**Approach to solving estate problems:**

1. Pay careful attention to the ***exact language*** used in the grant
2. Read and analyze the interests in a grant ***in sequence***.
3. Classify the present estate (*some future interests can only follow particular type of present interest*)
   1. Check to see if O has conveyed all she had. If not then there is a reversion in O.
4. Look at who has the future interest (*grantor vs. third party*)
5. Think about how the future interest will become possessory (*natural termination of or divest preceding estate*)
6. Determine whether the interest is vested or contingent
   1. Classify each interest in sequence by looking at the “words between the commas” setting off the interests.
      1. Distinguish between condition precedent, which comes “between the commas,” and condition subsequent, which divests a vested interest.
7. Apply the following rules to contingent interests
   1. The Rule in Shelley’s Case;
   2. The Doctrine of Worthier Title; and
   3. The Rule Against Perpetuities.

OUTLINE SUMMARY

1. **Acquisition of Property**
   1. **Discovery** 🡪 fedgov exclusive rt to extinguish Indian title of occupancy by purchase or conquest (Mc’Intosh)
   2. **Capture** 🡪 person who first captures resources is entitled to the resources
      1. Pierson 🡪 capture/occupancy is required; mere pursuit is not enough (later decisions overrule logic?)
      2. Ghen 🡪 securer gains possession when all that is practicable is done; trade usage standard
      3. Keeble 🡪 person who does not want to capture the animal cannot interfere; constructive possession
         1. *Rationale soli* 🡪 landowner has constructive possession of wild animals on his land
         2. U.S. says landowner owns no rights in wild animals on the land (but trespass action possible)
      4. Rule of increase 🡪 offspring of animals belong to the owner of the mother
      5. Rationale: promotes competition—rewards success; ease of administration; encourages killing of wild
   3. **Creation**
      1. Rule of accession 🡪 title is awarded to laborer if improvement was made in good faith and laborer is obligated to compensate the original owner for the value of the property in unimproved condition
         1. CL 🡪 landowner has right to force improver to remove the encroachment
      2. Copycats 🡪 CL allows copying and imitation in the absence of any statutory right (Cheney Brothers)
         1. Int’l News Srv. 🡪 labor + invest. protect from unfair competition (quasi-prop inter. in news)
         2. Smith 🡪 Allowing copycats to free ride serves important public interest by lowering prices
      3. Property in one’s persona 🡪 celebrity’s right of publicity is an assignable property interest
      4. Property in one’s person 🡪 Moore held one did not have a property right in his organ following its removal from his body by doctors who made it into a commercially valuable product line
      5. Right to exclude 🡪 Shack held landowner’s right to exclude is limited when the right harms others
   4. **Find** 🡪 True owner prevails over possessor prevails over subsequent possessor
      1. What constitutes possession? Finder must discover, acquire control, and intend to assume dominion
      2. Rationale 🡪 protect expectations & owners w/o title papers; peaceable; rewards honesty & labor
      3. Lost 🡪 finder entitled to possession against all the world except the true owner
         1. EXCEPTION 🡪 if finder is a trespasser, employee, guest, or licensee, or if property found in highly private locus or buried, owner of locus gets possessory rights
      4. Mislaid 🡪 owner of premises entitled to possession against all the world except the true owner
      5. Abandoned 🡪 Finder obtains possession and title if he exercises control over the property + intent
      6. NY has abolished the distinction between lost, mislaid, and abandoned property 🡪 all treated as lost
      7. Bailor (owner) v. bailee (possessor) 🡪 modern trend towards ordinary care under all circumstances
         1. Bailment for the sole benefit of bailee 🡪 extraordinary care required
         2. Bailment for mutual benefit 🡪 ordinary care; negligence
         3. Bailment for the sole benefit of bailor 🡪 slight care; gross negligence
   5. **Adverse Possession** (COACH)
      1. Continuous for statute of limitations 🡪 tacking requires privity; seasonal use ok if consistent w/land
      2. Open and notorious possession 🡪 acts appropriate to the land to give reasonable notice to owner
         1. In NY, if claimant does not have color of title, then adverse possessor must protect the land by a “substantial enclosure” or “cultivate or improve” the land (Lutz)
      3. Actual entry giving exclusive possession 🡪 multiple people can act in concert; exclusive against all
      4. Adverse/hostile + under claim of right 🡪 3 states of mind (objective, good-faith, bad-faith)
      5. Rationale 🡪 protect title, bar stale claims, reward labor; honor expectations
         1. Holmes’ *diminishing marginal utility of income* says recognizing AP’s right will raise his well-being considerably while giving the property to the original owner will have little effect.
      6. Extent of land acquired by adverse possession
         1. w/o color of title 🡪 claim extends only to actually occupied or controlled premises
         2. w/color of title 🡪 if good faith and owner has *adequate notice* then claim extends to all
      7. Rules for boundary disputes 🡪 Mannillo case followed NJ view
         1. Majority view (obj test) 🡪 possessor has claim of right if appears to be claim of ownership
         2. Maine doctr. 🡪 adversity is missing if poss would not have occupied land if aware of mistake
         3. NJ (similar to obj) 🡪 no claim if minimal encroachment insufficient to put owner on notice
      8. Adverse possession of chattels
         1. CL (thief friendly rule) 🡪 Statute of limitations starts running when the painting is stolen
         2. Discovery rule 🡪 SofL will not run if the owner diligently seeks recovery of the chattel, but cannot find it *or* discover the identity of the possessor
         3. NY rule 🡪 SofL will not run until owner knows who has the chattel and makes a demand for return of the chattel that is rejected
   6. **Gift** 🡪 intent to pass title; delivery (actual, constructive, symbolic); acceptance (presumed)
      1. Gift inter vivos 🡪 gift made during the donor’s life is irrevocable
      2. Gift causa mortis 🡪 gift made in contemplation of immediately approaching death is revocable
2. **Estates**
   1. **Present possessory estates**
      1. Condition precedent 🡪 while; during; until; so long as
      2. Condition subsequent 🡪 provided that; but if; however; on condition that
   2. **Future interests held by transferor**
      1. CL 🡪 possibility of reverter and right of entry were not transferable b/c only mere possibility
      2. Modern 🡪 all future interests are freely transferable and reachable by creditors
   3. **Future interests held by transferee**
      1. O to A for life, then to B and his heirs, but if A dies w/o children, to C and her heirs
         1. A = LE; B = VRSD(fsa); C = EI(fsa)
         2. Reason B has VRSD is b/c B’s VR is subject to A dying w/children, which means B and his heirs may or may not even gain actual possession of land after A dies. Once B does gain possession then there is no condition and B and his heirs hold it in FSA
      2. O to A for life, then to B and his heirs, but if B uses the land for commercial purposes, to C
         1. A = LE; B = VR(fssel); C = EI(fsa)
         2. Reason B has VR is b/c B’s VR is subject to a condition that cannot happen until after B and his heirs gain possession. Once B does gain possession then it is still subject to a condition that can be divested by C so B holds it in FSSEL
      3. O to A for life, then to B, but if B dies before A, to C = O to A for life, then to B for life, then to C
         1. A = LE; B = VRSD(fsa); C = CR(fsa)
   4. **Rules furthering marketability**
      1. Void and cross out future interests if there is a complete restraint on marriage
      2. Rule Against Perpetuities 🡪 no interest is good unless it must vest or terminate not later than 21 years after some life in being at the creation of the interest
         1. Class gift not vested until class is closed and all conditions satisfied for all members w/21 yrs
         2. Heirs and widows are not ascertained until grantor’s death
      3. Doctrine of Worthier Title 🡪 “to A for life, then *to my heirs*” 🡪 A = LE, O = reversion
      4. Rule in Shelley’s Case 🡪 “to A for life, then *to A’s heirs*” 🡪 A = LE + VR(fsa) = FSA (after merger)
   5. **Waste and Eminent Domain**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Reversion | Poss. of reverter | Right of entry | VR | CR | EI |
| Can enjoin waste? | Yes + damages | Only for reckless actions | | Yes | Little protection | |
| Can share in eminent domain award? | Yes | Questionable (but yes in Ink) | | Yes | Most | |

1. **Co-ownership and marital interests**
   1. Common law concurrent interests
      1. **Tenancy in common** 🡪 each holds undivided, fractional share and entitled to possession of whole
         1. Freely transferable, devisable, inheritable
      2. **Joint tenancy** 🡪 RofS; mortgage doesn’t survive mortgager; avoid probate; severed by conveyance
         1. 4 required unities
            1. Title acquired at the same time
            2. Title acquired by the same deed or will, or by joint adverse possession
            3. Each interest is identical in size, and
            4. Each tenant has to have equal right to possession of the whole parcel
         2. CL 🡪 must use strawman if owner wanted to create JT by conveying to herself and others
      3. **Tenancy by the entirety** 🡪 RofS; only terminated by divorce, death, agreement of both spouses
         1. Requires all 4 unities + unity of marriage
      4. Ouster 🡪 cotenant must physically bar other cotenant from entry
      5. Each cotenant entitled to pro rata share of rents paid by 3rd parties and profits from the land
      6. Cotenants are not individually liable for cost of repairs or improvements but are obligated to pay tax
      7. Termination of tenancy in common or joint tenancy
         1. Partition in kind (favored remedy) 🡪 physical division of the land
         2. Partition by sale 🡪 division of proceeds from the judicial sale of the land
   2. Marital interests
      1. **CL (coverture)** 🡪 W dependent on H; H holds LE in all lands but W holds title to her lands; upon divorce, property divided according to who held title + alimony if W is blameless
         1. Dower 🡪 surviving son is sole heir but W gets LE in 1/3 of H’s qualifying real property
         2. Curtesy 🡪 H gets LE in all W’s lands
      2. **English** 🡪 property owned by spouse who acquires it before and during marriage (unfair to housewife); spouse not liable to creditors for non-marital debts incurred by the other spouse
         1. Upon divorce, property to be divided according to *equitable distribution*
            1. Equal division 🡪 all property owned by spouses regardless of time and manner
            2. Equitable division 🡪 only “marital property”
         2. Is educational degrees/professional licenses marital property?
            1. Majority 🡪 no, degree has no exchangeable value and cannot be willed
            2. NY 🡪 yes, view marriage as an economic partnership and reward joint efforts
            3. Alternative 🡪 award reimbursement alimony to compensate for spouse’s sacrifice
         3. Upon death, W can abide by will or choose to take an *elective share* of all H’s property
      3. **Community property** (earnings and all proceeds of either spouse during marriage) v. separate property (acquired before marriage or during marriage through gift, devise, bequest, or descent)
         1. Each spouse owns a one-half undivided interest in all community property
         2. Separate property is the sole property of the owner spouse
2. **Landlord-tenant law**
   1. **Leaseholds/Nonfreehold estates**
      1. Term of years 🡪 period fixed in advance or computed using formula; automatically expires
      2. Periodic tenancy 🡪 automatic renewal for successive periods until one party gives notice
      3. Tenancy at will 🡪 no fixed period but may be terminable by either party; not assignable
      4. Tenancy at sufferance 🡪 arises from holdover; L can evict or treat as periodic tenant
   2. **Lease** 🡪 both a conveyance and a K
      1. L’s duty to deliver possession
         1. Majority/English 🡪 every lease has implied covenant that L will deliver actual possession
         2. Minority/American 🡪 L need only deliver the legal right to possession
      2. Assignment v. sublease (use objective test to ascertain the intention of the parties)
         1. Assignment 🡪 transfers entire remaining term; L can sue both assignor (K) and assignee (E)
         2. Sublease 🡪 transfers only part of remaining term; no privity between L and sublessee
         3. 3rd-party beneficiary 🡪 expressly assuming covenants of master lease creates liability
      3. Can L arbitrarily withhold consent to an assignment if lease has an approval clause?
         1. Majority 🡪 yes, but can be avoided w/estoppel; parties should bargain for reasonable consent
         2. Minority 🡪 no, must have commercially reasonable objection (duty to mitigate; good faith)
      4. What are L’s options if he believes T has defaulted on the lease?
         1. CL 🡪 seizure of T’s chattels; peaceful self-help or reasonable use of force
         2. Modern 🡪 eviction through summary proceedings; rent acceleration; security deposit
      5. Is L obligated to mitigate damages when T abandons possession?
         1. CL (property) 🡪 no duty but if L does relet for higher rent then original T entitled to windfall
         2. Modern (K) 🡪 every K has implied duty to mitigate (reasonable diligence); more efficient
      6. What rights does T have to ensure their use and enjoyment of the premises?
         1. Covenant of quiet enjoyment implied in every lease
            1. Actual eviction 🡪 T physically evicted from entire or portion of leased premises
            2. Constructive eviction 🡪 L at fault for substantial interference; T must give notice and reasonable time for L to fix before vacating
      7. What duties do L have in making sure the premises are habitable?
         1. CL 🡪 Doctrine of caveat lessee = “let the tenant beware” (commercial leases)
         2. Implied warranty of habitability 🡪 T must give notice and reasonable time for repairs
            1. Remedies 🡪 withhold rent; sue for damages; repair and deduct cost; terminate lease
      8. T has duty not to commit waste 🡪 change affects substantial portion of premises
      9. Rent control and the problem of affordable housing
   3. **Selection of tenants**
      1. CL 🡪 no restrictions on L’s freedom in selecting and evicting Ts
      2. FHA 🡪 bars racial, ethnic, religion, national origin, sex, disability, persons w/children
   4. **Crabgrass frontier**
      1. Govt’s long-term low-interest mortgage benefited white, middle-class moving to suburbs
         1. Effect was the abandonment of industrial cities and approval of racial/ethnic discrimination
      2. Use of govt funds for building permanent low-income housing in the poorest parts of central cities
         1. Effect was to segregate races + create divide btw poor inner cities and the refuge of suburbia
3. **Land use controls**
   1. **Private nuisance** 🡪 *nontrespassory* invasion of another’s interest in private use and enjoyment of land
      1. P has possessory interest in the land,
      2. D committed affirmative act that interferes with P’s use and enjoyment of her property, and
      3. Interference in use and enjoyment is substantial and *unreasonable*.
         1. CL: threshold test; R2T: 1) harm outweighs utility; or 2) serious harm and D can afford pay
      4. Distinguish trespass 🡪 invasion of another’s interest in exclusive possession of land; damages differ
      5. Four remedies: enjoin D; P gets damages; enjoin D and give D damages; or refuse P any remedy
   2. **Types of servitudes**
      1. Easements 🡪 grant of an interest in land that one to use land possessed by another
      2. Real covenants/equitable servitudes 🡪 promise respecting use of land by one landowner to another
      3. Negative easements 🡪 right to restrict or control another’s property (i.e., blocking windows, air)
      4. Licenses 🡪 revocable permission to enter another’s property for a narrow purpose
      5. Profits 🡪 right to enter another’s land and remove something attached to the land
   3. **Easements**
      1. Creation
         1. Express conveyance 🡪 subject to Statute of Frauds (no reservation in 3rd party)
         2. Implication by prior use 🡪 O *severs* *property into 2 parcels* such that an already *existing, obvious, and continuous use* of one parcel is *reasonably* *necessary* for enjoyment of the other
         3. Implied by necessity 🡪 unity of title; necessity at time of severance and still present
         4. Prescription 🡪 open + notorious; continuous; adverse and under claim of right; exclusive use
            1. English view 🡪 lost grant theory presumes that grant was made but record was lost
         5. Estoppel 🡪 created when conduct of owner leads another to act in reliance on that belief
      2. Transferability
         1. Appurtenant 🡪 easement creates relation between two plots of land; runs w/dominant estate
         2. In gross 🡪 easement not attached to land; runs w/owner; freely assignable
      3. Scope 🡪 Turns on the intent of the parties
         1. CL: may adjust to incl. reasonably foreseeable use w/changing times to serve orig. purpose
         2. R2P: may evolve over time as manner, frequency, and intensity of use change
      4. Termination
         1. Unity of title 🡪 merger of dominant and servient estates
         2. Written instrument 🡪 owner releases easement to servient owner
         3. Abandonment 🡪 stops using for long time and takes actions that clearly manifest intent
         4. Prescription 🡪 servient owner wrongfully and physically prevents the easement
         5. Destruction of servient tenement
      5. Public Trust doctrine 🡪 land covered by tidal water belong to the sovereign but for public use
   4. **Real Covenants and Equitable Servitudes**
      1. Real Covenants 🡪 traditionally enforceable by damages; burden does not run to adverse possessors
         1. Only created by express conveyance; Statute of Frauds
         2. Burden and/or benefit to run 🡪 intent to bind successors, notice, t&c, vp, hp (only burden)
            1. VP requires succession to an estate of same duration (FSA granting LE🡪 no VP)
            2. HP requires original promisor and promisee have *mutual* or *successive* relationship

Landlord-tenant; grantor-grantee; present-future interests; easement

* + 1. Equitable Servitudes 🡪 traditionally enforceable by injunction
       1. Created by express conveyance (SofF) and implied for subdivisions w/general plan
       2. Burden and/or benefit to run 🡪 intent, notice, t&c
    2. Termination
       1. Changed conditions 🡪 substantial changes that intended benefits cannot be realized
       2. Too vague/ambiguous and impairs the alienability of the property
       3. Unity of title; abandonment; violative of FHA; unconstitutional (Equal Protection Clause)

1. **Zoning**
   1. **Distinguish from nuisances and covenants**
      1. Nuisance provide damages or injunction after injury, but zoning designed to prevent injury
      2. Covenants are good for subdivisions and single owner plots, but zoning provides centralized control
      3. Zoning also regulates uses to achieve public benefits and maximize property values
      4. *But* Jane Jacobs argues zoning is a source of new social ills like the rise of “car culture”
   2. **Nonconforming use**
      1. Amortization period 🡪 give owners reasonable time to change; spare them harm of “substantial loss”
      2. Existing uses are protected because they have vested right; privileges those who use their land
      3. Expected uses are not protected unless sufficient commitments have been made in reliance
      4. Right runs w/land 🡪 survives a change of ownership but destroyed by abandonment and destruction
   3. **Achieving flexibility in zoning**
      1. Variances 🡪 *unique* *practical difficulty* and *unnecessary hardship*; not self-created nor inconsistent with the overall purpose of the ordinance; and cannot be detrimental to the general welfare of the area
      2. Special exceptions 🡪 permitted use meets all conditions and not unreasonably harm public interest
      3. Zoning amendments 🡪 courts grant a lot of deference as long as not arbitrary and unreasonable
      4. Spot zoning invalid if one parcel get special treatment; no public interest; one owner benefits; no plan
         1. Reverse spot zoning 🡪 singling out parcel to the detriment of the owner (historic landmark)
      5. Contract and conditional zoning 🡪 agreement to make zoning amendment if owner abide conditions
      6. Floating zone 🡪 developer applies for rezoning to attach preapproved creation of new zoning district
      7. Plebiscites 🡪 direct vote by citizens on some public question like zoning
   4. **Expanding the aims in zoning**
      1. Aesthetic regulation 🡪 courts have upheld aesthetic regs that purportedly enhance quality of life
      2. Controls on household composition 🡪 FHA §3604 prohibits discrimination in all real-estate transact.
         1. Village of Belle Terre 🡪 ordinance defining family as <2 unrelated persons is constitutional
         2. Moore 🡪 ordinance defining family to exclude certain blood relatives is unconstitutional
         3. City of Edmonds 🡪 provis. defining family composit. subj. to FHA, but not max. occup restr.
      3. Exclusionary zoning 🡪 measures w/purpose or effect to close entire community to unwanted groups
         1. Mt. Laurel 🡪 state const. obligated city to provide fair share of need for affordable housing
      4. Inclusionary zoning 🡪 require a certain component of affordable housing in each housing develop.
         1. Greenpoint-Williamsburg Inclusionary Housing Program granted floor-area bonus
2. **Eminent Domain** 🡪 “Nor shall private property be taken for public use, without just compensation” (5th Amend)
   1. **What constitutes a “public use”?**
      1. Means test 🡪 asking “did the legislature address the need rationally?
         1. Meaningless post-Kelo 🡪 state legislature is primary source for construing def. of public use
      2. Ends test 🡪 “is this a valid public use”? narrow (public has right to use) v. broad (benefit public)
      3. Berman 🡪 blighted land condemned and resold to developer under urban renewal scheme
      4. Midkiff 🡪 land condemned to break up land ownership oligarchy and reestablish free market
      5. Poletown 🡪 land condemned and resold to corporation for building plant providing jobs
      6. Kelo 🡪 condemned land for comprehensive development *plan* providing jobs & tax revenue
   2. **When do government exercises of police power to regulate the use of property constitute a “taking”?**
      1. Hadacheck (ordinance ban brickyard in residential) 🡪 nuisance control regulations are never takings
      2. Loretto 🡪 permanent physical occupation authorized by govt is taking regardless of other factors
      3. Lucas 🡪 loss of *all* economically beneficial use unless justified through existing background principl
      4. Penn Coal 🡪 diminution-in-value standard (numerator; denominator; avg reciprocity of advant. to O)
      5. Penn Central 🡪 DIBE balancing (economic impact to O; degree to which the reg interferes with O’s distinct, investment-back expectations; character of the gov action) *Transferable development rights*
         1. Court said the focus should be on the uses *permitted*, NOT on the uses prohibited.
      6. Palazzolo 🡪 notice of regs that preexist acquisition of title is not absolute bar to takings challenge
      7. Nollan 🡪 must be an essential nexus between the exaction and a legitimate state interest that it serves
      8. Dolan 🡪 exaction must be roughly proportional to the negative impact of development on the public
   3. **What is “just compensation”?** Fair market value on the date of the taking based on the highest and best use

