTIFF
C's successors (devise, intestacy, inter vivos)
DEFENDANT

Module Thirteen – Co-ownership

Pg. 417:

The common law operated under a presumption that grants to multiple grantees created a joint tenancy—precisely the opposite of the modern presumption in favor of a tenancy in common. Should we return to a presumption in favor of joint tenancy, at least for family homes where children are the heirs by intestacy?



How does the fragmentation of ownership down a line of heirs with each generation taking as tenants in common resemble an anti-commons (class slide 50, and policy perspectives below)

If joint tenancy instead applied as the default rule for the hierarchy above, how would the ownership be different in the "gC" generation? What is the maximum number of co-owners that would be possible in the "gC" generation?

Policy Perspectives - {} indicate the source, along with class discussion

Property supports various societal values {Overhead 5}.

Property rights provide a basis for other private law (contract, tort) and public law areas (criminal law, constitutional law).

Rights need a sufficient remedy to support the policy justification of the right {Jacque v. Steenberg}.

There are harms to these area or values or interests when a property owner can't exercise her right to exclude: freedom and self-actualization; economic incentives with the land/resource; the signaling value of borders around land or a resource; the possibility of losing integrity of ownership with the land from issues such as prescriptive easements or adverse possession {Jacque v. Steenberg}.

Without a sufficient remedy to support the right to exclude property owners might resort to societal-disrupting self-help; "keep lawful people lawful" {Jacque v. Steenberg}.

When fashioning property rights or their remedies there is a need to consider both the ex-post perspective and the ex-ante perspective; the former has to do with justice for the parties in a particular case; the latter includes the need to consider incentives for the future with the rule of law from the case {Jacque v. Steenberg}.

An example where the lack of borders as a signal influenced the property owners rights is the company town in *Marsh v. Alabama*.

Sometimes the right to exclude, or other property rights in the "bundle," need to give way to other policy values {Marsh v. Alabama, State v. Shack}.

Although the "greater power includes the lesser power," sometimes the lesser power is the greater power. This might apply in the context of property when a permission for use has been given under conditions. The landowner or resource owner could completely exclude the permitted user, so conditioning the use is exercising the lesser power. But, with time, and reliance that accrues over time, the eventual removal of the conditioned privilege may be an exercise of a greater power.

Many resources covered by property rules need to be coordinated in their use, and property law has various mechanisms to do that {Eyerman v. Merc. Trust}.

All the possible rights that might be listed in the "bundle" of rights that is one model of property are not necessarily coequal. For example, the right to destroy might not always be included {Eyerman v. Merc. Trust}.

"Dead hand control" is an important concern when property rights in a resource are wielded by commands from persons who have passed away. One specific concern with "dead hand control" is that the commands from the "dead hand" cannot be queried in the same way that one could query the actions of the living {Eyerman v. Merc. Trust}.

Property rights should, ideally, help align private interests with the public good, or with public interests; this statement could be applied generally to perhaps any law, but the idea is particularly salient with property because it underlies the other systems of private rights as well as public rights. It is also salient because ownership provides a basis for exchange; specialization, followed by exchange with others, is a basis for our market-economy society.

Property should not lose sight of the importance of the "thing," that is, the resource to which the rights attach and the borders or boundaries through which that "thing" broadcasts its "universal duties" in almost a language-like way {Smith}.

Transaction costs are a consideration in building up property-like legal relations from many *in personam* relations. {Smith}

Evaluate a particular proposition to give or revise property rules from the perspective of both the favored and dominant strategy of exclusion (with its various justifications) and the ideally-niche strategy of governance (with its differing justifications) {Smith}.

Some commenters propose that courts create and distribute economic power when they recognize property in a resource, even while shadowing that action in some other rhetoric; property rights do oftentimes follow investment, but there is a "what came first (the chicken or the egg)" paradox in those moves {Cohen}.

Possession and dominion over a resource is what brings it into the ownership of the possessor {Hinman}.

Some swaths of human activity and human existence are areas where property should not be an institution that applies {Amistad, Radin Market-Inalienability, body parts discussion pg. 63-66}.

Sometimes we want an *in rem* property right because we want the duties to "run with the resource" in order to have greater effect {perspective of dissent in Moore v. Regents of California, overheads 18 and 19}

For systems of property rights in information (intellectual property and other information law doctrines), a key consideration for the scope, scale, duration, and shape of the rights is both the type of information and the general problem that information has characteristics of a public good (non-rival; non-excludable).

While intellectual property doctrines respond to the public good nature of information with doctrines that reduce free-ridership and thus support an incentive (hopefully only as strong as needed) to invest in creating the protected information, the doctrines oftentimes also seek to balance access to the information; in part, such access is supported by limits on the rights.

With intellectual property and information law rights, boundary or border problems are particularity acute.

There are alternative policy justifications for systems of rights in information, such as a Lockean or personhood approach.

