**Property Outline**

1. **Introduction: The First Possession Rule**
   1. Property Policies
      1. Behavior Prevention
         1. Certainty
         2. Preservation of Peace
      2. Behavior Facilitation
         1. Reward Labor (Locke)
         2. Pro-Market
   2. Acquisition by Discovery
      1. Discovery acquires title (legal claim) over land – absolute ownership – dominion
         1. Dominion is not just exclusionary – it also allows control of one’s possessions – power to dispose of it
      2. First in time doctrine:  the person whose interest is first delivered prevails over anyone who acquires an interest later
         1. Reduces Conflicts
         2. Rooted in our nature as living organisms (Pipes)
         3. Incentivizes Productivity, economic efficiency, an activity
         4. Marxist critique – ideological – benefits the powerful – unjust and arbitrary
      3. *Johnson v. M’Intosh* (Should the government recognize Indian title to land when the government also has title to land?)
         1. Holding: Title is established by the first person to possess the now legally claimed land.
         2. Conquest gives title which the courts of the conqueror cannot deny
         3. Chain of title – GB relinquished claim to the proprietary and territorial rights to the US and states ceded their claims to title through the US Constitution
         4. Discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest
         5. An absolute title to land cannot exist at the same time in different persons or in different governments. An absolute must be an exclusive title or at least a title which excludes all others not compatible with it.
         6. Property rights are defined by the society in which they are at issue
         7. Discovery Doctrine - gives title (legal claim) to the land
         8. Rose – Indians occupied but did not possess the land by altering it – the doctrine of first possession reflects the attitude that human beings are outsiders to nature
   3. Acquisition by Capture
      1. *Pierson v. Post* (Post was suing Pierson for killing the fox he was pursuing)
         1. Holding: Mere pursuit of a wild animal gave Post no right to the fox.
         2. Occupancy requires actual physical possession of the animal
            1. Policy reasons:

Certainty

Preservation of Peace (prevents conflict)