ACQUISITION OF PROPERTY

* **What is property?**
  + Legal definition of property includes 2 parts: (1) rights among people (2) that concern things.
  + Property as a bundle of rights: right to possess and use, exclude, and alienate (transfer).
  + Property is a system of rules governing access to and control of scarce material resources.
  + Property consists of real property (rights in land) and personal property (rights in chattels and intangibles)
* **Theories Justifying Private Property**
  + First-in-time / First Occupancy / First Possession [*see Discovery and Capture*]
    - Serves as a low-cost, quick, and clear method to resolve competing claims to property rights
    - Encourages the waste of natural resources because individuals act in their own self-interest
  + Labor theory [*see Creation*]
    - People are entitled to the property that is produced by their labor.
    - Critics observe the theory should permit a person to receive the value that his labor adds to a thing, not title to the thing itself.
  + Traditional Utilitarianism
    - Private property exists in order to maximize the overall happiness or “utility” of all citizens. So property rights are allocated in the manner that best promotes the general welfare of society.
    - Because it is impossible to measure happiness, this theory offers no guidance about how property rights should be allocated. However, the theory does point out that property rights will change as social, economic, or political conditions change.
  + Law and Economics Utilitarianism
    - Private property exists in order to maximize the overall wealth of society. Law enforces property rights in order to motivate individuals to utilize resources “efficiently” (maximize value).
    - Coases Theorem holds that property will eventually be devoted to its highest value use, regardless of how property rights are initially allocated, if no transaction costs exist.
    - Critics argue not all human desires can be quantified in dollars and even if they could be, this theory perpetuates the existing unequal distribution of wealth. Also, this theory presents profound moral questions on whether the allocation of resources is socially or ethically desirable.
    - Harold Demsetz in his article “Toward a theory of property rights,” points out that a primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. “Internalizing” refers to a process, usually a change in property rights, that enables the externalities to bear (in greater degree) on all interacting persons. Externalities arise from interactions or conflicts among people in the use of resources and lead to misuse or misallocation of these resources. Private property is the best way to conserve and allocate scarce resource because it has lower transaction costs and better internalizes externalities than communal property.

###### DISCOVERY

Based on Christianity and European civilization superiority

* **What happens to property in a disaster (i.e. Hurricane Katrina)?** 
  + Although the hurricane victim still owns property in the disaster area, the government has limited their property rights. For example, the police can prohibit residents from returning to their homes, order homes to be demolished, and exclude passage on certain streets. Trespass into stores to grab food is condoned out of necessity.
* **Johnson v. Mc’Intosh**
  + Two Native American tribes sold land to private buyers and part of this property was later conveyed by the federal government to D. The private buyers leased the tract to tenants P and P sued to eject D from the land.
  + Issue: Did Native Americans have the power to convey title that would be recognized by the federal courts?
  + Holding: Justice Marshall held that under the laws of the United States, only the federal government held title to the land before the conveyance to D, while the Native Americans merely held a “right of occupancy” that the federal government could extinguish.
  + Who owns North America and why?
    - Justice Marshall held that the Europeans discovered North America and the discovery gave full title to the British, who passed it to the United States after the Revolution. He held that there is international consensus on the doctrine of discovery—based on Christianity and European civilization superiority. Only nation states, not individuals, can utilize discovery.
    - Discovery gave the federal government the exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. Thus, Indian tribes cannot alienate their land except to the federal government.
* **Legal positivism v. Natural law theory**
  + Johnson v. Mc’Intosh and the Constitution illustrate legal positivism: property rights arise only through government.
  + Declaration of Independence illustrates natural law theory: rights arise in nature as a matter of fundamental justice, independent of government.
    - “unalienable Rights” of “Life, Liberty, and the Pursuit of Happiness” were endowed upon humans “by their Creator”; governments exist merely “to secure these rights.”

###### CAPTURE

*A person who first captures resources is entitled to the resources.*

***[capture is required; mere pursuit is not enough]***

* **Pierson v. Post** (1805)
  + Post was hunting a fox on unpossessed land. Pierson, knowing this, killed the fox himself and carried it off. Both parties agreed that property rights in wild animals were obtained only by occupancy, which is first possession. The issue is what amounts occupancy?
  + Pierson maintained that only killing or other capture of the animal constitutes occupancy. Post argued that a probable capture is sufficient “possession” to create ownership.
  + Majority adopted the actual capture test and ruled for Pierson. Actual capture awarded successful hunters, ensured certainty in property rights, and minimized quarrels.
  + Justice Livingston criticized the majority in failing to view the law as an instrument of social change. Since foxes damage farmland, we should encourage fox hunting by adopting the probable capture standard.
  + Justices misinterpret the Keeble court as upholding *ratione soli* when in fact the decision rested on the theory of malicious interference with trade. Had the Pierson court interpreted Keeble correctly, then it may have ruled in favor of Post. Does it matter that Post engaged in mere sport rather than a trade? Does it matter that Pierson captured the fox as opposed to just scaring it away?

***[custom may be recognized as giving possession; constructive occupancy]***

* **Ghen v. Rich** (1881)
  + Rich purchased a whale at auction from a man who found it on the beach. Whale was killed by the crew of Ghen’s ship which left an identifying lance in the whale.
  + Here, two major considerations modified the application of the capture rule from Pierson to this situation.
    - The court reasoned when all that is practicable in order to secure a wild animal is done, it becomes the property of the securer who has thus exercised sufficient personal control over the wild animal.
    - Trade usage said that whoever killed the whale is the owner. The finder of a killed whale should notify the town and whoever killed the whale would claim it and usually give the finder a fee.
    - Judge worried that unless he sustained the usage of whalers, “this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder.” Justice Livingston expressed the same concern with respect to fox hunting.

**[*Person who does not want to capture the animal cannot interfere; constructive possession*]**

* **Keeble v. Hickeringill** (1707)
  + P claimed D intentionally frightened ducks away from his pond resulting in damage. Court held D is liable for the damages because D maliciously interfered with P’s trade in killing ducks.
  + *Ratione soli* – view that an owner of land has constructive possession of wild animals on his land.
    - Early American courts viewed the rule as both undemocratic and inconsistent with the policies underlying the capture rule. Accordingly, in the United States a landowner generally owns no rights in wild animals on the land.
    - Trespass doctrine provides an American landowner with protection similar to *ratione soli*.
* **Rule of increase**
  + Offspring of animals belong to the owner of the mother.
* **Rationale for the Capture Rule**
  + Rule encourages the killing of wild animals for the benefit of society (utilitarianism).
    - Note that this is also the major criticism of the rule today. “It is no person’s interest to invest in increasing or maintaining the stock of game” (Harold Demsetz).
      * Overcapture of fish; endangered species
  + Promotes competition. Rule rewards success, not mere effort.
    - Encourage owner to invest time and energy in making the captured animal more useful to society.
  + Ease of administration. Efficient mechanism for resolving any disputes that do occur.
    - Creates a clear standard for determining ownership. Avoids disagreement and prevents quarrels.
* **Ray Brown,** **The Law of Personal Property**, pp.13-18
  + Acquisition of title by taking possession of goods having no former owner
    - If the taking of possession is lawful, the one who takes possession becomes in all respects the owner of what is taken. As seen in Pierson v. Post, the mere chase of wild animals does not give the chaser any rights in the animal.
      * If the captured animal escapes then the owner loses his property rights and they become the property of him who recaptures them. The title of the first owner is not lost if the animal periodically returns to his master’s domicile (*animus revertendi*). The general rule may be better if modified such that if the animal at the second taking is far from his native habitat and the first captor can reasonably identify the animal in question, his rights should be preferred over those of the second captor. Indeed, the second captor should have known something was amiss if he saw a polar bear roaming near the Mississippi river!
    - Opportunity to acquire title to a wild animal by taking possession may be affected by the owner of the real estate where the possession is taken and by regulations imposed by the state.
      * State has the power to regulate the taking of game under its police power, by which it prevents conduct harmful to the public. But if wild animals are lawfully captured and tamed, normally the animals would become the property of their keeper, with the state’s interest ended.
      * The landowner is considered to have special rights to the game found thereon. Even if a trespasser killed a wild animal on another’s land, the owner of that land also owns the animal. The policy is related to denying title to one who takes game unlawfully.
    - It is not necessary that the pursuer of a wild animal in all cases reduce the animal to his actual physical possession. When an animal has been mortally wounded so that actual possession is practically inevitable, a vested property interest in it accrues. This is regarded as constructive possession. Policy considerations:
      * Who was first to reduce the wild animal to the stock of the world’s usable goods?
      * Who best observed the custom of the hunt?
      * Whose effort to gain possession is most closely related to his livelihood?
      * What is the best way to avoid future quarrels?
* **Rule of Capture and Natural Resources**
  + Resources, like wild animals, have the power and the tendency to escape without the volition of the owner. Resources belong to the landowner and are part of the land, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone. Possession of the land is not necessarily possession of the gas. If an adjoining or distant owner drills his own land and taps your gas, so that it comes into his well, and under his control, it is no longer yours, but his.
    - Former owner might be able to win an injunction against excessive drilling or nonratable extraction.
    - Suppose A reinjects gas that moves under B’s land. B sues to recover damages for the use and occupation of her land by A’s gas. What result?
      * Lower court held A was not liable under the rule of capture; once reinjected the gas was not owned by A.
      * Appeals court overruled holding A is still the owner of the gas, but reinjection does not ordinarily give rise to liability for the use of parts of a reservoir underlying the lands of neighbors. To impose liability would deny society the benefits of economical underground storage.
  + Ground water (p.40)
    - English rule (rule of capture) said whoever first captured the water was really its owner.
    - American rule of reasonable use (modified rule of capture) said that *wasteful* uses of water, if they actually harmed neighbors, were considered unreasonable and hence unlawful.

Surface water

* + - Western states followed the prior appropriate rule (first in time) which said whoever first appropriates (captures) the water *and puts it to reasonable and beneficial use* has a right superior to later appropriators.

###### CREATION

* **Rule of accession** 
  + Title is awarded to the laborer if the improvement was made in good faith and the laborer is obligated to compensate the original owner for the value of the property in unimproved condition.
    - Where A, in good faith, adds labor to B’s raw material, B will usually get the final product unless A’s efforts have sufficiently increased its value to make it unfair to award the final product to B.
    - If A trespassed and it would be grossly unjust for B to appropriate A’s labor to himself, A will get compensation for his labor and B will get damages for A’s trespass.
* **Copycats**

***[Labor and investment protected from unfair competition]***

* + **Int’l News Service v. Associated Press** (1918)
    - Court held that a news agency has a quasi-property interest in news it has gathered and can prohibit competitors from disseminating the news until its commercial value as news has passed away.

***[Common law commonly allows copying and imitation]***

* + **Cheney Brothers v. Doris Silk Corp.** (1930)
    - P, unable to patent or copyright a garment pattern, sought damages for the copying thereof. Court held since P cannot obtain a patent or copyright on its pattern, it cannot recover for the copying of it by others.
    - Copying and the common law rule:
      * In the absence of some recognized right at common law, or under the statutes, a man’s property is limited to the chattels which embody his invention. Others may imitate these at their pleasure.”
  + **Smith v. Chanel** (1968)
    - Court held that a perfume company could claim in ads that its product was the equivalent of the more expensive Chanel No. 5 since Chanel No. 5 is unpatented.
    - By allowing the perfume company to take a “free ride”, the copyist serves an important public interest by offering comparable goods at lower prices. Even though Chanel may have created the brand at great effort and expense, it is outweighed by greater good for the public to get cheaper prices.
* **Cyberspace**
  + Cybersquatting is the Internet version of land grab. It is the practice of registering “well-known brand names as Internet domain names” in order to force the rightful owners of the marks “to pay for the right to engage in e-commerce under their own brand name.”
  + Virtual Works v. VW of America (2001)
    - Volkswagen challenged Virtual Work’s registration of vw.net under the Anticybersquatting Consumer Protection Act. In determining whether the ACPA has been violated, the inquiry is whether the D acted with bad faith intent to profit from the protected mark and whether D registered, trafficked in, or used a domain name that is identical or confusingly similar to a distinctive mark or identical, confusingly similar to, or dilutive of a famous mark.
  + Parasites are people who register domain names similar to well-known trademarks and then use them in ways that tarnish the marks’ image (i.e. adultsrus.com dilutes the Toys “R” Us trademark).
  + Poachers are people who register domain names that use the names of other organizations in order to disseminate unfavorable information about them (i.e. reporting anti-abortion material on Prochoiceresource.com).
* **Intellectual Property**
  + “If you create something—you are first in time—then that something is yours to exploit, because the foundation of proprietary rights is the expenditure of labour and money.”
  + Law attempts to balance two competing goals: (1) providing an incentive to invest time and resources in creative effort that produces new goods, and (2) encouraging competition to reduce prices.
  + Patents – for novel, useful, and non-obvious processes or products. They last for 20 years from the date of application, not renewable, thing enters public domain when they expire.
  + Copyrights – protect the expression of ideas in artistic works. Protection begins when the work is set down in a tangible medium and lasts until 70 years after the author’s death. Others may make fair use of the material during this time.
  + Trademarks – words and symbols indicating the source of a product or service. Owners of marks are protected against use of similar marks by others when such use would result in confusion. They arise out of the use of the mark in commercial activity and are lost when they are abandoned. Can also be lost in other ways, like when the mark becomes generic, like aspirin.
    - Common law = till abandonment or generic
    - Federal law = 10 years + renewable
* **Property in One’s Persona**
  + A celebrity’s right of publicity is a property interest assignable during life and descendible at death. This includes name, likeness, and other aspects of identity.
* **Property in One’s Person**
  + Moore v. Regents of the Univ. of CA (1990)
    - Court held that Moore did not have a property right in his spleen following its removal from his body by doctors who made it into a patented cell line of great commercial value. The doctors who created the cell line through their scientific work acquired original ownership.
    - Court gives three reasons for not creating a property right:
      * CA statute governing the disposition of human body parts following scientific use preempted the patient’s control over removed cells.
      * Policy – at odds with ethics, would stifle research.
      * Better suited for legislation
      * There is an alternative remedy (making hospitals get informed consent)
        + Court allows Moore to proceed with his breach of fiduciary duty claim.
        + Breach of fiduciary duty may be an inadequate relief because it would be difficult for P to prove a causal connection between his injury and the researcher’s failure to inform. Also, P must prove that in the same circumstances no reasonable prudent person would have given consent. Third, this relief does not reach those defendants who are outside the strict physician-patient relationship.
    - Concurring – recognition of property rights in one’s cells would
      * Necessarily entail a right to sell one’s own body tissue *for profit* and
      * Give rise to the grave difficulties in
        + the effect on human dignity of a marketplace in human body parts,
        + the impact on R&D of competitive bidding for such parts, and
        + the exposure of researchers to potential limitless and uncharted tort liability.
    - Dissent **-** To allow a person to economically benefit from the nonconsensual use of another’s tissue can be considered a modern version of slavery or indentured servitude. Moore retained one property right despite the CA statute—the right to do with his own tissue whatever the defendants did with it.
      * Property is a bundle of rights or relationships among people with respect to things, not just the right to *profit*. We can agree that Moore owns his own cells but prohibit alienability and this would still protect Moore through the cause of action for conversion. We can prohibit transfer of one’s tissue or organs for profit, but permit giving them as gifts.
* **The Right to Exclude**
  + Jacque v. Steenberg Homes (1997)
    - D delivered trailer across the P’s land w/o permission. Ps win and court concludes that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded.
  + State v. Shack (1971)
    - Ds entered private property to aid migrant farm workers. Under state law the ownership of real property does not include the right to bar access to governmental services available to migrant workers, so there was no trespass. The right to exclude has long been recognized as a basic right of landowners. Without this right, the property loses its value and owners would resort to self-help remedies. On the other hand, the right to exclude is not without limitations. It is limited in a number of ways including when the right to exclude harms others that you have allowed on your property. Carve out a migrant worker’s exception to the right to exclude. They are occupants of the land with a qualified right.

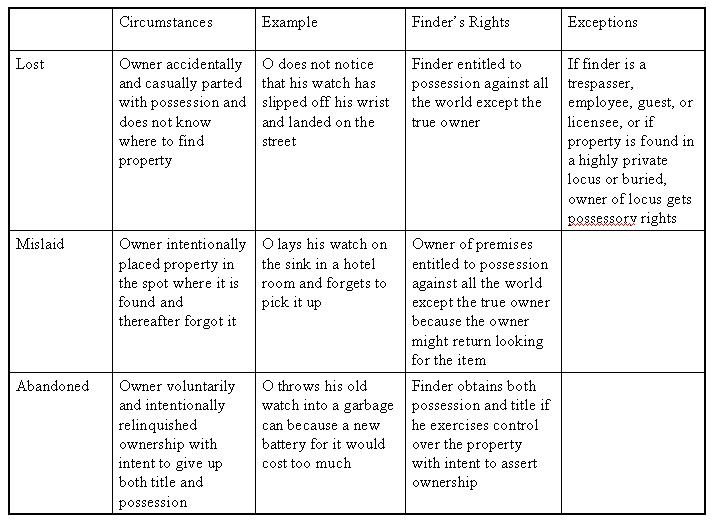
###### FIND

True Owner *prevails over* Possessor (e.g., Finder or even a thief) *prevails over* Subsequent Possessor

**What constitutes possession?** For the finder to become a prior possessor, the finder must have

1. discovered the whereabouts of the object,
2. acquired physical control over the object and
3. intended to assume dominion over it.

* **Rationale for the prior possessor wins rule:**
  + Prior possession protects an owner who has no indicia of ownership (i.e. title papers)
  + Entrusting goods to another is an efficient practice (i.e. bailment)
  + Prior possessors expect to prevail over subsequent possessors
  + Protection of peaceable possession is aimed at deterring disruptions in public order
  + Protecting a finder who reports the find rewards honesty
  + Protecting a finder rewards labor in returning a useful item to society
* **Factors that dominate the judicial analysis of finders’ rights:**
  + The identity of the competing claimants (i.e. employer-employee)
  + The location where the item is found (in soil? In public place? In private one?)
  + The presumed intent of the original owner.



\*\*\*NY has abolished the distinctions between lost, mislaid, and abandoned property. All such property is treated as lost property and goes to the finder.

* **Bailor v. Bailee**
  + Bailment transfers possession, not ownership. Requires bailee to assume *actual physical control* with the *intent to possess*.
  + Bailor is the owner and bailee becomes the possessor
  + Bailee’s duty of care depends on who benefits:
    - Bailment for the sole benefit of bailee 🡪 extraordinary care required
    - Bailment for mutual benefit of bailor and bailee 🡪 ordinary care; negligence
    - Bailment for sole benefit of bailor 🡪 slight care; gross negligence
    - \*\*\*There is a modern trend away from the above classifications and toward a rule requiring **ordinary care under all circumstances**.

