

949604

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Institution **Harvard Law School**
Course / Session **S21 Fisher Property**
Extegrity Exam4 > 20.11.23.0

Exam Mode **TAKEHOME**
Section **All** Page **1** of **21**

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Event **NA**

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Exam ID **949604**

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	0	0	0
Section 2	999	4447	5430
Section 3	279	1279	1555
Section 4	500	2181	2676
Section 5	200	958	1158
Section 6	1999	10963	13005
Total	3977	19828	23824

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Section **All** Page **2** of **21**

Answer-to-Question- _1a_

Existing property interests

To determine the legal rights of each party, I start with P and O's TE in the farm. A TE has a right to survivorship so when O died P received a FS in the farm.

P's Will

_____When P died, her (valid) will intended to give a FS in the farm and animals to T. T and S are married and living in CA under the community property regime (which does not encompass IL). Because T was given the farm (didn't work for it), it becomes separate property under the CP regime (if applicable); transfers in FS to T either way.

T's sale to D

T sold to D a FS in 20 acres of property and an affirmative appurtenant easement (to use the driveway on T's land). T also gives D the benefit of an affirmative RC/ES by promising to extend her driveway. As this is bestowed at the sale of the property, D is likely more interested in injunctive relief, so that is an affirmative ES.

T also, in her promise to keep her home for residential/farming purposes, created a restrictive RC/negative ES - it does not fit into the four narrow categories of negative easement. Here, too, D is probably more interested in injunctive relief (because he wants

the neighborhood to be bucolic) so this is likely a negative ES.

The fact that S did not participate in the sale is not important as T owns the property in FS (see above).

D's sale to E

D transferred a FS in house and land to E. Easements automatically transfer, so E also has an easement to use T's driveway.

For the benefit of the two ES's to be transferred from D to E, it must be in writing, T and D must have intended that they run, and (depending on the state) vertical privity and/or 'touch and concern' must be satisfied.

The affirmative ES concerning T's driveway likely does not run - it was not in writing and the parties did not express that they intended it to be enforced by purchasers. This interest is thus void.

The negative ES about keeping the grounds bucolic may run - it was in writing, T intended that it run, and there is vertical privity between D and E. Whether it 'touch and concerns' D's land is less clear and would depend on the approach used by courts in IL. However, if required, it is likely that it does not 'touch and concern' the land - whether T allows a business on her land does not necessarily have an impact on the quality of life on D's land. A judge could, however, rule that it 'touches and concerns' by looking to local customs of the rural area or public policy incentives to keep the area bucolic.

(note - if the two interests were instead considered RC's, the test would be more difficult and, depending on the the state, may require horizontal privity as well as 'touch and concern'. Horizontal privity *is* satisfied here because an easement was also transferred, so both parties have an interest in T's land)

T's will

_____T's (valid) will transfers a FS in the property to S.

Whether the burden of T's negative ES (to keep the property bucolic) transfers to S follows much the same analysis as above, but also requires that S was notified of the servitude. This is unclear - we know that S did not take part in the negotiating but likely T showed him the written promise. Burden transferring also requires that the burden 'touch and concern' T's land - this is satisfied because restrictions on the use of land certainly touches.

(Note: if the interest were a RC, it would require horizontal and vertical privity - which are both satisfied in this case. It would also require that the burden 'touch and concern' T's land - which is satisfied)

Possible legal claims - S and E

E's right to come on land

Prescriptive easement: E started walking on S's parcel in 2004, 16 years ago. Whether she has a prescriptive easement depends on the test in IL. Her use was not permissive so she has hostility & claim of right, she fished 'often' so may satisfy actual use. Unclear if she has 'open and notorious use' (depending on how easily S could see her). It also depends on the statutory period - which could be 5-30 years.

Trespass: If E has not satisfied prescriptive easement, S has a valid trespass claim.

S's school

Effect of ES: Whether E can bring an injunctive claim against S for violating the restrictive ES (in operating a school) depends on whether the benefit transferred from D to E and the burden from T to S (see above).

Nuisance: E can bring a nuisance claim: this is a private intentional nuisance. Under the *Middlesex* factors, 1) nature of defendant's activity may weigh in E's favor, as operating schools w/o health measures during COVID is frowned-upon. 2) may also weigh in E's favor as the school produces odor, flies, and may decrease her property value. 3) the severity of the harm is unclear, and depends on how close the children are/how severe the odors are. 4) expediency weighs in S's favor as he is making most productive use of his land. 5) localized usage will weigh in S's favor as the area is normally used for farming and the school is very small. 6) does not apply. E may also say that S's actions violate the *spite fence doctrine* as he is painting the barn and locating manure near the property line to annoy her.

Zoning: Local aesthetic zoning may prohibit Sam's painting of the barn, but as we are in rural IL this is very unlikely.