Objective fact

* + - 1. Rule of capture – possession requires either physical possession or mortally wounding
      2. Lockean perspective – Physical possession (or mortally wounding) the animal mixes the labor sufficiently to create a property right. Pursuit doesn’t mix with labor enough.
      3. Dissent (Livingston): (1) It was better to adopt the custom of sportsmen to determine ownership of the fox (2) recognition of property rights in wild animals when there is a reasonable likelihood of capture would conduce more rapid extermination of foxes – promote economic activity
      4. Ratione solie – a justification for assigning property rights to landowners over resources found on their own land
    1. *Ghen v. Rich* (Whaling case)
       1. Rejection of the rule of capture in favor of custom
       2. Holding: When an industry represents a reasonable act of first possession, property claims based on this custom will be upheld.
       3. Policy Reasons: custom is certain and preserves peace – promotes the policy goals
       4. Marking may justify a property claim of wild animals if it follows the same principle of first possession
       5. *Bartlett v. Budd*
          1. The act of killing and attaching a flag to the whale was sufficient to establish first possession even if the whale is later found by a third party without the flag attached
    2. *Keeble v. Hickerngill* (P had a decoy pond to capture ducks for profit. D fired guns near P’s land to drive away ducks)
       1. Holding: D cannot maliciously interfere with P’s commercial use of property.
       2. Rule: A person will be liable for any malicious interference with another person’s commercial use of property
       3. Policy Reasons: rewards labor, pro-market, and preservation of the peace
          1. Individuals should reap the fruits of their labor – increase productivity – support for capitalism
       4. Keeble had “constructive possession” of the ducks because they were on his property
    3. Fugitive Resources
       1. *Hammonds v. Central Kentucky Natural Gas Co.*
          1. The nature of oil and gas is fugitive and migratory and can escape without the violation of its owner and is analogous to wild animals – status as common property
  1. Property in One’s Person
     1. *Moore v. Regents of the University of California* (D uses P’s discarded cells for profitable purposes, P sues for conversion)
        1. Holding: A patient does not have a property interest in excised body parts and thus cannot sue for conversion for the use of these body parts without the patient’s consent
        2. P did not expect to maintain a property interest over his cells – no property interest, no cause of action
        3. To establish conversion – the P must establish an actual interference with his ownership or right possession – where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion
        4. Conversion is a strict liability tort – if P has a property interest – anyone who handled the cells is liable – creates uncertainty
        5. A patient may sue for a physician’s breach of a (1) disclosure obligations and (2) fiduciary duties in the use of the patient’s tissue without consent
        6. Pannelli – Property requires the right to exclude (false dichotomy – property rights can be split up)
        7. Dissent (Mosk): we limit and restrict property in a number of ways – you can’t sell an organ but you can still gift it – organs are inalienable – but you can still transfer them.
           1. Bundle of Sticks view – losing one stick doesn’t eliminate the whole bundle
           2. Statutes treat organs as property in other cases – their use should receive compensation
           3. Patients should have the right to both refuse consent and to grant it
        8. Policy Reasons:
           1. Allowing conversion creates uncertainty
           2. Encourages medical innovation
           3. Better solved through legislative action
           4. Not necessary to protect patient rights
        9. Accession v. Exception (p84 f.48)
           1. Accession – owner of property has dominion over what occurs on that property
           2. Exception – If the third party’s labor accounts for substantially all the value of the final product, reward trumps certainty
     2. Radin
        1. Property is more than a commodity on the market
        2. The body is personal property and constitutive of one’s personhood
        3. Commoditization and alienability of organs lead to anti-personhood
        4. Marxist – market inalienability leads to human alienation
     3. Hirschmann
        1. Commerce promotes peace and attaches men to one another through mutual utility
        2. Market economy creates a more polished human type – more honest, reliable, orderly, disciplined
  2. Conceptualizing Property
     1. Rose – possession requires communication, notice – it must be a declaration
     2. Blackstone: The Commons and the Evolution of Property
        1. World starts as a commons, possession is a right so long as you use it
        2. Use becomes the foundation for the conception or property
        3. Exclusion is recognized as the foundation of property as dominion
        4. “That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”
     3. Economic Analysis of Property Rights
        1. Demsetz
           1. In a commons – no one is responsible
        2. Transaction cost of people agreeing to prevent the destruction of the commons is too high for them willing to engage in those transactions to gain benefit
        3. Private property is the solution to the transaction cost problem
           1. Provides a right to exclude – internalize costs and benefits for the use of the resource
           2. Lowers transaction costs
  3. The Right to Exclude
     1. *Jacque v. Steenberg Homes Inc*. (D elected to trespass on P’s land rather than use an alternative private road that required extra equipment to get through)
        1. Holding: The P had “exclusive enjoyment” of his own land and had the right to exclude the trespasser
        2. Purpose of remedy is to uphold the right to exclude and prevent future trespass – secure the peace
        3. Property serves a social function – peaceful nature
     2. *State v. Shack* (D, a landowner, had no right to bar poverty agency worker from access to migrant workers)
        1. Holding: D’s right to exclude ended where the tenant worker’s need for reasonable access by visitors began.
        2. Title to real property are not absolute – cannot include dominion over the destiny of persons the owner permits to come upon the premises
     3. Morris Cohen
        1. The essence of private property is always the right to exclude others, but it is not inviolable: if the property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest
     4. Richard Epstein
        1. Nothing wrong with a system that allows individuals to exclude – those who exercise absolute rights in a capricious fashion pay for their folly by losing their markets

1. **Subsequent Possession: Find, Adverse Possession & Gift**
   1. Acquisition by Find
      1. General Rule: Finder Prevails against all but prior possessors and the rightful owner
         1. Finder v. Owner of Premises in Lawsuit over Found Object
            1. Finder = Trespasser: Owner of premises where object is found prevails in dispute over ownership

Policy reason: we want to discourage trespass, which is a breach of the peace and a potential source of conflict

* + - * 1. Finder = Employee on Premises for Limited Purpose: The owner of the premises usually prevail (states differ)

Same policy justification as in *McAvoy*: we want to facilitate return of objects to the person who left it

Hopefully: person who forgot the item will return to reclaim it – owner can keep it

* + - * 1. Object Found Underground: always awarded to the owner

Policy: the law respects the owner’s expectation of ownership of things in property

Exception: Doctrine of Treasure trove –valuables such as money, gold, silver, etc.. that are intentionally buried with the intent to retrieve it at a later point

English Rule: the object belongs to the crown

American Rule: treat as mislaid property and apply relevant rule

* + - * 1. Object Found in Private Home: goes to the homeowner

Exception: If the owner is not in possession of home, then it goes to the finder

From *Hannah v. Peel* (p101)

* + - * 1. Object Found in Public Place: Apply lost/mislaid distinction

Rule from *McAvoy*

Lost property – property mistakenly left somewhere

Result: Object goes to the finder

Mislaid property – property intentionally placed by the owner and then forgotten

Result: property goes to the owner of the premises

Policy justification this facilitates return of the object to its rightful owner who will approach the owner of the premises in attempting to recover the item