Rights of Finders Against Third Persons Generally

*A finder has rights superior to everyone but the true owner*

* **Armory v. Delamirie** (1772)
  + P found a jewel, which he took to D, a goldsmith, for appraisal, but D’s apprentice removed the stones, which D refused to return. P sued for trover, basically an action for damages resulting from D’s conversion.
  + A finder of chattel has title superior to all but the rightful owner.
    - The rule allows a finder to return a “found” item to productive use, rather than encouraging the finder to keep it hidden.
    - Rule gives an efficient standard for determining ownership.
    - Result honors the reasonable expectations of the competing parties; goldsmith is the moral equivalent of a thief.
  + Note (p.110): Would it have made any difference if P had stolen the jewel before he took it to D? The hornbook rule says no; the finder, though committed a tort, still has superior title to all but the rightful owner. But others argue that the general rule is explicitly invoked only in support of honest claimants.

Rights of Finder Against Landowner

*Owner does not have constructive possession of objects he is unaware of if he has not moved in yet*

* **Hannah v. Peel** (1945)
  + P, a soldier, found a brooch at D’s home during WWII, and sought to recover it after police gave it to D.
  + Bridges v. Hawkesworth
    - P found parcel on floor in D’s shop. P asked D to keep it until the true owners came. 3 years went by and P wanted it back but D said no. Parcel was never in the custody of the D before they were found, thus, P has title superior to all but the rightful owner. No suggestion that the place the parcel was found mattered.
  + South Staffordshire Water Co. v. Sharman
    - P hired D to clean out mud and D found rings in the mud. D gave them to P. Possession of land means possession of everything that is on the land, whether you know it is there or not. D was P’s servant and thus his agent.
      * Rationale for this rule says such objects were already in the “constructive” possession of the landowner.
      * Vesting possession in the landowner will facilitate its return to the true owner.
      * Landowners would reasonably expect that they own objects within their house or under their land. Persons entering onto the land of another should have no expectation that the law will award them title to objects they find there.
  + Court held that although a man possesses everything, which is attached to or under his land, a man does not necessarily possess a thing, which is lying unattached on the surface of his land even though someone else does not possess the thing. Court ruled in favor of P.
    - Court distinguishes this case from Sharman in that the landowner D has never lived in the home and therefore never possessed the brooch.
    - P was a lawful tenant with broad rights to use and enjoy the land.
    - Brooch could have been left by a previous fellow soldier of P.
    - Brooch was covered with cobwebs and dirt indicating that the true owner will not come back.
  + Did Major Peel lose because he did not have prior possession, or did he not have prior possession because he lost? (pp. 117-8)
    - Major Peel did not have prior possession because he lost. We are not concerned with whether Major Peel had prior possession in determining whether he had a better claim to the lost jewel than the finder. By and large it seems to be more of balancing test.
  + Why if Major Peel had resided in the house before the first acquisition to the government. Would the result be different?
    - Sanctity of the home: occupier of a house will invariably own all lost property on the premises
  + What if the house had never been occupied and never requisitioned by the government. Hannah, while walking by the mansion entered by the unlocked front door and found the brooch?

*Rights to objects found in public places*

* **McAvoy v. Medina** (1866)
  + A wallet was inadvertently left at a barbershop, a customer P found it, and the barber D asserted ownership.
  + Court concluded the wallet had been mislaid and not lost; thus, arguably it was already in the barber’s “constructive possession” before its discovery. Wallet was awarded to the barber on the basis that this result would best ensure its return to the true owner. As a bailee, the barber was obligated to “use reasonable care for the safe keeping of the same until the owner should call for it.”

###### ADVERSE POSSESSION

COACH— *Continuous, open and notorious, actual entry giving exclusive possession, claim of right and hostile*

**Elements:**

* + - * 1. Actual entry giving exclusive possession
  1. Purpose of requirement is to trigger the cause of action for adverse possession
  2. Actual entry on part of the land may be deemed constructive possession of the rest
  3. Exclusive possession can be two or more persons acting in concert (i.e. tenants in common)
  4. Not sharing possession with the owner or the public

2. Open and notorious possession

* 1. Acts appropriate to the condition, size, and locality of the land to constitute reasonable notice to the owner of a claim of dominion
  2. In NY, if the claimant does not have color of title, then the adverse possessor must protect the land by

a “substantial enclosure” or “cultivate or improve” the land. [*see Lutz*]

3. Adverse/hostile and under a claim of right (or claim of title)

* 1. Without the owner’s consent
  2. Three different states of mind:
     1. State of mind is irrelevant – objective standard
        1. Held in England, where the SOL begins to run as soon as the true owner is disposed by someone taking possession inconsistent with – not subordinate to – his title.
        2. Once there is an entry against the true owner, she has a cause of action, so the SOL should be running no matter what.
        3. Often applied in the US as well
     2. Required state of mind is “I thought I owned it.” – good-faith standard
        1. Comes up from time to time in America.
        2. Many courts do take this into account, but don’t admit it, according to one study.
     3. Required state of mind is “I thought I did not own it, but I intended to make it mine.” – aggressive trespass standard
        1. Compensation for the involuntary transfer of property—aggressive trespasser only gets title once he pays market value to former owner.
        2. Two-tier statute of limitations—require a longer period for bad-faith possessors

4. Continuous for statute of limitations

* 1. Degree of occupancy and use that an average owner would make of the property for statutory period
  2. Tacking requires privity of estate, which means voluntary transfer of possession
  3. Abandonment before the statute has run requires a new entry and the whole process begins anew
  4. If the owner re-enters the property then the statute is interrupted and the whole process begins anew
  5. Usually 5-20 years
* **Color of Title** – a claim founded on a written instrument or a judgment or decree that is defective and invalid
  + Not required by English law and most American jurisdictions. In a few states, it is essential to acquiring title by adverse possession. In any situation, it has advantages for the adverse possessor.
  + Some states have a shorter SOL if you have this. Actual possession under color of title of only a part of the land covered by the defective writing is constructive possession of all that the writing describes. The advantage is that the activities relied on to establish adverse possession reach not only the part of the premises actually occupied, but the entire premises described in a deed to the claimant. This is constructive adverse possession under color of title.
* **Rationales**
  + To protect title: protection of possession in fact protects ownership because title may be difficult to prove
  + To bar stale claims
  + To reward those who use land productively
  + To honor expectations
  + Powell (2000)
    - Adverse possession functions as a means of transferring ownership. The running of the SOL not only bars an action by the erstwhile owner but also vests a new title in the adverse possessor. Once acquired, the new title relates back to the date of the event that started the SOL and the law acts as though the adverse possessor was the true owner from that date.
  + Ballantine (1918)
    - The law of adverse possession does not regard the merit of the possessor, but the demerit of the one out of possession. The policy is to reward those using the land in a way beneficial to the community. The primary purpose is to quiet all titles that are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.
  + Holmes (1897)
    - The connection between property and prescription is in the nature of man’s mind. If you use something for a long time, you will not let it go without a fight. If the original owner did not want you to have it, he should have stopped you.
    - It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependant party.
    - Posner says Holmes was suggesting an economic explanation for adverse possession, based on diminishing marginal utility of income. This proposition states that the effect on subjective well-being of a $1,000 increase in income becomes progressively smaller the higher the initial level of income. So recognizing the adverse possessor’s right to the property will raise his well-being considerably while giving the property to the original owner will have little effect.
* **Can adverse possessor sell the property?**
  + For all intents and purposes, the adverse possessor is the owner and can improve the property, lease it, sell it, etc. The one difficulty in selling the property is the adverse possessor does not have record title in the courthouse. The adverse possessor must file a quiet title action against the former owner barred by the statute of limitations in order to have his title and name as owner recorded in the courthouse.
* **Property Rule v. Liability Rule**
  + Property rule is a rule that the property owner holds. Trespass is an example because it gives the landowner the right to exclude everyone else. One cannot trespass even if he does no damage.
    - Adverse possession doctrine protects (1) the original owner’s interest with a property rule before the SOL has run, then (2) the adverse possessor’s interest with a property rule after the statute has run.
  + Liability rule may say the landowner does have the right to exclude others, but if a trespasser does trespass than they must compensate the landowner. Breaking the trespass law gives rise to liability. We allow trespass as long as the trespasser pays. (See Lutz—Claim of Title(iii)).

*NY rule for open and notorious is “substantially encloses” or “improves or cultivates” the land; second key issue is adverse/hostile because Lutz was one of many users and in an earlier case he conceded that he did not own the land by claiming prescription*

* **Van Valkenburgh v. Lutz** (1952)
  + Beginning around 1920, D traveled across a triangular tract to reach his home on a nearby parcel, and also built a shed and kept a garden on the tract, but in 1947 P bought the tract and told D to vacate.
  + Title to a parcel may vest in an adverse possessor who occupies the parcel under claim of right, protects the parcel by an enclosure, improves or cultivates the parcel, and maintains that state of affairs for the statutory period. Here, the adverse possessor loses because D admitted that he knew he did not own the land and so the court felt that D failed to show hostile possession of the land for the SOL. The majority also disagrees that D’s use of the land satisfied the “improves or cultivates” element.
  + Prescription v. Adverse Possession
    - Prescription differs from adverse possession in terms of the sorts of interests acquired. The trespasser does not claim exclusive possession or claim of title. By adverse possession one may acquire the title or ownership, and the exclusive possession, of land formerly belonging to someone else, say X, whereas prescription gives rise to rights of use, such as rights of way and other easements, but title to the land remains in X. In some jurisdictions, the elements of the two doctrines are essentially identical, in others not.
    - Second difference involves the exclusivity requirement. With prescription, one must have exclusive use of the land with respect to the public but not necessarily with the owner. With adverse possession, one must have exclusive use of the land with respect to everyone including the present owner.
    - D first claimed prescription of the triangular tract and not adverse possession. After he fired his first lawyer and hired a Wall Street lawyer, he changed his claim to adverse possession.
  + Rule is now that you just have to act like you own the land. The fact that Lutz knew he had no title is irrelevant so long as he intended to acquire title. This is now the majority view, was the dissent in this case.

# Extent of Land Acquired by Adverse Possession

* Depends on whether the possessor entered with or without color of title
  + Without color of title
    - Claim extends only to such part of the land as she actually occupied or controlled in a manner consistent with ownership of such premises
  + With color of title
    - If claim made in good faith and the land described in the deed is recognized in the community as one defined parcel of land, then claimant is deemed to be in adverse possession of the entire property. Claimant has constructive adverse possession of the part of the tract she does not actually possess.
* Problems on p. 146-7
  + O owns and has been in possession of a 92-acre farm since 1975. In 1990 A entered the back 7 acres under color of an invalid deed from Z for the entire 92 acres. Since her entry, A has occupied and improved the back 7 acres in the usual manner for the period required by the SOLs. A brings suit to evict O from the farm, claiming title by constructive adverse possession. What result?
    - O has superior title to the farm over A’s invalid deed. O is found to be in actual possession of the land he used and constructive possession of the remainder. A, with an inferior title to the smaller tract, established an actual possession of 7 acres. As to the remaining 85 acres, A had at most only a constructive possession, which was neutralized by O's constructive possession of the same land. Thus, because O had the superior record title to this 85 acres, O prevailed.
    - Had O’s title also been invalid then the outcome may have been different.
  + Two contiguous lots, 1 and 2, are owned by X and Y respectively. (X and Y are not in possession.)
    - The lots are conveyed by an invalid deed from Z to A, who enters lot 1 and occupies it in the usual manner for the period required by the SOLs. Subsequently A sues X and Y to quiet title to lots 1 and 2. What result?
      * It seems clear that A would win adverse possession over lot 1 and so X would lose his title to lot 1. However, it is less clear that A would win adverse possession over lot 2. Did A think that he was purchasing one big piece of land and did not know that the land was actually two plots? Maybe A had a business plan to grow crops on half of his land first and once he made a profit, he was going to expand into the other half of the land. So A fully intended to use the whole land. Is that sufficient for A to quiet title to lot 2?
    - Would it matter if X had executed the deed?
      * It would not be adverse possession claim to lot 1, but rather, a legitimate transfer of ownership from X to A. However, it is not likely that A would win over Y’s claim since A did not use or enter lot 2 and X did not have the power to transfer lot 2 to A. There may have been no notice to Y that X sold his land to A since A never entered lot 2.
    - If X had executed the deed and A had entered lot 2?
      * A would win both lots based on claim of adverse possession to lot 2 and legitimate transfer of title to lot 1.

*Rules for boundary disputes*

* **Mannillo v. Gorski** (1969)
  + Claim of right issue arose between adjoining landowners where defendant has been in open and notorious possession of a strip of land along his boundary, mistakenly believing it to be his. In fact, it belongs to his neighbor plaintiff. Courts have taken several views:
    - Objective test—majority view
      * Possessor’s mistake is holding a claim of right if his actions appear to the community to be a claim of ownership and he is not holding with permission of the owner.
    - Maine doctrine
      * Minority hold that if the possessor is mistaken and the possessor would not have occupied the land if he had known the mistake, the possessor has no intention to claim title and adversity is missing.
    - New Jersey view – essentially the same as the objective test
      * In this case, the court said that “when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure,” the encroachment is not open and notorious. In such cases the owner must have actual knowledge of the encroachment.
  + Boundary disputes may be resolved by
    - doctrine of agreed boundaries
    - acquiescence
    - estoppel
    - neighbor remains silent in the face of expenditures by another
  + Mistaken Improvers (i.e., A mistakenly erects a building on B’s land)
    - Under common law, B had the right to force A to remove the encroachment
    - Under modern law, if A made the improvement in good faith then
      * If A pays damages to B then encroachment can remain, or
      * B has the option to pay A the value of the building, or
      * B has the option to sell the land to A at fair market value.
* **Howard v. Kunto**
  + Seasonal use for the statutory period is continuous use if such lands are normally used this way
  + To determine if the use is continuous, you must first decide whether the use is consistent with the type of property involved.
  + If there are intervals when the adverse possessor is not using the property you must also consider his intent. Facts must be analyzed carefully.
  + Separate periods of actual possession by those holding hostilely to the owner can be tacked together, provided there is privity of estate between the adverse possessors.
    - Privity of estate means that a possessor voluntarily transferred to a subsequent possessor either an *estate in land or physical possession*.
    - If adverse possessor is ousted for a period of time and then manages to reenter the property and resume possession, then the adverse possessor can tack her prior possession onto her later possession but the statute is tolled during the period she was ousted.
* Problems on p. 160-1
  + In 1985 A enters adversely upon Blackacre, owned by O. In 1986 O dies, leaving a will that devises Blackacre to B for life, remainder to C. In 2001 B dies without ever having entered upon Blackacre. Who owns Blackacre? Assume 10-years SOL.
    - A can argue that she owns Blackacre because she adversely possessed it since 1985. But the question hinges on whether B, the life tenant, was given adequate notice to A’s adverse claim when B assumed title to Blackacre. If B still owned Blackacre when he died, then C has a chance to argue ownership because as the remainder, C may not have been aware of A’s adverse claim until 2001. But if A gained adverse possession during B’s lifetime, say in 1995 or 1996, then by the time B died in 2001, A already owned Blackacre and C would have no interest.
  + O, owner of Blackacre, dies in 1986 leaving a will that devises Blackacre to B for life, remainder to C. In 1987 A enters adversely upon the land. In 2001 B dies. Who owns Blackacre?
    - In Piel v. Dewitt, the life tenant was the fee simple owner of half of 80 acres, but was merely a life tenant as to the other half. In 1962 the life tenant recorded a deed and affidavit claiming sole ownership in all 80 acres and conveying title to claimants. In 1973 the life tenant died and the remaindermen asserted their interest in 40 acres of the property. The claimants argued that they held title to the entire 80 acres by adverse possession and that laches and the statute of limitations governing partition actions barred the remaindermen's action. The court held the mere execution and recording of a deed and affidavit by the life tenant asserting title contrary to the vested interest of the remaindermen was not adequate notice to the remaindermen of an adverse claim so as to activate the statute of limitations. Thus, the statute of limitations did not commence until the death of the life tenant in 1973.

Adverse Possession of Chattels

* **O’Keeffe v. Synder**
  + Three paintings painted and owned by P disappeared from an art gallery in 1946. P learned in 1976 that D had acquired the paintings and brought a replevin action against D. D claimed ownership by adverse possession, asserting that the applicable six-year SOL had expired in 1952.
  + Thief friendly rule says that the statute of limitations starts running when the painting is stolen.
  + The discovery rule says if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the SOL will not begin to run. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with *due diligence*. The burden is on the owner to establish facts that would justify deferring the beginning of the SOL.
    - The discovery rule controls in actions involving the adverse possession of chattels because proving the open and hostile element for adverse possession of artwork is difficult since artwork is often purchased to be exhibited in a private home, which fails to put the true owner on notice.
  + Compare with NY rule
    - Rejected the discovery rule b/c it provides insufficient protection for owners of stolen artwork.
    - SOL does not begin to run on the owner of stolen goods until the owner knows who has the goods and makes a demand for return of the goods that is rejected. If the person in possession refuses to return the goods, the SOL begins to run. This rule places the risk of buying stolen goods on purchasers, who can often protect themselves by making inquiries.
  + In the US, a purchaser cannot get good title from a thief (UCC 2-403). But you can get good title from someone who unknowingly buys from someone with a voidable title.
  + Some other countries recognize the doctrine of market overt – according to which a bona fide purchaser may acquire good title to a thief if the sale takes place in an open market.

###### GIFT

Gift inter vivos 🡪 gift made during the donor’s life is irrevocable

Gift causa mortis 🡪 gift made in contemplation of immediately approaching death is revocable if the donor recovers

* **Elements:**
  + Intent (donor must intend to make an immediate gift)
    - Intent to pass title, not just possession
    - Most important element and often a clear intent obviates the need for formal delivery
  + Delivery (actual, constructive, or symbolic transfer of the gift)
    - Transfer that takes effect in the future or upon a condition *precedent* is not a valid gift
    - For constructive or symbolic delivery to be permitted, delivery of the object is impracticable
    - Symbolic delivery is where the owner hands over an instrument in writing
    - Transfer effective upon the donor’s death is governed by the law of wills, not the law of gifts
  + Acceptance (donee must accept the gift)
    - Usually presumed, especially if the thing is of great value
* Problems on p. 179
  + At a dinner party, O gives a ring to A, saying, “I want you to have it. It’s yours.” A tries the ring on, but it is too large for A’s finger. O then says, “Let me wear it until you can get it cut down to fit you.” O leaves the dinner wearing the ring, dies in a car crash. A sues O’s executor for the ring. What result?
    - In a similar case, the court held that the donee established a valid gift inter vivos. There was testimony that the donor intended to and did give the donee the ring, that she delivered it to him and that he accepted it, and that afterwards she borrowed it to wear until she was done with it. The court rejected the administrator's assertion that the donor intended no gift because she had the ring in her possession until her death. After the gift was complete, the donee was free to loan it to the donor or to any one else without affecting the validity of the gift.
  + O writes a check to B on her checking account and hands it to B. Before B can cash the check, O dies. What result?
    - In a similar case, the court held no gift until check paid, because donor retains dominion and control of funds; donor could stop payment or die, revoking command to bank to pay the money.
* **Gruen v. Gruen**
  + P’s father wrote P a letter giving him a gift title to a painting and reserving a life estate for himself. After P’s father died, P’s stepmother refused to give P the painting. Court held a donor may make a valid gift and retain a life estate with a complete right of possession.
  + Why wasn’t physical delivery of the painting required? Because the father transferred title of the painting to the son effective immediately but under the condition that the father gets to view it for the rest of his life. The letter transferred present ownership interest in the painting but deferred possessory interest. So the court does not view physical delivery as practical since the son would have to return the painting to his father as soon as the painting was delivered to him. Instead, the letter served as symbolic delivery.
  + Suppose father signed a letter to P stating: “I give you the painting when I die.” Would this be a valid lifetime gift?
    - No, the letter is a will and show no intention to give P any rights now. As a will, the instrument is not valid unless properly executed as a will, with witnesses.

###### LATIN PHRASES

*qui prior est tempore potior est jure*

Who is first in point of time is stronger in right

*causa mortis*

A gift made in contemplation of death

*res nullius or terra nullius*

A thing or territory belonging to no one [discovery]

*farae naturae*

“nature [wild] animal”

Not usually considered part of the property unless the animals have been tamed or captured

*ratione soli*

"according to the soil”

Landowners have property rights over resources found on their own land.