There are various justifications for the rule that "first possession equates to ownership of a chattel": administrability; fairness; morality; reliance; pragmatism; ecology; incentives {note 1, pg. 103-104, Pierson v. Post}.

Information is a resource that is often used as an input into other creative processes, thus, the concern about access to and allowed use of information in light of intellectual property rights is a concern.

Information is a resource that can often achieve network value (such as a standard for a file format), which counsels caution in applying intellectual property protection.

Lockean justifications for property emphasize joining one's labor with the resource as the key to establishing exclusivity; but when drawing from a commons this principle may be diminished if there is not "enough, and as good" left for others. {Locke}

"Title" in a resource is equivalent to fully owning it; sometimes property law requires acts to "perfect" title, where the owner of a resource has a prospect to perfect title in something else associated with the land, or a non-owner has a prospect to perfect title in a resource by continuing acts after having already taken some initial steps toward possession of the resource; these initial and continuing steps are similar to the boundaries or borders of a fully owned resource in that they serve as signals to the community that uses the resource.

There are various alternatives to allocation by first possession: first claimant; last possessor; equal divvying; commons; government rationing/control; random allocation by drawing "lots"{note 2, pg. 105}.

Sometimes a resource can be used as a commons for one use, and with exclusive property rights for another use; this modality might be called a semi-commons, with the example given on overhead 37; the discussion of that example, the "open fields" system, emphasized how the common use (grazing sheep) spread the benefit of that common activity over all the exclusive use (growing crops) "strips" of land; the odd arrangement of many, scattered, "strips" of land is perhaps explained as a way in which the exclusive use had borders arranged so as to limit any one landowner to opportunistically gather to herself a disproportionate share of the common use benefits: if my exclusive use land is scattered I can't easily keep all the sheep only on my land.

Possession as the origin of property has a tension of, on the one hand, reward for useful labor, versus, on the other, notice of a clear act to make possession; clear notice for title facilitates trade with resources and minimizes resource-wasting conflict; but, in reference to the Native Americans in Johnson v. M'Intosh, chain of title, from the common law perspective, could not run through the Native Americans because their original dominion over the land was not in the form of acts that the European "vocabulary" regarded as signaling possession, the doctrine of first possession has a "text" of cultivation, manufacturing and development {relating Pierson v. Post to Johnson v. M'Intosh}

Externalities are costs or benefits for which one does not account in one's planning or undertakings. Externalities can be negative or positive. They can be bilateral or multilateral. They can relate to a commons resource or a non-commons resource. One classic example of a negative externality is a factory that pollutes its smoke to the detriment of its neighbors. In the tragedy of the commons story, the negative externality is the incentive to graze one more cow on the land because the cost does not bear on me, even though in aggregate when many make the same choice the grazing lands might experience cascading failure, perhaps without an ability to recover because grazing went beyond a sustainable rate.

The Demsetz story on OHs 47-49 (in conjunction with the Hardin story on OH 46) is about a theory that a system of private property rights (PPR) arose as an exclusion strategy to avoid a tragedy of the commons in overhunting beavers as demand for their furs rose. Questions about this include: (i) how did the people using the commons come to agree to do this? (ii) how did they overcome the collective action problems (and freeriding problems – there is an incentive to wait for someone else in the community to come forward and lead the design of the PPR system) for the community to arrange the family-exclusive plots; and (iii) how does a community know when a resource has become valuable enough that the system of PPRs is worth the administrative costs of having the system, including the startup costs and ongoing costs such as adjudicating disputes or installing/maintaining boundaries.

The anti-commons story of slide 50 has a number of important policy perspectives. First, it relates to real-world situations where ownership is fragmented. In an anti-commons, any one person can cause all others to be excluded for any use or aspect of the resource. That is not necessarily how fragmented ownership works as property passes down to successive generations in co-tenancy, but in that passing the number of owners increases. One problem of the anti-commons is the transaction cost barrier that arises from many owners: to use the land I have to get permission from many persons. Second, the anti-commons shows how the categories of degrees of exclusively are a continuum rather than discrete buckets. Third, the anti-commons model applies to both tangible and intangible resources. Fourth, the more one thinks that persons are readily able to bargain without transaction cost hindrances, the less one would be worried about an anti-commons effect in a resource. For example, in the unreal and hypothetical world of zero transaction costs, we might expect the anti-commons fragmented ownership to be transacted as needed for someone to obtain the necessary bundle of rights to make beneficial use of the resource without encountering legal trouble.