* + - 1. Finder of Abandoned Property
         1. Property intentionally discarded by its true owner with no intent to retrieve it
         2. Rule: Property goes to the finder
      2. State Statutes
         1. In NY, all lost, mislaid, and abandoned property and treasure trove will be treated as lost property
    1. *Armory v. Delamirie* (P “found” a jewel in someone’s home and tried to cash it in and D’s employee took it)
       1. Holding: The finder prevails against all but the rightful owner
          1. Prevents people from taking the law into their own hands
          2. First possession = objective fact
          3. Finder only has relative title
       2. Trover – action for monetary damages in equal value of the chattel
       3. Replevin – Action for return of chattel
    2. *McAvoy v. Medina* (A pocket book accidentally left by D’s customer was recovered by P and given back to D on the condition that the rightful owner recovers it)
       1. Holding: The finder of misplaced chattels on another’s property does not have the right to possess the chattels.
          1. Item was misplaced, not lost
          2. It was the duty of the D to use reasonable care for the safe keeping of the object until the owner should call for it
       2. Policy reason: certainty – facilitate the return to the person who lost property.
  1. Acquisition by Adverse Possession
     1. Adverse Possession Doctrine: If, within a specified number of years, the legal owner of property (chattels or land) does not bring a legal action to eject a possessor who claims adversely to the owner, then the owner is barred from bringing an ejectment action. (standards based, not rule)
        1. Two Broad Requirements:
           1. Expiration of the relevant statute of limitations
           2. Adverse possession during the limitations period
        2. Four elements of Adverse Possession
           1. Actual entry giving exclusive possession

Rule: Possession must be of a character that the community would reasonably regard the adverse possessor as the true owner

From *Lutz*:

Cultivated or improved it

Enclosed it

Used it for harvesting materials

From *Ewing*:

If the adverse possessor has done something with the land, such as the factor identified in the statute in Lutz, and filed trespass lawsuits against third parties, then it is sufficient to qualify as actual entry with exclusive possession

Serves 2 functions:

Triggers claim by title owner to bring trespass and ejectment actions

Starts clock on statute of limitations

Establishes basis of adverse possessor’s claim to the land

The adverse possessor is acting as the true land owner

The Adverse possessor’s title to the land, once established, relates back to the moment the action accrued, i.e., the beginning of the trespass that ultimately lead to full-blown adverse possession.

Policy Justification

Rewards possession, as possession is the root of title (property=dominion=exclusive and absolute possession of something) (reward labor)

Economics: signal function of property (certainty; reduce conflicts; pro-market)

* + - * 1. Open and Notorious

Rule: Possessor must provide reasonable notice to the legal title owner that an adverse possessor is on the property

If the owner can’t see adverse possession if he actually looks at the trespass – or if owner couldn’t see trespass if owner had bothered to survey the property – then the trespass is not open and notorious

Example: *Manillo* (minimal adverse possession only identified by on-site survey is NOT open and notorious)

*Manillo* – if possession is only a minor encroachment, then it must be “clearly and self-evidently apparent to the naked eye”

Purpose of the requirement: If the adverse possession is kept secret, the title owner can’t defend her rights and file trespass/ejectment action

* + - * 1. Adverse and under claim of right (Hostile)

Rule: Possession must be without the owner’s consent

Easiest way for title owner to defeat potential adverse possession claim: The property owner tells the putative adverse possessor that she knows the person is on her property and she grants permission to use her property

The adverse possessor must possess land under claim of right

Two Tests:

Objective test: actions of possessor determine if there is a claim of right – the adverse possessor’s state of mind is irrelevant

Majority rule in American and England

Policy Issues

More certain in application, as there is no need for court to attempt to divine content of mind of adverse possessor

Problem: rewards the bad actor

Subjective Test (Maine rule): the adverse possessor must have bona fide or good faith belief that he or she has title to land

Minority Rule in America

Policy Issues

More certain in application, as there is no need for court to divine content of mind of adverse possessor

Problem: rewards bad actor

* + - * 1. Continuous and uninterrupted possession for the statutory time period

Rule: continuity of how an average owner would possess this particular type of property

There can be intervals during which the property is not used (such as seasonal homes)

Some states require that adverse possessor must pay taxes on land

Policy Justification: provide owner with sufficient enough time to discover the unlawful possession and do something about it. We only want to punish truly delinquent or nonfeasant owners.