*animus revertendi*

Habit of return (referring to domesticated animals)

*animus possidendi*

An intention to possess

*ad coelum doctrine*

To whomsoever the soil belongs, he owns also to the sky and to the depths

**ESTATES**

# In General

1. “to A and his heirs”
   1. Words of purchase = “to A” (identifying A as the grantee)
   2. Words of limitation = “and his heirs” (indicating A takes a fee simple)
      1. A’s heirs have no interest during A’s lifetime
2. Inheritance
   1. Heirs
      1. If a person dies intestate (w/o will), the decedent’s real property descends to his heirs.
      2. Under modern statutes, real property goes to first issue, and if no issue, then parents; then collaterals (related by blood), then escheats to the state.
      3. Under common law, spouse was not an heir
   2. Devisees
      1. Persons who take property under a decedent’s will
   3. Primogeniture (valid until 1925)
      1. Eldest son inherited the land. If the eldest son predeceased the decedent, leaving issue, his eldest son or other issue represented him.
      2. Only if there were no sons would the decedent’s daughters inherit.

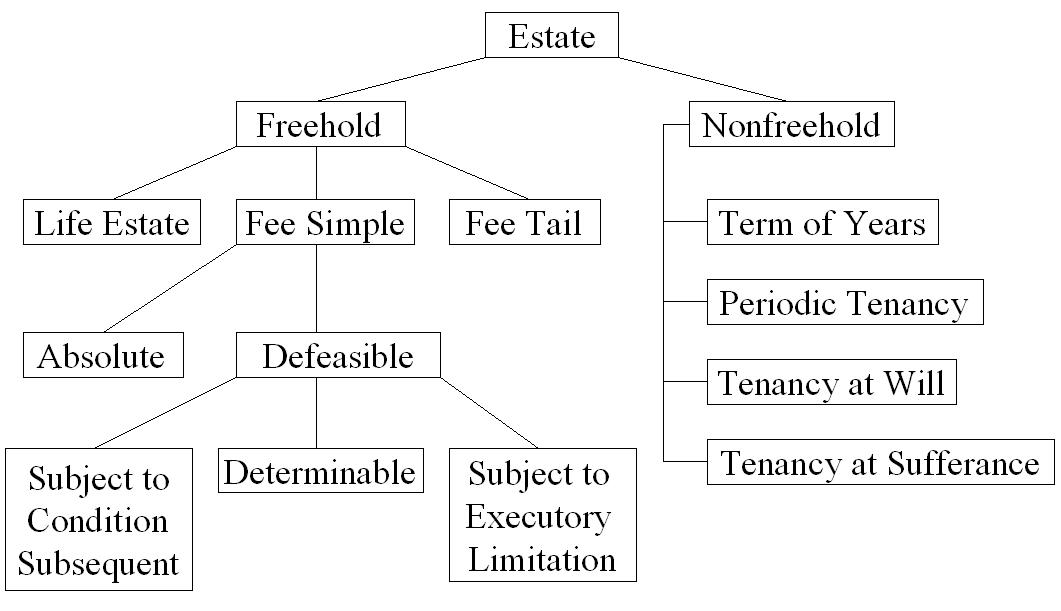


Figure . Basic Categories of Possessory Estates

###### PRESENT POSSESSORY ESTATE CLASSIFICATION

1. **Is it freehold (owned) or leasehold (leased)?**
   1. Freehold estates include fee simple, fee tail, and life estate.
      1. Fee simple absolute = “to A and her heirs” or “to A”
      2. Fee tail = “to A and the heirs of his body” (O has reversion)
      3. Modern trend: strong presumption given to fee simple absolute
   2. Leaseholds include terms of year tenancy, periodic tenancy, tenancy at will, and tenancy at sufferance.
2. **Is it absolute or defeasible?**
   1. Distinction turns on how might the estate end?
      1. A fee simple absolute is potentially infinite, absent escheat.
      2. A fee simple determinable may prematurely end if a particular future event occurs.
   2. Three types of defeasible fees: determinable, subject to condition subsequent, and subject to executory limitation.
      1. Two basic distinctions are used in categorizing a defeasible fee:
         1. Who holds the future interest? Where the future interest is held by a transferee, the estate is a FSSEL if words of condition are used. The estate automatically ends when the condition occurs.
         2. Words of limitation
            1. Determinable: so long as; while; during; until; or other words with time aspect

Statement of motive or purchase do not create FSD 🡪 “O to A for school purposes” (this is actually a FSA)

* + - * 1. Subject to condition subsequent: but if; **provided**; however; on condition
    1. Consequences of the distinctions:
       1. With a FSD, the former estate owner is liable for paying rent at market rate to the transferor if the former owner continues to use the property after the condition occurs. With a FSSCS, the former owner is not liable for rent until the transferor has take affirmative action to end the estate.
       2. With a FSD, the former owner starts the adverse possession period as soon as the condition occurs. With a FSSCS, adverse possession does not start until the transferor brings suit against the former owner.
       3. Equitable defenses such as waiver and estoppel are utilized to bar a future interest holder from terminating FSSCS. Because FSD ends automatically, such defenses are usually inapplicable.
  1. Today, when faced with ambiguity, the court prefers FSA and FSSCS over FSD.

1. **Is it legal or equitable?**
   1. “to T in trust for L for life, and then for R”
      1. T, the trustee, holds “legal” title in FSA
      2. Beneficiary L holds equitable life estate and R holds equitable vested remainder
2. **How do courts interpret the deed?**
   1. Courts try to figure out what is the intent of the transferor.
   2. Courts will do what it thinks is in the best interest of present interest holders and future interest holders.
   3. Take into account economic waste
   4. Strong preference towards fee simple absolute
   5. Restraints on alienation are void
      1. Certain restraints on “use” could be viewed the same as a restraint on alienation if the restraint on use affects marketability adversely such as by limiting alienation to an impermissibly small number of persons. (See dissent in Mountain Brow Lodge).

## Present Possessory Estates

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Present Estate | Examples | Duration | Correlative Future Interest in Grantor | Correlative Future Interest in Third Party |
| **Fee Simple Absolute** | “To A & his heirs” | Forever | None | None |
| **Fee Simple Determinable** | “To A & his heirs so long as…” until…” while…” during…” | As long as condition is met, then ***automatically*** to grantor | Possibility of reverter | (see FSSEL) |
| **Fee Simple Subject to Condition Subsequent** | “To A & his heirs, but if…” upon condition that…” provided that…” however…” | Until happening of named event ***and*** reentry by grantor | Right of entry | (see FSSEL) |
| **Fee Simple Subject to an Executory Limitation** | “To A & his heirs for so long as…, and if not…, to B” | As long as condition is met, then to third party | (see FSD) | Executory Interest |
| “To A & his heirs but if…, to B” | Until happening of event | (see FSSCS) | Executory Interest |
| **Fee Tail** | “To A & the heirs of his body” | Until A and his line die out | Reversion | None (but remainder is possible) |
| **Life Estate** | “To A for life,” or “To A for the life of B” | Until the end of the measuring life | Reversion | None (but see below) |
| “To A for life, then to B” | Until the end of the measuring life | None | Remainder |
| “To A for life, but if…, to B” | Until the end of the measuring life or the happening of the named event | Reversion | Executory Interest |

###### FUTURE INTERESTS HELD BY TRANSFEROR

* Future interest is a presently-existing property right; a non-possessory interest that will—or may—become a possessory estate in the future.
* Common law principles governing future interests reflect the struggle between giving landowners autonomy to control future events and perpetuate family wealth and maximizing social wealth by encouraging the productive use of land.

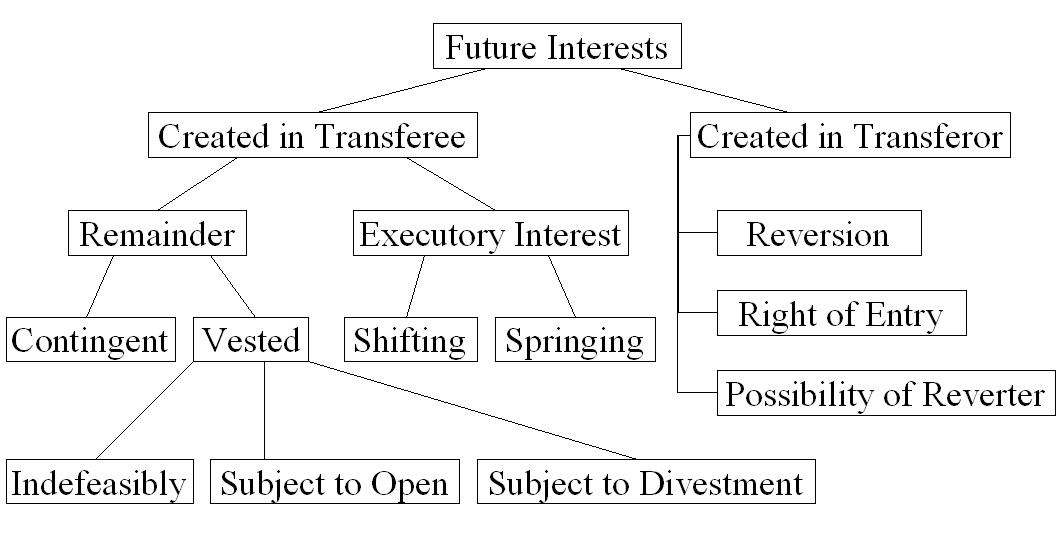


Figure . Categories of Future Interest

1. **Reversion**
   1. When transferor conveys an estate deemed “smaller” than the estate he holds
      1. Hierarchy is fee simple, fee tail, life estate, leaseholds
   2. Watch out for multiple reversions, see problem set 4 question 3
   3. Examples:
      1. O retains a reversion if O conveys Whiteacre “to A for life, then to B for life, and then to D and his heirs if D passes the bar”
      2. L, holding a life estate, retains a reversion if L conveys a term of years in tenancy to T.
2. **Possibility of Reverter**
   1. Follows FSD
   2. Examples:
      1. “to L for so long as the property is used as an orphanage”
3. **Right of Entry (also called “power of termination”)**
   1. Follows FSSCS
4. **Alienability**
   1. In most states, the future interests held by a transferor are freely transferable and thus, reachable by creditors. However at common law, a possibility of reverter and right of entry were not transferable and descended to heirs upon the death of the owner because they were only a “mere possibility” and not a “thing” respectively.
   2. Transfer of these to a third party does not change the name of the affected future interest.
5. **Waste**
   1. A holder of reversion can secure damages for past waste by present possessor and enjoin future waste, but a holder of possibility of reverter or right of entry can only enjoin actions that the prudent present possessor of a fee simple absolute estate would not have performed.
6. **Eminent Domain**
   1. A holder of reversion receives a share of the eminent domain award, but because the court views a possibility of reverter and right of entry as too insubstantial and contingent to merit eminent domain compensation, it is less clear whether a holder of possibility of reverter or right of entry can receive a share.
      1. However, in Ink v. City of Canton, the court reasoned that eminent domain award represented the fair market value of the property for any use, which was presumably greater than the value of land restricted to park use only. Court held that the heirs were entitled to the difference between these two values.

###### FUTURE INTERESTS HELD BY TRANSFEREE

1. **Remainder**
   1. A future interest created in a *transferee* that is capable of becoming a possessory estate upon the *natural* termination of a prior estate created by the same instrument. A remainder waits patiently for the prior estate to naturally terminate. **It cannot divest or “cut short” the prior estate.**
      * 1. Can only follow a life estate, a fee tail, or a term of years.
        2. O can never have a reversion with a remainder
   2. Estates in remainder
      1. “to A for life, then to B for 10 years, then to C for life, then to D”
         1. B has a remainder for a term of years, C has a remainder for life, and D has a remainder in fee simple.
   3. Vested Remainder
      1. Created in a living ascertainable person AND not subject to any condition precedent.
      2. Vested remainder
         1. Remainder in a presently identifiable person that is not subject to any condition or limitation.
         2. C has VR in “to B for life, then to C and her heirs”
         3. C and D have VRs in “to B for life, then to C for life, and then to D and his heirs”
         4. “to A for life, then to B on condition that it be used as farm, and if not to C”
            1. A=LE, B=VR(fssel), C=EI(fsa)
      3. Vested remainder subject to open
         1. Vested remainder in **one or more** ascertainable members of a class that may be enlarged by the addition of presently unascertainable persons
            1. “to A for life, then to A’s children”

if A has at least one child already then VRSO, if not then CR

* + - * 1. NOT VRSO = “to A for life, then to B’s children who survive A”

Instead of VRSO, this is a CR in B’s children b/c of condition precedent

* + 1. Vested remainder subject to divestment
       1. Vested remainder subject to condition subsequent
       2. Magic words are the same as FSSCS: but if; provided; however; on condition
       3. “to B for life, then to C and her heirs, but if C ever smokes, then to D”
          1. C has VRSD and D has EI
       4. “to A for life, then to B for life, then to C and his heirs”
          1. B has VRSD if B fails to survive A
  1. Contingent Remainder
     1. Subject to a condition precedent OR created in an unascertainable person
     2. “to A for life and then to B and his heirs if B reaches age 21”
     3. “to K for life, and then to K’s heirs”
     4. “to A for life, then to B if B survives A, but if B does not survive A, to C”
        1. B and C have alternative CRs and O has reversion b/c both can die simultaneously.
  2. Difference between vested and contingent remainders
     1. VR accelerates into possession whenever preceding estate ends, whereas CR cannot become possessory so long as it remains contingent
     2. Under common law, CR was not assignable during remainderman’s life and hence unreachable by creditors. Not so today.
     3. All CRs are subject to the Rule Against Perpetuities but only VRSO
  3. Transformation into Other Future Interests
     1. Transformation of a CR into a VR
        1. “to K for life, and then to L and his heirs if L reaches the age of 21”
           1. Assuming L is 10 years old when the devise became effective, he held a CR. If K is still alive when L reaches 21, then the condition precedent is fulfilled and L’s interest is now a VR.
     2. Transformation of a VRSO to a VR
        1. “to K for life, then to L’s children and their heirs”
           1. When O’s will becomes effective, L is alive and has one child M. M holds a VRSO. But if L dies without any additional children, M’s interest becomes a VR

1. **Executory Interest**
   1. Future interest created in a transferee that **must “cut short” or divest another estate or interest** in order to become a possessory estate.
      1. Follows VRSD, FSSEL, or life estate subject to an executory limitation
   2. Shifting Executory Interest divests another transferee
      1. C holds shifting EI in “to B and his heirs, but if C returns from France, then to C and her heirs”
      2. B holds shifting EI in “to A and her heirs, but if A becomes an attorney, then to B for life”
   3. Springing Executory Interest divests the transferor
      1. “to A for life then to B one day after A dies”
         1. A has LE, then O has reversion for one day, then B has springing EI
      2. “to A when A turns 21” (A is currently 15)
      3. C holds springing EI in “to C and her heirs, if C returns from France”
         1. Valid Rules Against Perpetuities test because C is the measuring life and within 21 years of C’s death, we would know whether C returned from France
      4. A holds springing EI in “to A and her heirs upon the birth of A’s first child”
2. **Waste**
   1. The law safeguards vested remainders because it is certain to become possessory, but little protection against waste is accorded to uncertain future interests like contingent remainders and executory interests.
3. **Eminent Domain**
   1. Vested remainder has a right to receive a share in an eminent domain award, and most modern courts allow contingent remainders and executory interests to also share.

## Future Interests in Third Parties

|  |  |  |  |
| --- | --- | --- | --- |
| Future Interest | Example | Reversion in Grantor Following Future Interest? | Transferable? |
| Vested Remainder | “To A for life, then to B.” | No; remainder certain to become possessory | Yes; B’s remainder transferable during life and at death |
| **Vested Remainder Subject to Open** | “To A for life, then to A’s children.” A has a child, B. B has a VRSO. | No; A’s children are certain of possession | Yes; B’s remainder transferable during life and at death |
| **Vested Remainder Subject to Divestment** | “To A for life, then to B, but if B dies before A, to C.” B has a VRSD by C. | No; no possibility of property reverting to grantor | B’s remainder transferable during life but not transferable at B’s death if B predeceases A |
| **Contingent Remainder** | “To A for life, then to A’s children.” A has no children. | Yes | No; no child is alive |
|  | “To A for life, then to A’s children who survive A.” A has a child, B. | Yes | \*\*B’s CR is transferable during life, but is not transferable at B’s death if B predeceases A |
|  | “To A for life, then to B if B reaches 21.” B is 17. | Yes | \*\*B’s remainder is transferable during life, but remainder fails if B dies under 21. |
|  | “To A for life, then to B’s heirs.” B is alive. | Yes | No; no one is heir of B until B dies |
|  | “To A for life, then to B if B survives A, and if B does not survive A, to C” | Yes | \*\*B’s remainder is transferable during life, but fails if B predeceases A; C’s remainder is transferable during life and at C’s death if A is then alive |
| **Executory Interest** | “To A, but if B returns from Rome, to B” | No | \*\*Yes |
|  | “To A for life, then to B, but if B does not survive A, to C” | No | \*\*C’s EI is transferable during life and at C’s death if A is alive then |
|  | “To A upon her marriage” | No reversion, but grantor has possessory fee until A’s marriage | \*\*Yes |

\*\*In a few states, CRs and Eis are not transferable during life except in certain circumstances.

###### RULES FURTHERING MARKETABILITY

1. **Void and cross out future interests if there is a complete restraint on marriage**
   1. “to A & hh as long as he remains unmarried, then to B” 🡪 A = FSA
   2. Some courts recognize an exception where the restriction upon marriage is not intended to punish marriage, but is intended to accomplish a reasonable purpose, such as providing support for the person until he or she had other means of support.
2. **Rule Against Perpetuities**
   1. No interest is good unless it must *vest or terminate* not later than 21 years after some life in being at the creation of the interest.
   2. Applicable to CR, EI, and VRSO
   3. Remote Possibilities and Exceptions
      1. Class gift may not vest
         1. A class gift is not vested *in any member* of the class until the interests of *all members* have vested. This means the class must be closed and all conditions precedent for each and every member of the class must be satisfied within 21 years.
      2. The fertile octogenarian
         1. The law conclusively presumes that a person can have children so long as the person is alive. Evidence that the person is 80 years old is irrelevant. After all a person can adopt.
      3. Unborn widow
         1. The law assumes that a person’s surviving spouse might turn out to be a person not now alive.
   4. Cross-out future interests in transferors that violate RAP
      1. “to A so long as used for a school, then to B and her heirs” 🡪 “to A so long as used for a school”
         1. B’s EI violates RAP so cross-out leaving A with FSD and O with possibility of reverter
         2. Way around this is for O to create two grants: first grant to B FSA and have B grant FSD to A with the condition so B retains a possibility of reverter
      2. “to A, but if it ceases to be used for school purposes to B and her heirs” 🡪 “to A”
         1. B’s EI violates RAP so cross-out leaving A with FSA!
   5. Wait-and-See Doctrine modifying RAP
      1. Common law: wait and see whether a contingent interest actually vests within 21 years
      2. Statutory USRAP: extended perpetuity period to 90 years

## Interests Under the Rule Against Perpetuities

|  |  |  |
| --- | --- | --- |
| **Example** | **Validity** | **Explanation** |
| “To A for life, then to A’s children for life, then to B.” | Valid | B’s remainder is vested on creation. |
| “To A for life, then to A’s children for life, then to A’s grandchildren.” | Invalid | A may have a child after the interest is created and so may have grandchildren beyond the perpetuities period. |
| “To School Board so long as it is used for a school, then to the Red Cross.” | Valid | This falls within the charity-to-charity exception. |
| “To School Board so long as it is used for a school, then to A.” | Invalid | The interest may vest in A’s heirs or devisees hundreds of years from now. (A’s interest is stricken.) |
| “To B for life, remainder to those of B’s siblings who reach age 21.” | Valid | B’s parents can be used as measuring lives. |
| “To B for life, then to such of B’s children who become lawyers.” | Invalid | B may have a child born after the disposition who becomes a lawyer more than 21 years after B’s death. |
| “To A for life, then to his wife, W, for life, then to A’s surviving children.” | Valid | No unborn widow problems because the gift is to W, a life in being. |
| “To A for life, then to his widow for life, then to A’s surviving descendents.” | Invalid | Unborn widow problem. |
| “To X for life, then to Y, but if at her death Y is not survived by children, then to Z.” | Valid | Y is the measuring life. |
| “To M for life, then to M’s children for their lives, then to M’s grandchildren.” M is 80 years old and has had a hysterectomy. | Invalid | Fertile octogenarian problem. |

## Technical Rules of the Common Law

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Destruction of Contingent Remainders** | **Rule in Shelley’s Case** | **Doctrine of Worthier Title** |
| Rule | Contingent remainders are destroyed if not vested at time of termination of preceding estate | If one instrument creates a freehold estate in A and a remainder in A’s heirs, the remainder becomes a remainder in fee simple in A. | An inter vivos conveyance attempting to create a future interest in the grantor’s heirs is void and the grantor has a reversion. |
| Applicability | Applies only to legal contingent remainders in land. A rule of law, not a rule designed to carry out the grantor’s intent. | Applies to legal and equitable remainders in land. Rule of law. | Applies to legal and equitable remainders and EI in real or personal property. Rule of construction designed to carry out the grantor’s intent, and can be overcome by contrary evidence of intent. |
| Example | “To A for life, remainder to A’s children who reach 21.” | “To A for life, then to A’s heirs”  “to my wife A during her widowhood, and upon A’s death or remarriage, to A’s heirs” | “To A for life, then to my heirs at law” |
| Result | If A has no children who are at least 21 at the time of her death, property reverts to grantor. | A has a vested remainder in fee simple and life estate. Merger 🡪 A’s two interests merge to become a fee simple | A has LE, O has reversion |
| Modern Status | Abolished in most jurisdictions | Abolished in most jurisdictions | Generally raises a rebuttable presumption |
| Modern Result | Property reverts to grantor; A’s children have indestructible CR or an EI | A has a LE and A’s heirs have a CR | Grantor’s heirs have a future interest given to them under the instrument |

* Objections to creating a life estate (many of these problems can be solved by creating a trust)
  + Life tenant cannot sell a fee simple unless all other persons having an interest in the property consent or unless a court of equity orders sale and reinvestment of proceeds
  + Life tenant cannot lease the property for a period extending beyond his death
  + Bank ordinarily does not lend money if the security is a life estate
  + Life tenant can be enjoined by remaindermen from committing “waste”
  + Life tenant is under no obligation to insure property
  + At common law, life estate could terminate prior to the life tenant’s death by forfeiture or merger.