Fishing rights

It is unclear what state or national statutes govern the rights to fish in IL. As common law property regimes govern only water use, E's best claim is under a statutory framework.

Answer-to-Question-__1b__

S and F have entered into a Term of Years. Even though S attempted to rent the apartment under a caveat lessee condition (by saying 'as is'), it is impossible under US law to disclaim the implied warranty of habitability (IWH). It is also illegal for S to include in the lease that he will not maintain the premises.

The conditions in December-March are dire enough to make S in violation of the IWH - spaces need proper heating and working toilet to be habitable. F has the right to withhold rent (dependent covenant) until S fixes the temperature and toilet, or pay for fixes himself and deduct them from rent (*Hilder*). If S continues to refuse, F may also be entitled to punitive damages.

S may attempt to evict F (though he would be, morally and legally, in the wrong to do so). That process, which could be complete in as little as 37 days, would start with S giving notice of eviction, filing a complaint, and having hearing dates. F, however, has the right at any point to pause this process to present evidence (about conditions in the apartment, for example) and request a jury trial. At a trial, F will likely win. However, his ability to get damages and recourse from S is dependent on his knowledge of his legal rights, ability to secure competent counsel, and ability to show up at several hearing/trial dates which may (in rural IL) require a sizable commute.

For his next tenant, S may (if he so chooses) apply discriminatory practices without being in derogation of FHA §3606(b)(2), as he is operating what is akin to a small boarding house.

Answer-to-Question- _1c__

Interests created by the will

T's will creates a LE in S. It then creates alternate CRMs in Q and R (condition: graduate from arts program) and in all unborn descendants (conditions: be born, graduate from arts program). If S dies before any descendant graduates from an arts program, the interest will revert back to T for a period of years before it vests (like a SpEI). There is a possibility of total intestacy if R and Q die without descendants, or if no descendant ever graduates from a fine arts program.

RAP: However, the second clause of the will does not satisfy the rule against perpetuities. R may fail to graduate arts school, and the first descendant to graduate may be R's great-grandchild, who does so many years after SRQ's deaths (lives in being). Thus, courts will strike out the provision after 'then,' and S will get a LE, with the RM to pass in intestacy.

As R and Q are T's only heirs, they will get the RM and then the property in FS upon S's death. They will hold it in a Tenancy in Common (the default rule).

Claims against S

Waste: R and Q may have a case against S's actions in Waste, as S holds only a LE. The US doctrine of waste allows for 'meliorative waste' if the conditions of the

neighborhood have changed (*Melms*).

R cannot use waste doctrine to protests against S's increasing use of the property as a farm, as the property was originally a farm and T and S kept animals together and S is bringing economic improvement to the farm. She may have a waste claim against S's cutting down of tree (although lessened if a court determines this was necessary for the meliorative waste of greater farming), painting of the barn in garish colors, and letting the house fall into disrepair. She may also have a claim against S using the property as a school (or hosting tenants, if the facts from (b) exist in this universe), but that is less likely to succeed because those ventures have no lasting effect on the land that would change R's enjoyment of the property.

Limits: As R and Q hold the interest in equal parts, it will be hard for R to bring suit against S if Q does not agree. It is unclear how a court may attack this issue - they may allow R to sue as one half of a TC (possibly getting half the damages her and Q would be entitled to?) or require that she buy out Q's future interest before commencing a suit. Per IL law, future interests do not pass inter vivos, but it is unknown if that would also affect R's attempts to obtain Q's future interest.

Effect on E

E's claims against S for nuisance would not change, but she could not as easily secure an RC/ES/easement from S. Any interest that he transfers to her will expire with his LE.

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Exam Mode **TAKEHOME**
Section **All** Page **12** of **21**

Answer-to-Question- _1d__

IL is part of the states which have a version of Riparian rights, so that water law regime will apply. Each landowner with water on their property has a right to use a reasonable amount (*Merriweather*). In times of scarcity, each party has total right to 'natural uses' which are necessary to survive and must share 'artificial uses' (everything beyond that). In this case, neither neighbor are using the water for drinking/hygiene. Certainly, E's swimming pool is an 'artificial use,' as is her right to fish because she does not eat the fish. S's agriculture is likely also an artificial use, as he uses his cattle and hayfield to teach students and not for personal subsidence. Per *Merriweather*, S does not have a right to use up the water for artificial uses. How a court decides how to split the water for artificial uses between neighbors may depend on a variety of factors and regimes of fairness, including local custom (which may even consider agriculture a 'natural use'). If there is a strong culture of fishing or laws protecting smallmouth bass, however, a court will likely order that S retains enough water in the creek to keep the fish alive.