The law of property can protect rights in a resource in one of two ways: "property rules" or "liability rules." This dichotomy corresponds to, for property rules, an injunction from a court, and, for liability rules, no injunction but instead damages. The property rules approach centers on the right to exclude that many see as core to a system of property. Under a property rules approach, non-owner-parties, prospectors, who want to take a resource to a higher-valued-use must bargain with the property owner. These prospectors cannot gain access to the resource unless a bargain is struck. Under a liability rules approach, the prospector can take the resource and use it without advance permission or a transfer of ownership, and later pay damages if sued. Thus, a liability rules approach is sometimes referred to as a "court enforced" bargain, even though the parties never actually bargained. One key difference is how the price is established. Under property rules, the parties bargain, presumably with knowledge of the value of the resource in relevant marketplace(s). Under liability rules, the courtroom process is used to establish a damages value. This process is known to be of a different character in terms of generating information about the value of uses or values.

Adverse possession, and its cousin, prescriptive easements, raise a variety of policy questions. What is the justification for adverse possession: sleeping versus earning?; quiet title?; lost evidence?; reliance interests?; something else? What are the disadvantages for the doctrine? What are the policy arguments for and against the various possibilities for the hostility / claim of right element? When should courts use equity to effect a forced transfer, meaning that adverse possession or prescription only grants title upon a court-ordered payment to the original owner (OHs 66-67; and white board items for Mannillo v. Gorski)? There are bigger picture policy questions as well, such as whether the law of property should have the doctrine at all? And, whether there should be more elements to adverse possession or prescription to make it harder to obtain title via those doctrines.

The system of estates and future interests raises several areas of policy.

First, there is the issue of "dead hand control." Future interests are currently-owned items that might be possessory in the future. Conditions and limitations on the interest's ownership, or use, or disposition, that persist from persons who have passed, raise questions about whether a resource is in its "best and highest use" at the present time. A fundamental purpose of property is to enable persons in society to transact around property and privately order our affairs among ourselves. To the extent convoluted future interests frustrate that purpose, we might want the law of property to disfavor them. One rule furthering marketability, the rule against perpetuities (RAP), in particular is "aimed" against dead hand control. How should courts or a society decide how far into the future to allow "dead hand control?" Related to this is the issue of dynastic trusts and jurisdictions that seek to increase professional class work in that jurisdiction by offering a place to shelter assets where dead hand control is legally allowed to be longer and stronger. This policy concern is sometimes called a "race to the bottom" – among jurisdictions there is a competition to offer the most favorable legal environment for some activity that, while legal, might be argued to have other wide-ranging negative social consequences.

Second, related to the concern about "convoluted future interests" are the common law rules furthering marketability (OH 91). These seek to diminish the uncertainty effect of certain types of conveyances. A future interest in real property is not a "cloud on title," but can sometimes have a similar effect: it makes persons in the present time less willing to buy, or own, or lend against, the real property when all they can get for their trouble or security is the convoluted future interest that only has a prospect of ever becoming possessory (and thus actually valuable).

Third, the transactions that sometimes carve up fee simple absolute into various estates might also include provisions that are deemed to be unenforceable restraints on alienation (RonA) (OH 90). These RonA can also happen in a conveyance that is not creating future interests. When should the law enforce a RonA? The law tolerates the RonA effect of some future interests because balanced against this is the policy objective of allowing some control over real property into the future via the estate system (and its modern mode of implementation, the trust).

Fourth, the doctrine of waste "arbitrates" the duties and responsibilities between the presently possessor life estate owner and the future owner, who might have a remainder or a reversion. Policy questions related to waste include: to what extent should the doctrine require that the real property be returned in substantially the same state?; how should courts treat situations where there is dramatic change to the real property but that change increases the value of it?; what types of remedies should apply in these varying scenarios?; and to what extent should waste cabin the life estate owner to mere use (as opposed to revision) of the property?

A further example of the *numerus clauses* principle ("the number is limited") is its application to the standardized property interest represented by the system of estates and future interests in real property. The insight is that a "limited number" of standardized ways to represent own-able property facilitates marketability. A set of standardized property interests promotes liquidity and transparency in a market. Marketability for property is important because the law favors an environment where private parties can trade with each other to move property to higher-valued uses. The information costs to transact in property are lower when what can be owned is standardized. Thus, some of the cases have judges declaring a property interest as "repugnant to the fee" – one way to understand this is to say that the judge does not want to endorse a non-standardized interest. To say it differently, courts or other law-makers should be careful to not increase information costs by creating idiosyncratic or novel property interests.

These insights also relate to restrains on alienation. A restraint on alienation severs control over conveyancing of property from the person currently in possession and making use of it. This severing inhibits the otherwise beneficial effect of bundling control with possession: internalizing externalities with use and possession of the property. If I have no restraint on alienation, my use and possession rights allow me to invest in the property and develop it with the possibility of a sale to reap rewards from that effort.

The prior two paragraphs derive in part from the discussion on pages 366-67.

The casebook asserts on page 453 that the law of co-tenancy "generally regulates relationships between intimates" whereas "landlord-tenant is very different [-] [i]t is the law of strangers." How are these two statements reflected in the default doctrines in each area of property law?