###### RULES AGAINST RESTRAINT

* Applies only to legal interests, NOT to equitable interests (trusts).
* The legal system voids any total restraint on alienation of a fee simple estate because
  + You and society benefit from maximizing utilization of land,
  + It makes it possible to secure financing by granting lenders a mortgage,
  + It protects good faith expectations of creditors by allowing them to execute on property in order to satisfy the owner’s unpaid debts,
  + It promotes willingness to invest in the land because you will recoup it through sale, and
  + It prevents undue concentration of wealth that is seen as a potential threat to democratic values.
* Types of restraint
  + Forfeiture restraint: If the grantee attempts to transfer his interest, it is forfeited to another person
  + Disabling restraint: Withholds from the grantee the power of transferring her interest
  + Promissory restraint: Grantee promises not to transfer his interest

# Restraints on Alienation of Fee Simple – Examples

|  |  |
| --- | --- |
| **Void Restraints** | **Usually Valid Restraints** |
| Total restraint (forfeiture, disabling, or promissory) | Preemptive option (right of first refusal) |
| Sale requiring consent of another | Sale requiring consent of board of directors in coop apt building (financial interdependency involved) |
| Sale only to a member of a club with arbitrary power to deny membership | Agreement by co-tenants not to partition (if reasonable in time and purpose) |
| Racial restraint (violates FHA) | Restraint on use |

###### WASTE

* The legal system justifies the restriction on use (the waste doctrine) because
  + The law effectively presumes that the original grantor intended the estate holder to pass on possession of the land to the future interest holder in approximately the same condition as it was received.

|  |  |  |
| --- | --- | --- |
| **Type of Waste** | **Circumstances** | **Example** |
| Affirmative (Voluntary) Waste | Life tenant actively causes permanent injury to the land | Life tenant leases farm land for use as a toxic waste dump |
| Permissive (Involuntary) Waste | Life tenant allows land to fall into disrepair or fails to take reasonable measures to protect the land from the elements | Life tenant fails to repair barn roof after a hail storm, leading to future water damage and decay |
| Ameliorating Waste | Life tenant substantially changes principal use of the land but the change increases the value of the land | Life tenant changes unproductive farm land into a lucrative shopping center |

**CO-OWNERSHIP AND MARITAL INTERESTS**

###### COMMON LAW CONCURRENT INTERESTS

The rules governing concurrent estates attempt to reconcile three often conflicting policies that underlie American property law: autonomy, efficiency, and equity.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **CoT** | **JT** | **TE** |
| **Devise/inherit** | OK | RoS (*jus accrescendi*) | RoS |
| **Transfer inter vivos** | OK | Creates CoT | No\* |
| **Interest** | Can be unequal | = | = |

1. **Types of Concurrent Estates**
   1. Tenancy in common
      1. Each co-owner of this estate holds an undivided, fractional share in the entire parcel of land; and each is entitled to simultaneous possession and enjoyment of the whole parcel.
      2. No right of survivorship; freely transferable during the lifetime and at death
      3. Any devise to 2 or more unmarried persons is presumed to create a tenancy in common
      4. Interests can be acquired at different times and by different instruments
      5. Shares need not be equal
      6. Alienable, devisable, inheritable, attachable
      7. Can be created upon
         1. Severance of a joint tenancy
         2. Divorce ends a tenancy by the entirety
         3. If FSA holder dies intestate leaving multiple children as her only surviving relatives then each child receives an equal interest in the estate as tenant in common with the siblings.
      8. Default classification
   2. Joint tenancy
      1. Each joint tenant has a right of survivorship.
         1. A joint tenant’s death does not create any new rights in the other joint tenant. Rather, the death merely withdrew the tenant’s interest from the estate, leaving the surviving tenant with a FSA.
      2. Four unities are required in order to create and continue a valid joint tenancy
         1. Title acquired at the same time,
         2. Title acquired by the same deed or will, or by joint adverse possession,
         3. Each interest had to be identical in size, and
            1. This requirement has been eroded today
         4. Each tenant had to have an equal right to possession of the whole parcel.
      3. Some states have eroded these four requirements.
      4. Joint tenancy interest is inalienable.
      5. A mortgage on a joint tenant’s interest does not survive the mortgager because the mortgage does not destroy the four unities so the surviving joint tenant has right of survivorship.
      6. Avoidance of probate—popular for married couples b/c it avoids probate since no interest passes on the joint tenant’s death
         1. For this reason, most courts will not allow joint tenant to sever the joint tenancy by will because there would be such uncertainty about rights of survivorship that all joint tenancies would have to be probated, and the purpose of the estate would be defeated.
      7. At common law, an owner could not create a joint tenancy by conveying to herself and others, because the unities of time and title were absent. Since this requirement could be circumvented by use of a “straw man”, a number of states allow direct conveyance.
   3. Tenancy by the entirety
      1. Medieval relic based on the view that a wife had no legal existence and the husband had exclusive control of all property. The Married Women’s Property Acts gave either spouse the power to manage and control marital property.
      2. Requires the four unities of time, title, interest, and possession, plus the fifth unity of a valid marriage.
      3. Provides a right of survivorship.
      4. Can only be terminated by divorce, death of one spouse, or agreement of both spouses.
      5. Some states allow creditors to execute on the right of survivorship of the debtor spouse only, while others permit creditors to sell the debtor’s interest subject to the non-debtor’s right of survivorship. However, most states do not allow the creditor of an individual spouse to reach tenancy by the entirety property.
         1. The majority view protected the integrity of the family unit by ensuring that real property was available as housing and as security for educational and other expenses. Unfairness to creditors was avoided because they (a) were charged with notice of a spouse’s limited estate in deciding whether to extend credit, or (b) never relied on the asset in the first place.
         2. Critics of the majority approach argue the insularity of the assets from creditors protect tortious and illegal conduct. For example, property acquired through the proceeds of drugs and jointly held by the entirety allows only the survivorship right of the guilty spouse to be forfeited. So the innocent spouse is entitled to lifetime use of the property, together with a right of survivorship.
2. **Rights and Duties of Cotenants**
   1. Each cotenant has equal right to possession and enjoyment of the whole property, regardless of the share of his fractional interest
   2. Under the majority view, even a cotenant in exclusive possession is not liable to the other cotenants for rent, absent an ouster, a previous agreement to pay rent, or the occupier refuses a demand by other owners to let them use & enjoy the property
      1. Ouster: a cotenant must physically bar the other cotenant from entry; merely ignoring an order to partially vacate does not constitute ouster
      2. Ouster is very much like inchoate adverse possession
   3. But each cotenant is entitled to pro rata share of
      1. Rents paid by third persons and
      2. Profits from the land
   4. All cotenants are obligated to pay their share of mortgage, taxes, etc. They are not individually liable for the cost of repairs or improvements, absent special circumstances (i.e., generally no fiduciary duty).
3. **Termination of Concurrent Estates**
   1. Any tenant in common or joint tenant may end the cotenancy by suing for partition
      1. Partition in kind 🡪 physical division of the land (favored remedy)
      2. Partition by sale 🡪 division of proceeds from the judicial sale of the land
         1. Sale may be ordered when
            1. It’s in the best interest of both of the parties and a physical partition would result in unequal shares
            2. Employed only where partition in kind is unworkable (i.e. too many tiny partitions)
            3. Economic test: the value of the land when divided into parcels is substantially less than its value when owned by one person
      3. Traditional common law more reluctant to grant partition by sale though the modern trend is towards partition by sale
   2. Cotenant can sever the joint tenancy by conveying her interest to another person.
4. **Joint bank accounts**
   1. True joint tenancy account: O intends to make a present gift to A of half the sum deposited + survivorship rights to the whole sum
   2. Payable-on-death account: O intends to make a gift to A only of survivorship rights
   3. Convenience account: O intends that A only have power to draw on the account to pay O’s bills (no survivorship rights)

###### MARITAL INTERESTS

1. **Traditional Common Law System**
   1. Rights During Marriage
      1. Under the doctrine of *coverture*, the wife became a dependent entitled to her husband’s protection and support, and obligated in return to provide domestic services for him.
      2. Husband obtained a life estate in all freehold lands that his wife held at the time of marriage or acquired later. Wife still holds title to her lands, but the husband owns her personal property.
   2. Rights Upon Divorce
      1. Property divided between the spouses according to who held title. If the wife is blameless for the divorce, then she is entitled to alimony.
   3. Rights Upon Death
      1. Dower
         1. If the husband died survived by a son, then his son is the sole heir and gets all property. However, the widow is entitled to one-third of her deceased husband’s *qualifying* real property.
         2. Without the wife’s consent, the husband could not transfer his wife’s “inchoate dower”, nor could creditors seize them.
      2. Curtesy
         1. Curtesy is the counterpart of dower for the surviving husband.
         2. While dower provided the wife with a life estate in only one-third of her husband’s qualifying lands, curtesy gave the husband a life estate in all such lands held by his wife.
         3. Unlike dower, curtesy arose only if the marriage produced issue capable of inheriting the wife’s lands. Upon the birth of such issue, the wife cannot transfer any interest in her lands without the husband’s consent.
2. **Equity System – women could own and manage property in trust**
3. **English System – Modern Common Law System**
   1. Rights During Marriage
      1. Property is owned by the spouse who acquires it before and during marriage. Thus, a spouse was not liable to creditors for non-marital debts incurred by the other spouse.
      2. Gender equality is still unfulfilled because a housewife would end up owning nothing while her working husband owns everything unless he makes her a gift of his property.
      3. Married Women’s Property Act abolished coverture– women and men get equal rights to use and enjoy property. In some states, women get the same rights as men to receive, hold, manage, and dispose of property. In most states, the rights of the men are taken away such that neither can convey the property or have it attached by creditors
   2. Rights Upon Divorce
      1. Today all common law states view marriage as a common partnership and distributes marital property according to equitable distribution. Three ways of defining marital property:
         1. All property owned by the spouses, regardless of the time and manner of acquisition (equal division);
         2. Only “marital property” (equitable division); or
         3. Only property acquired from earnings of either spouse during marriage (community property concept)
      2. Is educational degrees/professional licenses martial property?
         1. Majority approach: not marital property
            1. A degree had none of the traditional characteristics of property and was simply an intellectual achievement that may potentially assist in the future acquisition of property. The degree has no exchangeable value on the open market and cannot be willed.
            2. Court did not view human abilities as property subject to private ownership. The husband’s education was attributable to the inherent abilities he possessed before marriage.
            3. Court recognized the practical difficulty of appraising the value of an education. Any such valuation attempt is largely speculative.
         2. New York approach: marital property
            1. NY statute directs court to consider the contribution of a spouse to “the career or career potential of the other party.” The degree represents investment in the economic partnership of the marriage and their joint efforts.

But isn’t this NY rule double-counting the wages of a spouse if he remarries? The wages from an advanced degree will be included in both marital estates.

* + - * 1. In Elkus, the court held that a plaintiff opera singer’s career and celebrity status were marital property. Although plaintiff’s successful career was primarily based on an “innate talent”, the efforts of defendant’s coaching, support, and care of their children led to the rise in the value of her career.
      1. Alternative approach: reimbursement alimony
         1. Although graduate degrees are not property, the court can award “reimbursement alimony” to compensate the supporting spouse for economic sacrifices made during the marriage (i.e. educational expenses).
         2. But reimbursement does not recognize appreciation so is it really equitable?
  1. Rights Upon Death
     1. Elective share replaces dower and curtesy. Surviving spouse may elect to either:
        1. Abide by the terms of the decedent spouse’s will or
        2. Take a share (normally one-third or half) of all property the decedent owned at death.
     2. Major loophole if husband gives all his property to a third party right before he dies, leaving the wife with nothing to take a share of.

1. **Continental System – Community Property System**
   1. In General
      1. System views marriage as an economic partnership between husband and wife in which the contributions of each are valued equally.
      2. Community property: earnings and all proceeds of either spouse during marriage
      3. Separate property: property acquired before marriage or during marriage through gift, devise, bequest, or descent.
   2. Rights During Marriage
      1. Each spouse owns a one-half undivided interest in all community property
      2. Separate property is the sole property of the owner spouse who may use or transfer it freely.
   3. Rights Upon Divorce
      1. Courts are split between equitable or equal division of community property upon divorce.
   4. Rights Upon Death
      1. Upon death, a spouse may transfer by will one-half of the community property and all of his separate property to whomever he wishes.
   5. Mixing community and separate property
      1. Inception of right rule: character of the property is determined at the time the spouse signed the contract of purchase
      2. Time of vesting rule: title doesn’t pass to the spouse until all installments are paid
      3. Pro rata apportionment: payments made from community fund “buy” a pro rata share of the title
   6. Migrating couples
      1. Property is characterized based on domicile of spouses at the time it is acquired and once it has been initially characterized, the ownership doesn’t change when the parties change their domicile unless both parties consent to such a change.
2. **Domestic Partners**
   1. Methods of determination of rights of domestic partners
      1. A contract for property division can be implied from the conduct of the parties; unjust enrichment rationale
      2. In NY, only a written or oral express contract to share earnings and assets between unmarried partners is enforceable
      3. IL rejected enforcing any contract between unmarried cohabitants
      4. ALI’s Principles of the Law of Family Dissolution
         1. legal rights and obligations may arise from the conduct of the parties with respect to one another even though they have created no formal document setting forth such an understanding
         2. domestic partners are required to share a primary residence and life together for a significant period of time

**LANDLORD-TENANT LAW**

##### **LEASEHOLDS/NONFREEHOLD ESTATES**

1. **Term of years**
   1. Period fixed in advance or computed using a formula that is agreed upon in advance
   2. Usually defeasible conditioned on tenant’s fulfillment of lease covenants (i.e., pay rent)
      1. “to T for 10 years so long as used for a sawmill” is a 10-year term of years determinable
   3. Automatically expires when the period ends without any notice
2. **Periodic tenancy**
   1. Automatic renewal for successive periods until one party gives notice
      1. Notice terminates tenancy on the final day of the period
      2. Notice should be equal to the period but only 6-months notice for a year-to-year tenancy
   2. Created by express, implied, or by law (holdovers)
      1. “to A from month to month”
      2. “to A, with rent payable on the first day of every month”
3. **Tenancy at will**
   1. No fixed period but may be terminable by either party
      1. Terminable by only one party is not tenancy at will
      2. Terminates if either party attempts to assign a tenancy at will
   2. Most will arise from implication, not from an express agreement
      1. “to T for and during the pleasure of L”
      2. “to T for as many years as T desires”
         1. Even though the language gives only one party the right to terminate, either party may terminate at any time
4. **Tenancy at sufferance**
   1. Arises when tenant who was rightfully in possession wrongfully remains in possession (holdover)
   2. Landlord can choose to either evict and collect damages or treat holdover as agreeing to a new term that is at most one year
      1. Once the landlord chooses an option, he cannot change his mind

###### LEASE

1. **Is a lease a conveyance or a contract?**
   1. Traditionally, a conveyance because it transferred the owner’s possessory interest in the land.
   2. Modern trend is to treat leases as contracts.
      1. Covered by statute of frauds
2. **Distinguish leasehold from nonpossessory interests like license and easement**
   1. Tenant has the right of exclusive possession, whereas a license and easement only grants the right to use the land.
   2. How do you distinguish a lease from a license?
      1. Breadth and exclusivity of possession
      2. Nature of payment (“rent”?)
      3. Words (e.g., “lease”) help reveal intent, but not determinative
3. **Does the landlord have a duty to deliver possession?**
   1. Majority or “English” rule
      1. Every lease has an implied covenant that the landlord will deliver actual possession
      2. Implied covenant does not extend beyond the day the term begins
      3. Rationale:
         1. Lessor is in the best position to know whether former tenant intends to hold over.
         2. No reasonable lessee would knowingly enter into a lease if he had known at the time that he could obtain possession on the first day of the term, but that he would be compelled to begin a lawsuit against the wrongdoers and be delayed before possession.
         3. More efficient to place the duty on the landlord because the landlord is usually more familiar with eviction procedures and can evict the holdover at less cost.
      4. Tenant’s remedies
         1. Terminate the lease and recover damages for having to obtain quarters elsewhere
         2. Affirm the lease but refuse to pay rent for the portion of the term not in possession and recover damages
   2. Minority or “American” rule
      1. Landlord need only deliver the legal right to possession
      2. Rationale:
         1. Lessee could easily ask for express covenant to protect himself if such a situation arose.
         2. Lease conveys a leasehold to the tenant so it is up to the tenant to take possession of his property if he wants it.
         3. English rule places the fault of the wrongdoer on the landlord, who is innocent and has no control over the misdoings of the former tenant.
         4. English rule prohibits landlord from leasing the premises while in the possession of a tenant whose term is about to expire because the tenant can change his mind about holding over at any time.
      3. Tenant’s remedies:
         1. Evict holdover through summary proceedings
         2. Treat holdover as a tenant for another term with rent payable to incoming tenant
   3. From a property analysis, the American rule makes sense. From the contract point of view, the English rule makes sense.
4. **What is the difference between an assignment and a sublease?**
   1. The common law ignores the intent of the parties
      1. Assignment: Tenant transfers the right of possession for the *entire* remaining term of the lease
         1. Partial assignment: Tenant transfers all of this interest in some physical part of premises
      2. Sublease: Tenant transfers only *part of* the remaining term of the lease
         1. Tenant retains a reversionary interest
   2. The modern rule uses an objective test to ascertain the intention of the parties
      1. Words like “sublease” or “assignment” are not conclusive
   3. Assignment
      1. Privities
         1. Between lessor and assignor/lessee 🡪 K
         2. Between lessor and assignee 🡪 estate
         3. Between assignor/lessee and assignee 🡪 K
      2. Lessor can sue both the assignor and the assignee for breach of covenant.
      3. Example:
         1. L leases land to T for $200 a month. T becomes one month in arrears. T then assigns the leasehold to T2, who becomes four months in arrears. T2 assigns to T3, reserving a rent of $250 a month.
            1. L can recover $200 a month from T3 for the time T3 is assignee. During this time, L and T3 are in privity of estate. L cannot recover the extra $50 reserved in the assignment to T3.
            2. L can recover $800 from T2 because during the four months of default L and T2 were in privity of estate.
            3. L can recover $1000 (five months rent in default) from T because the parties are in privity of K. In turn, T is subrogated to L’s claim against T2 for the rental in arrears during the time that T2 held the leasehold, so that T could recover $800 from T2 if T pays L the rent due for these four months.
   4. Sublease
      1. Privities
         1. Between lessor and sublessor 🡪 K and estate
         2. Between lessor and sublessee 🡪 nothing (but lessor can still evict sublessee)
         3. Between sublessor and sublessee 🡪 K and estate
      2. Sublessor becomes the landlord to sublessee. Sublessee has no obligations to lessor.
   5. Third-party beneficiary
      1. If an assignee or sublessee expressly assumes the covenants of the master lease, the assignee or sublessee is directly liable to the landlord, who is a third-party beneficiary of the K between the tenant and his assignee or sublessee.
      2. Example:
         1. L leases to T. T sublets to T2, who promises to perform all obligations of T under the lease from L. T2 later assigns his interest to T3, who fails to pay the rent. L can sue T2 for the rent owed by T3. Having expressly assumed the lease obligations, T2 is bound to perform his K notwithstanding the assignment of his entire interest to another.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Assignment by landlord** | **Assignment by Tenant** | **Sublease by Tenant** |
| Consent | Tenant’s consent not required | Landlord’s consent may be required by lease | Landlord’s consent may be required by lease |
| **Privity of estate** | Assignee and tenant are in privity of estate | Assignee and landlord are in privity of estate | Sublessee and landlord are *not in privity of estate*. Original tenant remains in privity of estate with landlord. |
| **Privity of K** | Assignee and tenant are *not in privity of K*. Original landlord and tenant remain in privity of K. | Assignee and landlord are *not in privity of K*. Original tenant and landlord remain in privity of K. | Sublessee and landlord are *not in privity of K*. Original tenant remains in privity of K with landlord. |
| **Liability for covenants in lease** | Assignee liable to tenant on all covenants that run with the land because of privity of estate.  Original landlord remains liable to original tenant on *all* covenants in the lease because of privity of K. | Assignee liable to landlord on all covenants that run with the land because of privity of estate.  Original tenant remains liable for rent and *all* other covenants in the lease because of privity of K. | Sublessee is *not personally liable* on any covenants in the original lease and *cannot enforce* the landlord’s covenants.  Original tenant remains liable for rent and *all* other covenants in the lease and can enforce the landlord’s covenants. |