Answer-to-Question- 2a

“[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.” - J. Marshall, *Johnson v.*

M’Intosh

From the dawn of European society in America, those in power have leapt forward in the name of progress: a race towards development that has necessarily left segments of society trampled underfoot. This underclass was first the Native Americans, whose land was conquered through bloodshed and genocide. As John Gast’s resplendent *American Progress* shines a light over the territory, bringing light and industry, she chases away those things that were ‘undesirable’ and ‘un-American’ - the non-Europeans who called that land home. As America gained independence and developed a system of laws, this value on economic progress and disregard for human life was codified into the legal code. Humans were bestowed ownership rights in enslaved people, whom the upper classes subjected to unimaginable horrors (*Mann*). In industry, priority was given for generations to those who created economic value, despite the environmental harms that were spewed out from factories and plants (*cf. Boomer*).

This American heritage has culminated in our current society - deeply unequal with pervasive inequalities between races and between the rich and poor. Nowhere is the legacy of centuries of discrimination more evident than in housing: in any major US city, maps color-coded by highest with home value or prestige of public schools will

correspond almost 1:1 onto demographic maps of white residents (*Rothstein*). The neighborhoods where we are born determines the quality of public education we receive, the cleanliness of the air we breath and water we drink, the likelihood that we will be stopped for the police for petty offenses, and are better predictors of future income than race or parents' educational background. Home ownership is the most important way that middle class American families build generational wealth, and, conversely, being born into a low-income neighborhood with gang activity, widespread drug use, and lack of public facilities and job opportunities is a major reason that people get sucked into the school-to-prison pipelines and lives as disenfranchised former felons (*See Alexander, The New Jim Crow*).

With the 14th Amendment and laws prohibiting discrimination, housing segregation is no longer *de jure*, it is *de facto*. But, for centuries, discrimination has been *de jure*, mandated by redlining policies and the effective exclusion of non-white Americans from programs such as the G.I. bill's mortgage assistance. Middle- and upper-class Black neighborhoods in cities like Baltimore and New Orleans have been bulldozed to make way for interstates. Government at every level has had a hand in creating the unequal environment that we now live in, and for our legal system to assume that all citizens of the world are starting from 'baseline 0' in the present and it's just chance that some happen to be billionaires, or impoverished, or drinking lead-filled water, is a moral derogation of duty.

Mitigating housing discrimination will not fix racial inequality in America, but it is a worthy place to start. In doing so, I adopt a distributive justice framework, within the fairness theories of law. I propose a twofold approach to our current legal landscape that has created and entrenched *de facto* racial segregation: first, an overhaul (effectively a

gutting) of exclusionary zoning laws. Secondly, modifications to the procedure surrounding federal anti-discrimination laws to ensure their continued effectiveness.

I. A distributive justice response to exclusionary zoning laws

A. Distributive justice is the optimal framework of property law through which to rectify residential segregation

Distributive justice is a framework of law that takes into account the allocation of resources among individuals and classes. It promotes regimes where ‘who gets what’ is considered as part of deciding a legal outcome, with the answer to that question governed by ideas of fairness and corrective justice. Instead of measuring ideal outcomes by economic efficiency or rewarding labor, distributive justice considers the overall effects of those policies in society, and modifies the law to create outcomes that encourage justice and equity among citizens. In a distributive justice framework, laws governing housing policy must take into account the racist roots of past discrimination and illegal takings that have persisted throughout American history. Governed by any other major theory of property law, the existing legal landscape of exclusionary zoning laws will only exacerbate discrimination and *de facto* segregation. Cohen argues that property ownership is equal to sovereign power - and we see that in modern America the classes shut out from home ownership have lesser bargaining power in our legal system overall.

Utilitarian law and economics, the predominant framework in much of American law for the past several decades, has allowed *de facto* segregation and racial disparities to expand. Law and Economics values the total size of the pie as evidenced through Pareto optimization, but not the distribution or ‘taste of the pie’ (*Hanson*). The Coase theorem ignores the many externalities in law and the fact that disadvantages parties (because of,

for instance, past discrimination) often have high transaction costs to contracting or are unable to pay for resources that they dearly desire. Kaldor-Hicks Efficiency, as applied to modern day America, has created a situation wherein it is viewed as a net positive for the US economy that the net worths of billionaires grew during the COVID pandemic while millions of Americans lost their jobs or went hungry.

A Lockean labor-desert theory of law is fundamentally at odds with modern American capitalism. Locke's labor theory allocates resources and wealth as the result of mixing oneself with the land to create productive purpose. But, in modern-day America, millions of low-wage workers slave away as warehouse workers or retail employees, with the fruits of their labor going to the shareholder class, who reap the benefits of Amazon or McDonalds' profits (*cf. Marx*). These workers, despite the backbreaking nature of their labor, are often shut out of the housing market, while landlords and descendants of property owners increase their wealth and equity through home ownership without equivalent expenditures of effort. Like the San or the Kalina of French Guiana, the fruits of their labor are coopted without just payment. Locke's spoilage and sufficiency provisos are also not consistent with the realities of the current housing market, as pictures of the Gates' *Xanadu 2.0* megamansion show. Obligations of charity are also often-ignored under the Lockean theory, or represent a fraction of the charitable givings necessary to right societal wrongs.