1. **Can lessor arbitrarily withhold consent to an assignment in the absence of a provision that such consent will not be unreasonably withheld?**
   1. Majority view
      1. Traditionally if a lease contains an approval clause, then the lessor may arbitrarily refuse to approve an assignment no matter what.
      2. This harsh rule can be avoided through the doctrines of waiver and estoppel.
      3. Parties can and should bargain for a restriction that consent must be reasonable.
   2. Minority view
      1. Consent may be withheld only where the lessor has a commercially reasonable objection to the assignment
         1. Not reasonable if the reason for refusal is that lessor wants to benefit from a windfall
      2. Lessor has a duty to mitigate damages upon lessee’s abandonment of the property.
      3. Shortage of commercial space has made it necessary to permit alienation
      4. Emphasis on contractual duty of good faith and fair dealing when exercising the discretion granted by the approval clause
2. **What are the landlord’s options when he believes a tenant has defaulted on the lease?**
   1. Common law
      1. Seizure of tenant’s chattels
         1. In the old days, landlord could seize tenant’s chattels and hold them as security
      2. Self-help
         1. Allowed if landlord has legal right to possession and means of reentry are peaceful
            1. In Berg, the court held that changing the locks was not “peaceful” reentry
         2. Some states today allow *reasonable use* of force
   2. Modern trend
      1. Means of assuring performance
         1. Rent acceleration clause (landlord cannot terminate lease *and* accelerate rent)
         2. Security deposit
      2. Eviction of Tenant
         1. Termination for breach of covenant
            1. Most states only allow landlord to evict for nonpayment of rent and not for breach of any other covenant (landlord can contract around this in the lease)
         2. Eviction through judicial process (summary proceedings)
            1. Quick and efficient means by which to recover possession and possibly rent.
            2. Typical statute requires a few days notice prior to bringing an eviction action
3. **Is the landlord obligated to mitigate damages when a tenant abandons possession?**
   1. An abandonment occurs when the tenant
      1. Vacates the premises without justification,
      2. Lacks the present intent to return, and
      3. Defaults in the payment of rent.
   2. Common law rule based on property law
      1. Property law equates a lease with a transfer of a property interest, which forecloses any control of the property by the landlord so the landlord may but need *not* mitigate.
      2. If the landlord does relet for more than the original rent then the original tenant is entitled to the windfall since the original tenant owns the property and is entitled to all rent. And if the landlord relets for less than the original rent then the original tenant is responsible for the difference.
      3. New York follows the common law.
      4. The landlord should not be forced into a new relationship with a new tenant especially since it is the tenant who did something wrong.
   3. Modern rule based on contract law
      1. Every contract imposes an implied duty on the landlord to do what is fair and equitable.
      2. Burden is on the landlord to show that he used reasonable diligence to mitigate the damage.
      3. This rule is more efficient because it returns the property to productive use.
      4. Helps prevent property damage by finding a new tenant.
4. **What rights do tenants have to ensure their use and enjoyment of the premises?**
   1. Covenant of quiet enjoyment – implied in every lease
      1. A tenant has a right of quiet enjoyment of the premises, without interference by the landlord.
      2. Can be breached by either actual or constructive eviction.
         1. Actual eviction
            1. Tenant physically evicted from the entire or any portion of the leased premises
            2. Tenant can remain in possession of the rest of the premises, refuse to pay rent, and sue for damages
         2. Constructive eviction
            1. Through the fault of the landlord, there occurs a substantial interference with the tenant’s use and enjoyment of the leased premises that renders the premises unsuitable for the purpose for which they were leased
            2. Elements:

Substantial interference

Measured objectively

Landlord has a duty to disclose defects prior to lease

If tenant knows of the interference before taking possession, and then takes possession, the tenant has waived the interference

Prior to claiming constructive eviction, tenant must give notice and give the landlord a reasonable time to fix the problem

Tenant must vacate premises

R2P does not require this

Fault of landlord

Generally landlord is not responsible for acts of other tenants

Depends on whether the landlord can control the acts

* + - * 1. Tenant must abandon the property within a reasonable time and terminate the tenancy if the tenant wants to stop paying rent; also tenant can sue for damages
    1. If only partial breach then tenant can choose to not pay the full amount of rent

1. **What duties do the landlords have in making sure the premises are habitable?**
   1. Doctrine of Caveat Lessee – “let the tenant beware”
      1. Under common law, the duty to repair was imposed on the tenant
         1. This is still the case for commercial leases.
   2. Implied Warranty of Habitability
      1. Courts recognized that each residential lease included an implied warranty that the landlord will deliver and maintain the premises in habitable condition.
      2. Tenant must notify the landlord of the defect and allow a reasonable time for repairs to be completed.
      3. Definition of “habitability” is not a sliding scale, meaning rich tenants are not entitled to more.
      4. One or two minor violations shall be considered de minimis and not a breach.
      5. Applicable to residences, not applicable to commercial leases
      6. Retaliatory acts by the landlord is prohibited.
      7. Remedies
         1. Continue lease and withhold rent
         2. Remain in possession and sue for damages
         3. Repair the defects and deduct the cost from rent
         4. Terminate the lease and sue for damages
            1. Damage is the difference in value of the dwelling as warranted and the value of the existing dwelling.
            2. Damages for cost to find other quarters
            3. Damages for discomfort and annoyance may also be warranted
            4. Punitive damages may be awarded when the breach was willful and wanton
2. **When does the tenant breach his duty not to commit waste?**
   1. If a tenant makes such a change as to affect a vital and substantial portion of the premises; as would change its characteristic appearance; the fundamental purpose of the erection; or the uses contemplated, or a change of such a nature, as would affect the very realty itself, extraordinary in scope and effect, or unusual in expenditure
3. **Rent control and the problem of affordable housing**
   1. Rent control is a form of price regulation.
   2. Held constitutional on the theory that it bears a rational relation to a legitimate public purpose: the welfare of housing consumers.
   3. Landlord-tenant reforms don’t help the poor & under-privileged b/c landlords will just shift costs to the tenants by raising rents, thereby out-pricing poor inhabitants
   4. Rent control & other landlord-tenant reforms are criticized by economists as middle-class or interest group regulation
   5. Reforms discourage apt. turnover (shift from apts. to condos) & creates an incentive for illegal subleases

###### SELECTION OF TENANTS

1. **Common Law did not restrict a landlord’s freedom in selecting or evicting tenants**
2. **Civil Rights Act of 1982**
3. **Fair Housing Act of 1968**
   1. Kinds of Discrimination
      1. Disproportionate effect on one race
         1. Need not be motivated by a racially discriminatory purpose (discriminatory effect is sufficient)
         2. Policy of racial ceiling quotas on rentals to prevent white flight and maintain an integrated apartment complex violates the FHA.
      2. Sex discrimination
         1. Includes harassing tenants for sexual favors
      3. Familial status
         1. Debatable whether restrictions limiting the number of occupants per bedroom discriminate against families with children
      4. Disabilities
         1. Excludes drug addicts, but includes recovering drug addicts and alcoholics
         2. Reasonable accommodation in rules and services
            1. Tenant must first ask landlord for the reasonable
            2. Landlord must allow the disabled tenant to make reasonable modifications to the premises at the expense of the tenant. Landlord *must* condition the modifications on the agreement that the tenant will restore the premises to the prior condition minus normal wear and tear.
            3. Are reasonable modifications subject to waste?
            4. If a tenant made reasonable modifications without first notifying the landlord, then who is liable for returning the premises to the prior condition?
      5. *Sexual orientation, age, and marital status are not protected*, but may in local laws
4. **Proving Discrimination**
   1. Under the McDonell Douglas model
      1. P has to show a prima facie case of discrimination (i.e., disparate impact)
      2. Then burden shifts to D to articulate some legitimate, nondiscriminatory reason
         1. “rational economic test”
         2. “compelling business necessity”
      3. Burden shifts back to P to show the defendant’s legitimate reason is only a pretext

|  |  |  |
| --- | --- | --- |
|  | Civil Rights Act § 1982 | Fair Housing Act |
| Protection | Bars **racial or ethnic** discrimination only | Bars **racial and ethnic** discrimination, **and** discrimination based on **religion, national origin, sex, disability,** and **against persons with children** |
| Type of Property | Sale or rental of **all property** | Sale or rental of **dwelling only**; also includes advertising for sale or rental of dwelling |
| Exemptions | None | Private clubs, religious organizations, qualifying owner of 1 to 3 single-family dwellings, qualifying owner-resident of building with 4 or fewer units, qualifying senior citizen housing |

# CRABGRASS FRONTIER

1. For at least the past two centuries, the easy availability of housing and land has distinguished the United States from other nations of the world.
2. In 1920s, when the Census Bureau announced that more than half the American population lived in urban areas, what was really unique about the United States was not the size of its huge cities, but the extent of their suburban sprawl; not the number of its workers, but the number of its commuters; not the height of its skyscrapers, but the proportion of its homeowners.
3. Beginning in the 1930s, the American government began two major thrusts in the broad field of housing. On the one hand, it encouraged homeownership through the long-term, low-interest mortgage. The beneficiaries of these programs were typically white and middle-class and their destinations were usually suburban.
   1. The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies, which had the result of the practical abandonment of large sections of older, industrial cities.
4. The second major housing initiative of the federal government involved the actual construction of dwellings of public tax monies for the benefit of those who could not pay market rates for shelter. This program slowly evolved from one offering temporary relief for the working poor to one offering a kind of permanent and dismal protection for the most disadvantaged members of the society. The locations of these structures were almost always in the poorest parts of central cities.
   1. The result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place of refuge for the problems of race, crime, and poverty.

# LAND USE CONTROLS

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **PRIVATE PUBLIC** | | | | |
| Private land use controls | | Common law restrictions | Legislative Restrictions  *(Police Power)* | Constitutional Limits |
| Grantor’s restriction | Servitudes |
|  | Easements  Real covenants  Equitable servitudes | Rule Against Perpetuities  Nuisance | Landlord/Tenant laws  Fair Housing Act  Zoning | Eminent Domain |

# NUISANCE

1. **What is a public nuisance?**
   1. An unreasonable interference with a right common to the general public.
      1. Intentional conduct that unreasonably interferes with the public health, safety, welfare, or morals may constitute a public nuisance.
2. **What constitutes a private nuisance?**
   1. A *nontrespassory* invasion of another’s interest in private use and enjoyment of land.
   2. Elements:
      1. P must have a possessory interest in the land
      2. D has committed an affirmative act that interferes with P’s use and enjoyment of her property.
      3. The interference is substantial and unreasonable in nature.
         1. Interference can be an intentional or unintentional result of negligence, reckless, or abnormally dangerous activity
   3. What does unreasonableness mean in the context of an intentional tort?
      1. Threshold test 🡪 Under common law, the unreasonableness focused on the *level* of interference that results from the conduct.
      2. R2T states an intentional interference is “unreasonable” if
         1. The gravity of the harm outweighs the utility of the actor’s conduct *or*
            1. Factors relevant to gravity of the harm are

The extent and character of the harm (i.e., depreciation of property value, discomfort in the use of land, and fear of harm),

The social value of P’s use,

Its suitability to the locality in question, and

The burden on P of avoiding the harm.

* + - * 1. Factors relevant to utility of the actor’s conduct are

Its social value,

Its suitability to the locality, and

the impracticability of D preventing the harm.

* + - 1. The harm caused by the conduct is *serious* and D can *afford to pay* those damaged.
  1. Are apprehensions about criminal activity or devaluation of property sufficient for nuisance liability?
     1. Some courts have said yes, but others held that negative publicity resulting from unfounded fears did not constitute a significant interference.
     2. Generally, nuisance law protects ordinary uses, not abnormally sensitive ones. So courts have found no nuisance in cases alleging interference with light.
     3. Courts commonly find nuisance in instances where actor’s sole purpose is to vex another.
     4. Most courts hold that unsightliness (aesthetics) alone does not constitute nuisance.

1. **Distinguish from trespass**

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|  | **Trespass** | **Nuisance** |
| Definition | Actionable invasion of a possessor’s interest in exclusive **possession** of land | An actionable invasion of a possessor’s interest in the **use and enjoyment** of land |
| **Standard for Relief** | An **intentional**, unprivileged physical intrusion | Unreasonable conduct; substantial injury; and the equities balance in the plaintiff’s favor |
| **Remedy** | Damages for past conduct and an injunction against future trespass (as a matter of right). Damages are more easily measured and accounted for. | Damages for past conduct **or** permanent damages for future conduct **or** an injunction (in court’s discretion). Damages are measured much more subjectively. |

1. **Economic Analysis – Coase theorem**
   1. Suppose the cost to A (factory owner) of installing smoke abatement equipment is $100, and the damage to B’s land is $50. If entitlement is given to A, then A will continue to belch smoke because B will give A only $50 to stop, and it is worth $100 to A to continue. If the injunction is given to B, B will sell the right to smoke to A at somewhere between $50 and $100. The sale will make them both better off. Thus, regardless of whether A or B is given the right, it will end up in A’s hands by operation of the market if transaction costs are low.
   2. If the figures are reversed, so that installing the equipment would cost A $50 and the smoke damage to B’s land is $100, A would install the equipment no matter where the right is initially assigned. If assigned to A, B will pay A something between $50 and $100. If assigned to B, A would install the equipment for $50 rather than buy out B’s right for $100. Thus, the market determines whether the activity will continue, not the initial allocation of rights by the courts.
   3. Reasons for high transaction costs:
      1. The holdout problem – many parties and they all hold out for exorbitant price
      2. The free rider problem – many parties and all do not want to pay to buy out entitlement
      3. The strategic behavior problem – few parties and all want to make the highest profit
   4. How should the court determine who gets the initial entitlement (property right / granted the injunction)?
      1. Give to highest valued user
      2. First in time prevails (not the one who has “come to the nuisance”)
      3. Wealth redistribution (give to the poorer party)
      4. Healthy environment (do not give to party causing harm)
2. **What is the appropriate remedy for a private nuisance?**

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| **ENJOIN D** | **P GETS DAMAGES** |
| Forces D to weigh whether to invest to get rid of nuisance or negotiate to buy P’s injunctive right  Morgan (smell from neighboring oil refinery = nuisance)  Estancias (vibrations and noise from neighboring apt complex AC unit = nuisance) | Essentially court forced P to sale her property right to D (liability rule)  *Permanent nuisance*: P receives damages for past and future harm in one lawsuit  *Temporary or continuing nuisance*: P receives damages to compensate for past harm and must sue again in future as additional damages are suffered.  Boomer (cement plant a nuisance, BUT ct said plant had great social value and so Δ can continue if they pay P for the permanent nuisance; it’s like “slapping a servitude [right to use] on the P’s land”) |
| **REFUSE P ANY REMEDY** | **ENJOIN D AND GIVE D DAMAGES** |
| D is not a nuisance and can continue doing it.  Injunction against P complaining about the “nuisance.” | P has to pay D for the injunctive right.  Spur (feedlot owner was a lawful business, but became a public nuisance by the expansion of a nearby residential area. Since many homeowners would be injured and D only one injured with an injunction, ct forced P to pay D for the costs of moving or shutting down the feedlot. |

1. **Lateral and Subjacent Support**
   1. Every landowner is entitled to have his land receive the necessary *physical support* from adjacent (lateral) and underlying soil (subjacent).
   2. Lateral support
      1. Right is absolute so once support has been withdrawn and injury occurs, the responsible person is liable even if he used utmost care in his operation.
      2. Exists only with respect to land in its *natural state*. So does not apply to buildings.
      3. Example is one neighbor very carefully constructs a large excavation extending almost to the edge of his property, which causes the other neighbor’s soil to run into excavation, impairing the surface of other neighbor’s property.
   3. Subjacent support
      1. Right arises only where sub-surface rights (i.e. mineral rights) are severed from the surface rights. When such a severance occurs, the owner of the surface interest has the right not to have the surface subside or otherwise be damaged by the carrying out of the mining.
      2. Surface owner has absolute right to support, not only of the unimproved land, but also support of *all structures existing* on the date when the severance took place.

# SERVITUDES

1. **In General**
   1. Purpose of these private agreements is to increase the total value of all parcels involved.
   2. Right to use or control use of another’s land
   3. “Dead Hand” binds successors to title
2. **Three functions**
   1. A’s right to *use* B’s land
   2. A’s right to *restrict* B’s use of B’s own land
   3. A’s right to impose an *obligation* on B to use his own land in a certain way
3. **Types of modern servitudes**
   1. Easement
      1. Grant of a right by one landowner to another
   2. Real Covenants and Equitable Servitudes
      1. Promise respecting the use of land by one landowner to another
   3. Negative Easements
      1. Right to restrict or control someone else’s property
      2. Recognized under the English law
         1. Blocking windows
         2. Blocking air that flowed in a defined channel
         3. Blocking water that flowed in a defined channel, and
         4. Removing support from a building.
   4. Licenses
      1. A revocable permission to enter someone else’s property for a narrow purpose
      2. Can be express or implied (i.e., UPS delivering packages)
      3. Generally not transferable
   5. Profits
      1. A is given the right to enter upon B’s land and remove something attached to the land.
      2. A type of an affirmative easement

# EASEMENTS

1. **In general**
   1. *Grant* of an interest in land that entitles a person to *use* land possessed by another
   2. Can have a duration comparable to any of the possessory estates (FSA, FSD, etc.)
   3. Dominant v. servient estates
      1. Benefited by the easement v. burdened by the easement
   4. Easement (right to use and generally irrevocable) v. Lease (right to possession) v. License (narrow privilege that is revocable at any time)
2. **Creation**
   1. Express conveyance
      1. Voluntarily created in a deed, will, or other written instrument.
      2. Subject to statute of frauds (oral grant of an easement constitutes a license)
      3. Reservation in favor of a third party
         1. Under the majority view, an easement can be reserved only for the grantor. An attempt to reserve an easement for anyone else will likely be held void. (not problem w/covenants)
         2. Solution – two pieces of paper!
            1. In Willard, O wanted to convey land to A and reserve an easement for parking in favor of her church across the street. First, O conveys land to church. Second, church conveys land to A reserving an easement in itself.
   2. Implication
      1. Created by *operation of law* (exception to Statute of Frauds) when an owner severs property into two parcels in such a way that an already existing, obvious, and continuous use of one parcel is necessary for the reasonable enjoyment of the other parcel.
      2. Elements required for an easement implied from prior existing use:
         1. Severance of title to land held in common ownership
         2. An existing, apparent, and continuous use when severance occurs; and
            1. “apparent” not the same thing as “visible”

In Van Sandt, court held that an implied sewer easement has been reserved to adjacent houses because the sewer is apparent.

* + - * 1. “continuous” includes a permanent physical change in the land for a use

Improvement of a roadway by paving counts as “continuous” use

* + - 1. Reasonable necessity for the use at time of severance.
         1. Relevant factors include cost and difficulty of establishing other alternate use, and whether the price paid reflects the expected continued use of the servient
    1. An easement in gross will not be implied. An easement by implication must benefit a dominant tenement created by dividing a tract into two or more lots.
  1. Necessity
     1. Elements required:
        1. A unity of ownership of the alleged dominant and servient estates;
        2. Necessity existed at the time of severance of the two estates; and
        3. Necessity is still present; not a mere convenience.
           1. i.e., when the parcel has no legal right of access to a public road
  2. Prescription
     1. American view: Claimant’s *adverse use* must generally be
        1. Open and notorious,
        2. Continuous and uninterrupted for the statutory period.
        3. Adverse and under a claim of right, and
           1. Exclusive use w/o permission

Exclusivity does not require a showing that only the claimant made use of the way, but that the claimant’s right to use the land does not depend upon a like right in others. So the easement can also be used by the servient owner (see Othen).

* + 1. English view: Lost grant theory
       1. If an easement has been recognized for many years then it is presumed that a grant was made, but the written record has been presumed to be lost.
  1. Estoppel
     1. Created when the conduct of the owner of land leads another to reasonably believe that he or she has an interest in the land so that he or she acts or does not act in reliance on that belief.
     2. Expenditure of substantial money or labor in good faith reliance
     3. Also called “irrevocable license”
     4. A New York court refused to recognize estoppel

1. **Transferability**
   1. Appurtenant easement *(favored)*
      1. Easement creates a relation between two plots of land and is owned by whoever owns the dominant estate
      2. Automatic transfer of the benefit if the parties so intend and the burdened party has notice of the easement
   2. Easement in gross
      1. Easement not attached to land
         1. O grants to a billboard company the right to erect a sign on his property. Company owns no land. If O sells his land to A, the burden of the easement passes to A.
      2. Most profits and many licenses are in gross: they are owned by some individual or corporation who does not live nearby
      3. Freely assignable unless the original parties had a contrary intent
2. **Scope**
   1. Common law property principles say that the scope of an easement may be adjusted in the face of changing times to serve the original purpose, so long as the change in use is reasonably foreseeable at the time of the establishment of the easement.
   2. Scope of easement may evolve over time as manner, frequency, and intensity of use change. R2P §4.10.
   3. Turns on the intent of the parties. In ascertaining intent, the court may examine
      1. Whether the increase in the burden is unreasonable.
      2. What changes in use might reasonably be foreseeable by the parties,
      3. What changes in use are required to achieve the purpose of the easement under modern conditions and preserve the usefulness of the easement to the dominant tenement, and
      4. Whether the easement was created expressly or by prescription,
         1. It is more difficult to increase the burden of an easement by prescription than any other kind of easement because while the servient owner might not have objected to some slight use of her land, she might have strongly objected to heavier use.
   4. Use for benefit of nondominant land is generally not allowed
      1. In Brown, the court allowed the plaintiff to traverse the servient estate to reach not only the original dominant estate, but also a subsequently acquired parcel because the change in use caused no increase in the burden on the servient estate. The dissent argued that the plaintiff, when purchasing the subsequent parcel, should have known from the public records that the easement was not appurtenant to the subsequent parcel. The court imposed the liability rule on the defendant and ignored the defendant’s property right to limit the scope of the easement. Maybe the court should have enforced the property right and forced the plaintiff to bargain with the defendant.
3. **Termination**
   1. Owner releases easement to the servient owner by a written instrument
   2. By unity of title 🡪 merger of dominant and servient estates
   3. Abandonment
      1. Stops using it for a long period *and*
      2. Takes other actions that clearly manifest intent to relinquish the easement
   4. Prescription
      1. Servient owner wrongfully and physically prevents the easement from being used for the prescriptive period.
   5. Easement created by necessity terminates when the necessity ends
   6. Destruction of servient tenement
4. **Public Trust Doctrine**
   1. Land covered by tidal and navigable waters belonged to the sovereign but for the common use of all the people (i.e. beachfront).
   2. In Matthews, the court held where use of dry sand is essential for enjoyment of the ocean, the doctrine warrants the public’s use of the beach area subject to an accommodation of the interests of the owner of the beachfront.

# REAL COVENANTS AND EQUITABLE SERVITUDES

1. **Reason for**
   1. Under early English law, a promise concerning land use could not burden or benefit the successors of the original contracting parties. Real covenants and equitable servitudes were developed to address this restriction.
   2. The same promise can create both a real covenant and an equitable servitude. The crucial difference between the two is the *remedy* sought. If money damages are sought, analyze under real covenant. If injunction is sought, analyze under equitable servitude.
2. **Real Covenants**
   1. In General
      1. A promise concerning the use of land that benefits and burdens the original parties to the promise and also their successors and is enforceable by damages
      2. Run with the estate 🡪 privity required
         1. Burden does not run to adverse possessor because adverse possessor does not succeed to the promisor’s estate but takes a new title by law
   2. Creation
      1. Requirements for the Burden and/or Benefit to Run
         1. Satisfies the Statute of Frauds;
         2. Original parties must intend to bind their successors;
         3. Successor must have notice of the covenant.
         4. “touch and concern” land;
            1. physical use or enjoyment (including homeowner’s fees)
            2. enhance the value of the benefited land
         5. Vertical privity must exist;
            1. Succession to an estate of the same duration as owned by the original promisor

Distinguish owners v. possessors (possessors usually are not in VP)

Example

B buys land from O and promises she will not erect a pizza parlor on the land. Subsequently B devises land to C, for life. C erects a pizza parlor, but is not liable for damages because C did not succeed to the whole fee simple B had.

* + - 1. Horizontal privity must exist *only for the burden to run*;
         1. Original promisor and promisee have mutual or successive relationship

Landlord-tenant (mutual)

Grantor-grantee (successive)

Present-future interests (successive)

Easement (mutual)

* + 1. Few courts have said that the last three requirements should be dispensed with.
    2. Cannot arise by estoppel, implication, or prescription as can an easement.

|  |  |  |  |  |
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| BURDEN | |  | **BENEFIT** | |
| **Real Covenants** | **Equitable Servitudes** |  | **Real Covenants** | **Equitable Servitudes** |
| Intent  Notice  T&C  VP  HP | Intent  Notice  T&C |  | Intent  Notice\*  T&C  VP | Intent  Notice\*  T&C |

\*not required in Gilbert’s

1. **Equitable Servitudes**
   1. In General
      1. Run with the land 🡪 privity not required
      2. Same as real covenant but is enforceable by an injunction
   2. Creation
      1. Requirements for the Burden and/or Benefit to Run
         1. Satisfies the Statute of Frauds or implied from a general plan;
         2. Original parties must intend to burden successors;
         3. “touch and concern” land; and
         4. Successor must have notice of the promise.
   3. Special Problem: Subdivisions
      1. If a developer manifests a general plan to impose uniform restrictions on a subdivision (intent) *and* the plan existed no later than the time the parcel in question was sold (notice), then most courts will conclude that an equitable servitude will be implied in equity.
   4. Distinguished from easements
      1. An easement cannot be reserved in favor of a third person (see Willard). On the other hand, an equitable servitude analogous to a negative easement can be enforced by third parties. Such a result seems irrational but New York follows it.
2. **Termination / Defenses to Enforcement**
   1. By unity of title 🡪 merger of benefited and burdened lands
   2. Changed conditions
      1. Conditions in the area of the burdened land have so substantially changed that the intended benefits of the covenant cannot be realized
      2. As long as enforcing the covenant is not unconscionable or oppressive then the court must abide by the wishes of the parties
      3. Zoning ordinances cannot override privately-placed restrictions
   3. Abandonment
      1. Conduct of the person entitled to the benefit of the covenant demonstrates the intent to relinquish her rights
      2. Some states do not recognize abandonment of land—perfect title cannot be abandoned and so covenants hold
   4. Too vague/ambiguous and impairs the alienability of the property (see Caullet)
   5. Violative of FHA
   6. Unconstitutional under the Equal Protection Clause (see Shelley).
3. **Property Rights or Contract Rights**
   1. Equitable servitudes have property rights. That means no consideration is needed.
      1. Once the original promisor has conveyed the burdened land, the promisor cannot be sued on the covenant in law or in equity because promisor is not responsible for what subsequent owners do.
      2. If government condemns the burdened land, the government must pay the benefited owner damages for loss of the servitude.
      3. Government must pay damages to the easement owner if it destroys an existing easement.
      4. Government must pay damages to benefit owner if it violates a restrictive covenant.
4. **HYPO**
   1. Facts:
      1. A&B are neighbors
      2. Contract: A agrees with B to use land for “residential purposes only” & “runs with the land”
      3. They record the agreement
   2. Question #1
      1. A sells to C, who starts to build a Starbucks
      2. Can B sue for damages?
   3. Answer #1
      1. The answer depends on whether the burden runs to C
      2. In order to sue for damages, the agreement must have created a real covenant
      3. Intent? Notice? T&C? All yes
      4. VP? You look at the relationship between A&C. Both have the same estate in interest
      5. HP? You look at the relationship between A&B. No, because covenantors lacked simultaneous or successive interests in same estate. We are trying to figure out whether the real covenant exists so B does not have an interest in A’s land yet. The lawyer messed up. He could have ensured HP by using “strawman” to simultaneously convey plots of land to A&B.
      6. Must B live next to Starbucks?
         1. No, he can package the agreement as an equitable servitude so he can get an injunction
   4. Question #2
      1. B sells to C rather than A sell to C
      2. A starts to build a Starbucks
      3. Can C enforce as a real covenant?
   5. Answer #2
      1. The answer depends on whether the benefit runs to C
      2. YES – no need for HP for benefit to run. So C can sue for damage.
      3. Or C can choose to sue for ES.

## ZONING

1. **Introduction**
   1. How are nuisances and restrictive covenants inadequate such that we need zoning?
      1. Nuisance law did not prevent nuisances from arising, but merely gave damages or an injunction after the fact in an expensive lawsuit. On the other hand, zoning was designed to *prevent* harmful effects being visited upon neighbors.
      2. Restrictive covenants were useful only in new subdivisions and other large acreage developments occurring under a single owner, who imposed the covenants. Zoning provided a more centralized means of control.
      3. Besides preventing harm, zoning often regulates uses to achieve public benefits and maximize property values (the tax base) in the city.
   2. Criticism of Zoning
      1. Zoning practices can be used to exclude affordable housing from a city or suburb.
      2. Zoning has been criticized by urban planners, most notably Jane Jacobs, as a source of new social ills, including the separation of homes from employment and the rise of "car culture." Some communities have begun to encourage development of denser, mixed-use neighborhoods that promote walking and cycling to jobs and shopping. However, a single-family home and car are major parts of the "American Dream" for nuclear families, and zoning laws often reflect this: in some cities, houses that do not have an attached garage are deemed "blighted" and are subject to redevelopment.
2. **The Constitutionality of Zoning**
   1. Zoning regulations fall under the police power—power of the State to protect health, safety, welfare, and morals—rights governments may exercise over real property. States delegate their police power in zoning to the local government through an enabling act.
   2. Since property rights are not fundamental rights, courts apply the rational basis test when reviewing zoning ordinances: Does the ordinance bear a rational relationship to a permissible state objective?
   3. In Euclid (1926), the Supreme Court held that a zoning ordinance would be upheld against substantive due process and equal protection attack unless it was arbitrary and unreasonable, having no substantial relation to the public health, safety, welfare, or morals.
      1. The village had zoned an area of land held by Ambler Realty as a residential neighborhood. Ambler argued that it would lose money because if the land could be leased to industrial users it would have netted a great deal more money than as a residential area.
      2. Court justified the ordinance saying that a community may enact reasonable laws to keep the pig out of the parlor, even if pigs may not be prohibited from the entire community.
   4. Since Euclid, there have been no other facial challenges to zoning. However, beginning in 1987, the Supreme Court has ruled several land use regulations as being a taking requiring just compensation.

###### THE NONCONFORMING USE

1. A *nonconforming* *use* is a use of land that lawfully existed before the zoning ordinance was enacted, but that does not comply with the ordinance. Usually owner is granted substantial time or indefinitely.
2. **What is the purpose of the amortization period?**
   1. If the government was free to amortize nonconforming use out of existence, future economic development could be seriously compromised. Anyone could find one day that his home or business had become a nonconforming use and would be required to vacate the premises within some arbitrary period of time, without just compensation.
      1. The idea is that a nonconforming property owner must be given a reasonable amount of time to change to a conforming use so as to spare them the harm of “substantial” loss.
3. **Why do we distinguish between existing uses and expected uses?**
   1. Expected uses are not protected but existing uses are protected because they have vested right.
      1. A lawful nonconforming use establishes in the property owner a *vested* property right which cannot be abrogated or destroyed, unless it is a nuisance, abandoned, or extinguished by eminent domain.
      2. Vested rights protects a proposed use if sufficient commitments have been made—plans drawn, permits obtained, site prepared, construction begun—in reliance on existing zoning requirements that are subsequently changed in a way that invalidates the proposed use.
      3. The difference privileges landowners who actually use their land rather than simply hold their land for speculative purposes.
   2. Estoppel is sometimes applied when developers rely reasonably and to their detriment on the issuance of a permit and proceed to make substantial expenditures. Developer’s reliance must be in good faith, making all the inquiries as to the permit’s validity as are expected of a reasonable person.
4. Right to maintain a nonconforming use usually runs with the land; hence it survives a change of ownership.
5. Some states allow nonconforming uses to expand to meet natural changes, e.g., increased demand.
6. Abandonment and destruction of nonconforming use usually terminates it.

### **ACHIEVING FLEXIBILITY IN ZONING**

1. **Zoning Amendments and the Spot Zoning Problem**
   1. A zoning ordinance may be modified by a zoning amendment to correct an original zoning mistake, to adjust to changed neighborhood conditions, or any other reason that is not clearly arbitrary and unreasonable.
   2. Why are zoning amendments better than variances and exceptions?
      1. Zoning amendments are legislative and courts grant a lot of deference to legislatively-passed zoning board amendments.
   3. Spot Zoning
      1. Zoning amendments invalidated as legislative acts unsupported by any rational basis related to promoting public welfare. The zoning changes typically apply to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district, and which dramatically reduce the value of uses specified in the zoning ordinance of either the rezoned plot or abutting property.
      2. Invalid where these factors are present:
         1. Small parcel of land is singled out for special or privileged treatment;
         2. Singling out is not in the public interest but only for the benefit of the landowner;
         3. Action is not in accord with a comprehensive plan.
      3. Reverse spot zoning
         1. Singling out parcel of land to the detriment of the owner (i.e. historic landmark)
2. **Euclidean means of achieving flexibility**
   1. Variances
      1. An *administratively-authorized* departure from the terms of the zoning ordinance, granted in cases of practical difficulty and unnecessary hardship, in which a strict application of the terms of the ordinance would be unconstitutional.
      2. A variance will be granted if:
         1. Denial of a variance would result in practical difficulty or unnecessary hardship,
         2. The hardship must not be self-created,
         3. The need for the variance is a problem unique to the owner’s lot, and
         4. Granting a variance cannot be inconsistent with the overall purpose of the ordinance, and
         5. It cannot be detrimental to the general welfare of the area.
      3. What constitutes a hardship?
         1. Strict enforcement of the terms renders the property invaluable.
         2. Usually the property has some special characteristic (e.g., irregular lot size) that is not shared by other parcels in the district.
         3. Attempts to acquire neighboring land would be significant if feasible. If the landowner is willing to sell at a fair and reasonable price and the adjoining landowners refuse to make a reasonable offer, the undue hardship would exist. (see Commons).
      4. Variances run with the land because they have to do with the unique use of that land.
      5. If you already violate the zoning ordinance, you cannot get a variance for additional violations.
      6. Conditions may be attached to the grant of a variance (analyze with Nolan-Dollan test)
   2. Special Exceptions (special-use/conditional-use permits)
      1. A use *permitted by the zoning ordinance* if specified conditions are met. The conditions ensure the uses will be compatible with surrounding uses.
      2. A special exception will be granted if:
         1. The ordinance lists the use
         2. The use will meet all standards and conditions set out in the ordinance, and
         3. The use will not detract from the area’s health, safety, and public convenience beyond that inherent in the normal conduct of the activity itself
      3. Special Exception v. Variance
         1. Special exception is granting the right to do something that is already permitted by the ordinance so long as the property owner meets certain conditions.
         2. Variance is not permitted in the ordinance but the property owner is asking for a deviation due to special hardship.
      4. Exceptions are to be specified by the legislative body. The state grants the local zoning board the power to determine whether or not the conditions have been met. The state must provide legislative standards to guide and limit the zoning board to prevent the board from acting in a discriminatory manner. Standards that are too broad and vague are facially unconstitutional. (see Cope).
3. **Non-Euclidean means of achieving flexibility** 
   1. Contract and Conditional zoning
      1. Bilateral and unilateral agreement to make a zoning amendment that the property owner seeking the change will abide by certain conditions
      2. Raises concerns about spot zoning, departures from the comprehensive plan, and might be seen to involve unlawful delegation of legislative authority
   2. Floating zone
      1. The zoning entity approves the creation of a new zoning district with particular characteristics, but does not specify its location; a developer can then apply for rezoning to attach the floating zone to her property
      2. Some say this is invalid because it does not conform with a comprehensive plan, amounts to spot zoning, or entails an improper delegation of legislative power.
   3. Plebiscites
      1. A direct vote by citizens on some public question (i.e. rezoning)
      2. Problems with small-scale rezoning by popular procedures
         1. Issues at stake are poorly presented to the public, giving at best only a superficial understanding
         2. Voter turnout is generally low and hence can be “conspicuously undemocratic”