B. Distributive justice necessitates that much of the current regime of exclusionary zoning is eliminated

State statutes should, in the vast majority of cases, prohibit exclusionary zoning.

While there are, at least in the ideal, certain advantages to suburban life (*Belle Terre, Euclid*), those pictures of idyllic suburbia are intrinsically tied up with past racial discrimination in housing. Lot size restrictions and single family home requirements, perpetuated through exclusionary zoning, have created insurmountable obstacles for many Americans to obtaining home ownership in the suburbs.

In Hohfeld's taxonomy, 8 distinct entitlements comprise the building blocks of entire fields of law. I propose that, in the abstract, all Americans should be given a **right** to safe, affordable housing in a neighborhood with adequate public works (clean air, water, public transit, broadband, etc). More specifically, I argue that landowners should have a **privilege** to build low-income housing (including high-rises and multi-family dwellings) on any plot of land that they own. Conversely, municipal, state, and federal governments would have a **duty** to ensure that citizens' neighborhoods are affordable (by rent stabilization measures or otherwise), safe (through police reform or abolition), and supplied with essential services. Home owners associations and zoning boards would have a **no-right** to stop construction of affordable housing or to forbid sale to those who plan to construct such housing. This would, in effect, dismantle much of the current regime of exclusionary zoning (though I would maintain zoning restrictions against large-scale industrial buildings and historic preservation zoning for cultural value). The result would be a more blended America - with high-rise buildings perhaps springing up on 5-acre lots in Harvard, MA - but ultimately a more inclusive and just one.

Protecting home values is not a valid reason to maintain regimes of exclusionary zoning. As home equity rests with largely white and middle- to upper-class Americans, a regime of distributive justice requires balancing the loss that property value would represent to these Americans with the gain of inclusion of minority and working-class

Americans. Moreover, the fact that exclusionary residential zoning would be simultaneously outlawed everywhere in the country would, in effect, level the playing field. Home values for single-family homes may, at least at first, *rise*, as developers have the option of turning single lots into condos or apartment buildings.

II. Ensuring the robust application of existing laws governing housing discrimination

While some have argued that this problem also warrants a revival of the laws prohibiting racial discrimination in housing, I argue that those laws do not need modification so much as entrenching. Our current regime of anti-discriminatory housing law operates at the federal level with the FHA and the 14th Amendment's equal protection clause. The FHA creates a system akin to a regime of private law (wherein it is the responsibility of the government to proactively respond to and investigate all complaints of discrimination). I argue that this system is the best-suited to promote goals of distributive justice - it does not put the onus on the individual to find a lawyer and defend their rights in court (as with the ineffective IWH regime).

Instead, I would modify the procedures surrounding the FHA to make sure it is operating 'with teeth.' As HUD is an agency under the control of the executive branch, the degree to which it enforces its policies can vary with administrations (Trump, for instance, used the FHA much less than Obama). I would propose amendments to the FHA and to HUD's enacting statutes that gave it a greater degree of independence from the executive branch, instituting benchmarks through which Congress and the public could monitor its progress and effectiveness, and mandating reports back to congress on the extent to which complaints are being investigated and resolved.

Additionally, I would make amendments to the FHA to make sure that it is able to respond to novel problems of discrimination brought about by new technology.

Algorithmic discrimination, though understood by only a small segment of the population, has the potential to be a serious and pervasive problem as our systems grow more and more dependent on machine learning. Tech giants like Facebook and Google who control a huge majority of the advertisements that the average American sees must be forced to amend their own code to an extent where they can prove to the courts and to HUD that it no longer produces discriminatory outcomes.

These policies, while not originally adopted under a regime of distributive justice, fit the aims of that theory of property law. Through the 14th amendment, which forbids state action that treats citizens differently on account of their race (*Shelley v. Kramer*), citizens are ensured protection against government discrimination. And through robust enforcement of the FHA, citizens are given even greater protections against private or commercial discriminations in housing. Although anti-discrimination regimes take no affirmative steps to reallocate resources (as is necessary in a distributive justice regime), they play an important role in assuring that openly discriminatory practices are not allowed to continue.

The American race towards progress, starting with manifest destiny and culminating with our obsession with free-market capitalism and shareholder gains, has left a wave of discrimination and disenfranchisement in its wake. While the federal government has an important role to play to protect vulnerable Americans and promote distributive justice, the impact of local policies is often just as important. By outlawing residential exclusionary zoning and strengthening federal anti-discrimination laws,

America can atone for the discriminatory policies of its past and decrease the incidents of *de facto* residential segregation.