### **EXPANDING THE AIMS OF ZONING**

1. Zoning began in response to problems created by rapid urbanization—overcrowding, disease, traffic, smoke, odors, and the like. The nature of zoning has evolved over time to serve new goals, including protecting property values, preserving neighborhood character, preventing environmental degradation, enhancing the property tax base, and encouraging economic development.
2. **Aesthetic Regulation**
   1. Supreme court approved the expanded conception of “public welfare.” The values it represents are spiritual as well as physical, aesthetic as well as monetary.
   2. The standard to be applied to aesthetic ordinances is whether the prohibited use offends the sensibilities of the *average person* and tends to *depress property values*. (see Berkeley)
      1. Most courts recognize architectural design review ordinances but it is unclear whether city can prohibit owner from building “ugly” home solely on aesthetic.
      2. Some courts have upheld ordinances that prohibit billboards on the theory that they are harmful to the quiet and tranquility sought in residential areas.
   3. Private architectural restrictions are governed by a different standard than public restrictions. Cases have held that specific standards are not necessary when architectural approval is required by a private covenant. The architectural committee only has to act reasonably and in good faith.
3. **Controls on Household Composition**
   1. In Village of Belle Terre, the Supreme Court upheld “family” zoning against constitutional challenges. The ordinance permitted only one-family dwellings, and defined “family” such that no more than two unrelated persons could inhabit the same home.
      1. The majority found that the ordinance was merely social and economic regulation that should be reviewed under the traditional deferential standard accorded to zoning.
         1. The majority said that the ordinance easily met the substantial relationship test because it reduced the traffic, parking, noise, and other urban problems caused by group living arrangements, and thus was rationally related to public health, safety, and welfare.
      2. The dissent said that the strict scrutiny test is required because the ordinance burdens the students’ fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments.
         1. Dissent says regulation of use is fine, but NOT regulation of users.
         2. This ordinance fails the strict scrutiny test because it is overinclusive and underinclusive. It is overinclusive because it prohibits three unrelated people living together even if they drive one car and have only one income, whereas a family of three could have two cars. It is underinclusive because it does not restrict whatsoever on the number of related persons living together no matter how much traffic, noise, etc. they cause.
   2. In Moore, the Court struck down the ordinance because it directly interfered with the sanctity of the family, while Belle Terre involved unrelated persons. The ordinance defined the term “family” so narrowly that certain blood relatives were excluded.
   3. Intersection Between Zoning and the FHA
      1. FHA prohibits discrimination in all real-estate transactions including covenants, zoning.
      2. Zoning ordinances are valid when they regulate the use of land (i.e. density) but invalid when they try to regulate the identity of the users (i.e. race, family orientation).
      3. In City of Edmonds, the city sued a group home for violating a provision that defined “family” as “persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons.” The court held that the provision was a family composition rule, subject to FHA, and not a maximum occupancy restriction because so long as the occupants are related, any number of people can live in a house. Remanded to determine if it violates FHA.
4. **Exclusionary Zoning**
   1. All zoning is exclusionary by definition: Its central purpose is to minimize or eliminate unwanted effects—externalities—in a given district. Contrast this with another kind of e*xclusionary zoning*: measures whose purpose or effect is essentially to close an entire community to unwanted groups—typically people of low income who might put a heavy burden on the public fiscal yet at the same time contribute little to it, resulting in increased property taxes and reduced land values throughout the community.
   2. In Mt. Laurel, the NJ Supreme Court held that the state constitution obligated each developing city to meet its “fair share” of the regional need for low and moderate-income housing. However, the town responded by rezoning less than a quarter of a percent of its land for low-income. In Mt. Laurel II, the court could grant variances going over the jurisdiction of the local zoning board and overcoming the very deferential standard usually given to local governments. Still the changes were very slow-moving, so in Mt. Laurel III, the legislature stepped in and enacted the state’s version of the FHA to enforce the court’s rulings.
   3. Courts have invalidated efforts to set minimum housing-cost requirements. Efforts to impose minimum floor-area requirements have faced mixed judicial reaction. Minimum lot-size has been mostly upheld if they find rational justification.
   4. Are restrictions on exclusionary zoning a good thing?
      1. Tiebout Hypothesis – specialization among suburbs (no inclusionary zoning) is a good thing because people can choose which municipality they want in terms of what public goods and taxing policies they have.
         1. This assumes that there is a true free market and people all have equal mobility and access.
      2. Waring Blender model – all land uses and all types of households have to be represented in each neighborhood in proportion to their representation in the entire metro area. Great diversity within neighborhoods, but none between neighborhoods.
5. **Inclusionary Zoning**
   1. Requirement: require a certain component of affordable housing in each housing development
   2. Incentive: lifting certain restrictions in exchange for building more low-income units
   3. Greenpoint-Williamsburg Inclusionary Housing Program
      1. The rezoning program reclaims two miles of neglected waterfront to create open space, park, low income housing, and commercial development. The zoning changes include a new Inclusionary Housing program, which allows developers who provide affordable housing to be eligible to develop additional floor area (i.e. 33% floor area bonus to site providing 20% affordable housing).

## EMINENT DOMAIN

1. **Rationale**
   1. Eminent domain is an inherent attribute of sovereignty, necessary to the very existence of government.
   2. It is utilitarian and increases efficiency for the most people through takings for public use (i.e., schools, parks)
   3. Prevents monopolies and oligopolies. Also prevents hold-outs which involve high transaction costs, which have adverse effects on the larger market.
   4. Way to redistribute wealth? Epstein argued that taxes is a “taking.”
   5. There is longstanding policy of deference to legislative judgments in this field.
2. **Eminent Domain v. Police Power**
   1. The difference lies in the relations which the property affected bears to the danger or evil which is to be provided against. Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests.
   2. It may be said that the **state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.** From this difference, we require compensation for takings, but not for police power.
   3. Police power is granted by Tenth Amendment to give states the power to regulate the exercise of property rights that are detrimental to public interests. However, if the regulation goes too far it will be recognized as a “taking” and the government is required to compensate. The question is where to draw this line. See the next section for the rules that the Supreme Court has set out.
3. **The Takings Clause of the Fifth Amendment**
   1. “Nor shall private property be taken for public use, without just compensation”
      1. The Takings Clause confirms the government’s power to take land through eminent domain as a legitimate police power.
      2. Main purpose of the clause is to bar government from forcing some people to bear public burdens alone which, in all fairness and justice, should be borne by the public as a whole.
   2. “Nor shall private property….”
      1. Any type of private (real & personal) property may be acquired through eminent domain.
   3. “….be taken….”
      1. Permanent physical possession; temporary physical invasion; or an overly-restrictive land use regulation
   4. “…without just compensation”
      1. Permanent taking 🡪 the fair market value of the property on the date of the taking based on the “highest and best use” that can be made of the property under the current zoning regulations
      2. Temporary taking 🡪 the fair market value of the use of the property during the takings period

###### THE PUBLIC USE PUZZLE

1. **Public use or purpose?**
   1. Narrow view 🡪 the public must have the *right to use* the condemned property
   2. Broad view 🡪 condemnation must *benefit* the public
      1. In Berman, the government condemned blighted land and resold it to a developer under a redevelopment scheme (urban renewal)
      2. In Midkiff, the government condemned land to break up a land ownership oligarchy and reestablish a free market
      3. In Poletown, the government condemned land and resold to a private corporation for building an industrial plant providing jobs
         1. The *dissent* explained that there are three elements that justify use of eminent domain for private corporations:
            1. Public necessity of the extreme sort,
            2. Continuing accountability to the public (i.e., oversight committee), and
            3. Selection of land according to facts of independent public significance (i.e., slum/blight clearance).
      4. In Kelo, the city of New London approved a comprehensive development plan that would create jobs, increase tax revenues, and revitalize an economically depressed city.
         1. The majority holds that the sovereign may take private property so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, and maybe even aesthetic pleasure. The dissent responded that any lawful use of real private property can be said to generate some incidental benefit to the public. The dissent differentiated Kelo from Berman. In the latter, eminent domain was *needed* to correct pervasive blight in the neighborhood, which is a strong public interest. But in Kelo, the eminent domain power is for economic development, which *generated* a public benefit.
2. **Post-Kelo view of public use**
   1. In Kelo, the court reasoned that the Court's jurisprudence on eminent domain has evolved to a point where now state legislatures are the primary source for construing the definition of public use. This argument assumes that the legislature's definition of public use or blight is such that the state action would be considered legitimate by the citizens who elected the present government representatives. Those affected can use the political process to remove the representatives who propose to abuse the power of eminent domain under an economic development rationale.
      1. Given the significant barriers to attacking the findings of fact which lead to condemnation, the public should have greater protection than merely the political process, which is exercised intermittently at the polls.
      2. Also, doesn’t giving such power to the legislature without adequate judicial review a violation of the separation of the branches?
   2. In fact, as a result of the Kelo ruling and the rise in abuse by municipal legislatures, public backlash to excessive takings is on the rise and the formation of grassroots efforts to pass statutory protection has begun. The Kelo effect should not be underestimated. Politicians are poised to act, demonstrated by the introduction in Congress of two pieces of legislation designed to undo the effect of Kelo, and with state legislators moving for constitutional amendments prohibiting eminent domain for private development. Kelo has opened the eyes of many politicians, conservative and liberal, to the potential misuses of eminent domain.
3. **Two views justifying public-purpose**
   1. Contemplated ends are sufficiently “public.”
      1. Once the legislative purpose is within its authority, the right to realize it through the exercise of eminent domain is clear. The power of eminent domain is merely the means to an end and the means by which the purpose is to be achieved is for the legislature to decide. Thus, courts must defer to the legislature’s determination that the taking will serve a public use where it determines there are substantial reasons for an exercise of the taking power. (see Midkiff).
      2. But if the relevant sense of “public” is the broad test of “public benefit” then it erases the distinction between the act of condemnation and police powers. If eminent domain is used, it is an exercise of police power, then it must also be in the public interest. Eminent domain should only be used if it is in the public interest. The logic is circular. And since the exercise of police powers requires no compensation, then this effect would allow the state to freely choose compensation and noncompensation any time its actions served a “public use.”
   2. Government means is for a use that is difficult to provide for without the use of eminent domain.
      1. Test essentially authorizes eminent domain when transaction costs are sufficiently high.
      2. Since the court already can decide whether the government may properly proceed by regulating under the police power or whether instead the government must use the taking power and bear the burden of compensation, then the court should be able to also decide whether the government may condemn or must instead resort to voluntary transactions in the market.

###### REGULATORY TAKINGS

The government can regulate the use of property under the police power, but at some point, the land use regulation may so restrict an owner’s rights as to become a taking even if the government does not physically occupy the land.

1. **In Hadacheck, the court held that nuisance control regulations are never takings. (1915)**
   1. When the regulation has the purpose or effect of protecting the public from harm (or prohibiting a nuisance), it is an exercise of the police power and noncompensable; when the regulation has the purpose of extracting a public benefit, it is an exercise of eminent domain, and the owner must be compensated.
      1. Here, the court upheld a zoning ordinance prohibiting the continuation of a brickyard in a residential area.
   2. But the distinction between preventing a harm and acquiring a benefit may be illusory. All restrictions preventing A from harming B confer a benefit on B. Harm arises only when the neighbors want to make an incompatible use. To decide that one of two completing land uses is harmful is merely a conclusion reflecting a judgment about which of two incompatible property uses ought to be preferred.
2. **Loretto’s permanent physical occupations rule (1982)**
   1. Any permanent physical occupation authorized by government was a taking (nuisance controls aside) regardless of the public interests that it may serve or the economic impact on the owner, and even if the extent of the occupation is relatively minor.
   2. Here, the government authorized cable companies to install cables along the side of the building and metal boxes on the roof of an apartment building. The court reasoned that permanent physical occupation effectively destroys all of the owner’s basic property rights: right to possess, power to exclude, and power to control use.
   3. How is the statute different from the state’s broad power to regulate housing conditions in general and the landlord-tenant relationship in particular, both of which do not require paying compensation? Isn’t the statute simply like a utility connection?
      1. Regulations for housing conditions do not authorize the government the permanent occupation of the landlord’s property by a third party.
3. **Pennsylvania Coal’s diminution-in-value ad-hoc standard (1922)**
   1. When governmental regulation of a use that is not a nuisance works too great a burden on property owners, it cannot go forth without compensation.
      1. Numerator 🡪 What is the diminution of value?
      2. Denominator 🡪 How does this compare to the total value of petitioner’s property rights?
      3. "average reciprocity of advantage" rule 🡪 Comparison of the benefits and harms to plaintiff.

\*\*Note that the denominator problem is the same as conceptual severance.

* 1. What is reciprocity of advantage?
     1. If the regulated owners obtain some advantage, though it be less than the advantage obtained by others, the regulation is within the police power. An example is zoning. Although a landowner with a residentially zoned lot loses the economic value of commercial uses, he is protected from possible economic loss by commercial use next door. If the landowner obtains **no** advantage from the regulation, the regulation is more likely to be held a taking. Measured objectively.
  2. Penn Coal has a *profit* to mine the coal. State adopted a statute that prohibited the mining of coal under residential areas in a manner that caused the subsistence of any dwelling. In effect, this required that pillars of coal be left in place underground to support the land surface, which is a right not owned by Penn Coal. The statute was struck down as an unconstitutional taking.
     1. Numerator: How much of its profits and land value is Penn Coal losing by not being able to mine the support area?
        1. The value of the entire support estate.
     2. Denominator:
        1. State recognized three separate rights in an estate: surface, support, and minerals. Majority found that the statute took the coal company’s entire support estate and that this was not justified by the public interest.
        2. Dissent argued that the majority should not be comparing the diminution-in-value to just the support estate, but should have compared it with all the rights owned by the coal companies. By doing that, the coal companies still had substantial rights left in the minerals. Penn Coal has lots of other mines where it can dig for coal where there are no homes on the surface.
     3. Reciprocity of advantage:
        1. Majority says there is no reciprocity of advantage. Penn Coal is harmed and the homeowners are benefiting.
        2. Dissent argued that this factor is irrelevant because public safety is at stake. The dissent characterized the mining as a nuisance. By applying Hadacheck’s rule regarding nuisance, then the Act is not a takings.

1. **Penn Central’s distinct investment-backed expectations (DIBE) balancing test (1978)**
   1. Multi-factor balancing test
      1. The economic impact of the regulation on the property owner,
      2. The degree to which the regulation interferes with the property owner’s distinct, investment-back expectations (similar to diminution-in-value but also accounts for “development plans”)
      3. The character of the governmental action (substantially advance state interest?), and
   2. What is meant by “investment-back expectations”?
      1. Some courts hold that expectations are frustrated only when a land-use regulation denies all economically viable use of land. Other courts have found DIBE only in instances when regulations interfere with investments that have already been made, as opposed to regulations limiting possible future investment activities.
   3. What are TDRs and what advantage do they give to landowners?
      1. Parallels reciprocity of advantage?
      2. The TDR approach severs development rights from other rights in land and treats them as a separate item. The right to develop is restricted at particular sites, but owners of the restricted land are given TDRs that can be sued for development, beyond that which would otherwise be permitted, on receiving lots or in so-called transfer areas. Depending on the method used, recipients of TDRs may sell their rights or use them on land they own.
   4. As part of a comprehensive program to preserve historic landmarks, the city denied the petitioners the right to build a high-rise office building atop the Grand Central Terminal.
      1. The court refused to apply the conceptual severance theory that the majority in PA Coal used to conclude that the ordinance abolished a particular right. Penn Central could not segment the air rights over the Terminal from the remainder of the property, in an effort to claim that all of its property (the air rights) was taken.
      2. Applying the multi-factor balancing test
         1. Economic impact and DIBE
            1. Majority held the taking issue must be resolved by focusing on the uses *permitted*, not on the uses prohibited. The uses permitted included *continuing use* as a terminal containing office space, which the Court regarded as Penn Central’s primary expectation concerning use.
            2. Dissent said the owners are losing millions from not having the office building. The owners already consulted with builders and had an extensive plan
         2. Character of the government action
            1. Majority characterized the action as protecting historic landmarks.
            2. Dissent characterized the action as imposing a servitude on the property.
         3. TDRs
            1. Majority reasoned that the city’s offering of TDRs to the owner also weighed against a taking, by softening the economic impact of the tower rejection. Penn Central owns a lot of other properties, so they could just build those buildings taller than the zoning restrictions.
            2. Dissent points out that TDRs are insufficient because it will not always be the case that owners will have other properties to which they could transfer their development rights. And what if they don’t want to build on those other buildings? If air rights are taken, then they should be alienable. And who knows whether Penn Central can build a lower building on top of Grand Central!
2. **Lucas’ categorical rule for loss of all economically beneficial or productive use**
   1. Has the regulation caused a “total taking”—a complete deprivation of the property’s use and/or value? If yes, then there is a per se taking. HOWEVER, despite complete elimination of use and/or value, a restriction is not a taking if it merely duplicates a restriction that could have been imposed under “background principles of the State’s law of property and nuisance” existing when plaintiff acquired the land (or in other words, unless the state can justify its actions as preventing a common law nuisance).
   2. Statute prohibited construction on P’s oceanfront lots, as part of the state’s program to protect life and property from hurricane risks.
   3. The majority found that the statute had taken all value from P’s land and so remanded the case so that a state court could determine whether the statute was justified under prior property or nuisance law.
   4. Dissent rejects the majority’s per se rule and said that the case should have applied the ad-hoc balancing test.
      1. The land was not valueless at all. The land was undeveloped and in Euclid we held that nonconforming uses are more likely to be allowed when they violate a regulation.
      2. The majority’s per se rule will likely have one of two effects: Either courts will alter the definition of the “denominator” in the takings “fraction,” rendering the Court’s categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court’s rule sweeping effect.
      3. The per se rule is arbitrary—95% loss in land value = no compensation; 100% loss = full compensation
      4. With the majority’s rule, the denominator can always be manipulated (if you discount certain property rights) to lead to the conclusion that the regulation leads to a total wipeout.
      5. The majority’s holding today effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Courts will only be able to enforce the traditional nuisance under the background principles of state law but cannot recognize other statutes even if they have been “on the books” long enough to be a background principle.
3. **Palazzolo ruled that notice of regulations that preexist a property owner’s acquisition of title is not an absolute bar to a takings challenge.**
   1. Council rejected petitioner’s proposal to develop his waterfront property in coastal wetlands after became the sole shareholder of a corporation he started with several partners.
   2. The Rhode Island court held that Palazzolo, per se, lost his right to sue for a taking because he had notice of the regulation before he assumed ownership of the property. The Supreme Court rejected this argument and held that notice of regulations that preexist a property owner’s acquisition of title is not an absolute bar to a Penn Central takings challenge. Just because a generation of property owners had notice of a particular regulation does not mean that they have forfeited their right to sue for a taking.
      1. Although the Court unanimously agreed that notice of a preexisting regulation does not, per se, prohibit a successive interest holder from challenging the regulation as a taking, Justice O’Connor and Justice Scalia disagreed over the consequence of notice on the holder’s ability to challenge the preexisting regulation as a takings.
         1. Justice O’Connor argued that Palazzolo’s knowledge of the existing regulatory regime at the time he acquired his property was relevant to the reasonableness of his investment-backed expectations and was therefore relevant to the question of whether the restrictions on his property were so substantial as to constitute a Penn Central taking.
         2. Justice Scalia contended that, other than the Lucas background principles exception, notice of a land use restriction that pre-dates an owner’s acquisition of title is irrelevant to a determination of whether the substantiality of the restriction results in taking.
   3. Applying Penn Central’s balancing test: the economic loss is not too great since P can still build a large house. Court remanded to determine the character of the government action.
4. **Nollan-Dolan rule for exaction**
   1. An exaction is a government requirement that a land developer provide specified land, improvements, payments, or other benefits to the public to help offset the impacts of the project.
      1. Impact fees are also exactions
         1. A developer is allowed to build a sports complex so long as it paid fees to mitigate loss of recreational facilities and to provide art in public places.
   2. When does an exaction become so great as to become a regulatory taking?
      1. An exaction/condition must meet two tests in order to NOT constitute a taking:
         1. There must be an “essential nexus”—logical connection—between the exaction and a legitimate state interest that it serves; and
            1. The state interest is the specific public need or burden that the owner’s building creates or to which it contributes.
            2. This test speaks to the purpose of the exaction – the ends.
         2. The exaction must be “roughly proportional” to the negative impact of the development on the public.
            1. The public burdens must be roughly proportional to the public benefits.
            2. This test speaks to the burdens and effects of the exaction – the means.
   3. In Nolan, the court conditioned the construction of the house on putting a public easement for the beach part of their property so that the public can walk from one park to another.
      1. If the Commission could have rightly refused the permit to build because of the same legitimate state police-power purpose, then it could have rightly conditioned the construction on the easement, without it being a taking.
         1. The Commission cannot do this here because it fails the nexus test. The government claims that the purpose is so that the public can see the beach, overcome a psychological barrier so that they can feel alright using the beach. This makes sense if the permit were denied, but it does NOT make sense if the permit were allowed on the condition of the easement because the house would block the public view to the beach and would not help the public overcome a psychological barrier.
      2. Brennan dissented arguing that the court used too high a standard for reviewing the legislature’s action and should have applied the rational relation test.
   4. In Dolan, the court held that the city’s conditions for petitioner’s building permit were not roughly proportional to the impact of the proposed development. Although a nexus exists between the conditions for flood and traffic improvements and the pedestrian and bicycle path, the city failed to explain neither how a public greenway is in the interest of flood control nor how the bicycle path will decrease traffic.