Abandonment by the adverse possessor stops the running of the clock for adverse possession

Tacking is permitted

Adding periods of possession by prior occupants in order for the adverse possession claimant to meet the statutory time period

Requires privity between the adverse possessors, i.e., a successive or mutual legal relationship with respect to the property

Can tack 28 years of adverse possession

Two ways the title owner can stop the clock:

Interruption: If owner reenters the land openly and notoriously for purpose of regaining possession, then the clock is stopped

Disability of Owner: tolls the clock for as long as disability exists

* + - 1. State of Mind Requirement
         1. Objective Standard

State of mind is irrelevant

* + - * 1. Good Faith Standard

The required state of mind is “I thought I owned it”

* + - * 1. Aggressive Trespass Standard

“I thought I didn’t own it, but I intended to make it mine”

* + - 1. Adverse Possession Doctrines
         1. Doctrine of agreed boundaries

If there is uncertainty between neighbors as to the true boundary line, an oral agreement to settle the matter is enforceable if the neighbors subsequently accept the line for a long period of time. (p140-41)

* + - * 1. Doctrine of acquiescence

Long acquiescence (maybe shorter than the statute of limitations) is evidence of an agreement between the parties fixing the boundary line

* + - * 1. Doctrine of estoppel

When one party indicates there is a common boundary but the other party changes their position

* + - 1. Property rule v. Liability rule
         1. Adverse possession is a property rule
         2. Liability rules would force the bad faith adverse possessor to pay the original owner

A rule of limited indemnification – would in effect impose a fine on bad faith dispossessors equal to the value of the property at the time of original entry – reduces the incentive to engage in coerced transactions

* + 1. *Van Valkenburgh v. Lutz* (Lutz claimed adverse possession on a portion of P’s land)
       1. Holding: An adverse possessor may acquire title that is actually occupied for the statutory time period.
       2. Majority – Lutz was not an adverse possessor because he did not cultivate enough of the property or make “improvements”
          1. Judge Dye said there was no enclosure, cultivation or improvement of the land – use of land so that neighbors or third party observers deemed that the person possesses dominion over the occupation of the land

Cultivation promotes labor – brings goods to the market

* + - 1. Dissent – Fuld – Dye screws up the statutory analysis and the law
         1. Improvement in the law does not mean making better, it means changing the land
         2. Fact-intensive standard – facts and context matter
         3. Lutz obtaining a judicial order for an easement is irrelevant because Lutz had title to the property since the statute of limitations already ran out
         4. Don’t care about the subjective intent of the possessor – Majority Rule
    1. *Ewing v. Burnet*
       1. The sort of entry and possession that will ripen into title by adverse possession is use of the property in the manner that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion.
    2. *Mannillo v. Gorski* (Boundary dispute involving the extension of rooms, a porch, and a concrete platform)
       1. Holding: Mistaken entry and possession onto another’s land is sufficiently adverse or hostile to sustain a claim for adverse possession. In order for adverse possession to be open and notorious, it must provide reasonable notice of the act of trespass to the title owner.
       2. Majority rule – but intent is still taken into account so as not to reward bad faith
       3. Factors in favor of the majority rule – cannot ascertain the intent of the adverse possessor
       4. Adverse possession does not require *actual* notice - would the owner noticed if he went and looked?
       5. *Folkman v. Myers and Preble v. Maine Cent. R. Co* (Maine Doctrine) (Minority rule)
          1. Intention matters. If the intention is to claim the land beyond what you actually own, then you can acquire adverse possession. If the claim on the land occurred due to a mistake, then he has no intention to claim title over something that isn’t his
    3. *Howard v. Kunto* (Conflict with deeds to three lots leads to adverse possession; summer homes)
       1. Holding: (1) Possession is uninterrupted if it is in accord with the nature and condition of the property as used by an average owner. (2) Tacking of time periods is permitted if successive occupants are in **privity**, which is established if there is a voluntary transfer of title or possession from one occupant to another.
       2. Judge applies a reasonableness standard – contextual standard to possession
          1. Not necessary to be on the land 24/7
          2. Nature and condition of the property is taken into account (summer home)
  1. Adverse Possession of Chattels
     1. *O’Keefe v. Snyder* (P brought action for replevin for an art piece “stolen” many years earlier)
        1. Holding: A cause of action for adverse possession accrues at the time of possession of a chattel absent fraud or concealment, UNLESS the owner is entitled to the benefit of the discovery rule
        2. Discovery Rule – a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.
           1. Shifts burden to the true owner to prove diligence
           2. Fact intensive inquiry
        3. New rule – 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 in pursuing his or her personal property (p156-57)
     2. Thomas W. Merrill
        1. When the party claiming adverse possession acted in bad faith the court is reluctant to grant it
        2. Subjective good faith is an unstated sixth element
  2. Acquisition by Gift
     1. Gift Doctrine - Voluntary, irrevocable transfer of property without any consideration or compensation
        + 1. Exception: a causa mortis gift is revocable if the donor recovers
     2. Elements of a Gift
        1. Intent
           1. Donor must intend to give a gift
           2. Donor must intend to transfer title – not mere possession
        2. Delivery
           1. Donor must transfer possession to the Donee
           2. Donor must feel the “wrench of delivery”
           3. Exceptions – Delivery must be tailored to suit the circumstances of the case. If delivery of the object is not practicable due to its size, weight, or inaccessibility, the courts will find a gift has been delivered on the following two doctrines:

Symbolic Delivery

This occurs when the donor provides to the donee a written instrument declaring the gift

Gruen – a letter promising a gift is sufficient for symbolic delivery

Constructive Delivery

This occurs when the donor hands over the means of obtaining possession and control of the object to the done, such as handing over the keys to a car

*Newman v. Bost* (pp167-173) – the court accepts constructive delivery doctrine but focuses on evidence of control retained by the donor over objects given

* + - * 1. Mechen on the delivery requirement:

Handing over the object makes vivid and concrete to the donor the significance of the act performed

The act is unequivocal evidence of a gift to the actual witness of the transaction

Delivery of the object to the donee gives the donee, after the act, prima facie evidence in favor of the alleged gift

* + - 1. Acceptance
         1. The donee must accept the gift from the donor in order for a gift to be legally recognized (and enforced)
         2. Important: acceptance will be presumed by a court if a gift is beneficial to the donee

1. **The Estates System: Possessory Estates**
   1. **The Fee Simple**
      1. An estate that is unlimited in time, disposition and descendability
         1. Endures forever
         2. Absolute ownership
         3. Only exists in land (not chattels)
      2. Three characteristics
         1. Alienable
         2. Disposable (devisable) at death by the owner’s will
         3. If not disposed of by will, it will automatically pass to the owner’s heirs
      3. Creation: “to A and his heirs”
      4. Definitions
         1. Heirs – no heirs when there is a will. Receiving through statute.
         2. Issue – Blood descendants
         3. Ancestors – Parents
         4. Collaterals – Blood relatives brothers, sisters, aunts, uncles
         5. Escheat – when a person dies without a will and there are no identifying heirs – goes to the state
   2. **The Fee Tail**
      1. An estate that descends (receiving not through will) through A’s lineal descendants and expires only when all of A’s descendants are dead
      2. Creation: “to A and the heirs of his body”
      3. Abolished in most states (except Mass., Del., Maine, RI)
      4. If a person tries to create a fee tail in a will, there are two options (set by state statute):
         1. Creates only a fee simple
         2. Creates fee simple in A with a future interest in B (known as a divesting executor interest). B takes control of the estate only if A dies without any issue.
   3. **The Life Estate**
      1. Replaced the fee tail as the primary means for controlling estates – defined by the life of a person
      2. Creation: To A for life
      3. Life Estate pur autre vie: two ways to create:
         1. Created at the time of conveyance: “To A and for the life of B”
         2. Possessor of a life estate (“life tenant”) transfers her interest to another person, eg., A owns a life estate and she sells her interest to B, who now owns an estate for the life of A.
      4. Future Interest
         1. Reversion – estate returns to the grantor
         2. Remainder – estate is transferred to another person
      5. Law of Waste (p217-218)
         1. Life tenant is not a full owner of the property – the property must go to someone else
         2. Life tenant does not have full rights in the estate
         3. A should not be able to use the property that unreasonably interferes with the expectations of B
   4. *White v. Brown* (The will granted a home to the P “to live in and for it not to be sold”)
      1. Holding: Unless the words and context of a will clearly evidence an intention to convey a lesser estate, a will shall be interpreted as conveying a larger estate, such as a fee simple.
         1. The language in regards to restraint on alienation does not show clear intent to pass a lesser estate
         2. Limitations on alienation should be voided as a matter of public policy
      2. Dissent: Lide gave conditions that prevented a fee simple – she put restrictions on it – intent was not to give a fee simple
   5. Defeasible Estates – an estate that terminates on the occurrence of an event that s identified in the original conveyance instrument – alienable – may pay by devise (will) or descent
      1. **Fee Simple Determinable**
         1. Automatically end at the occurrence of a specified event
         2. Creation: words of duration: so long as, until, while, during
         3. Grantor holds a “possibility of reverter”
      2. **Fee Simple Subject to Condition Subsequent**
         1. Does not automatically terminate, by may be cut short (divested) when a stated event occurs
         2. Creation: right of re-entry, but if, on condition that, provided that
         3. “Right of re-entry”
      3. **Fee Simple Subject to Executor Limitation**
         1. The estate is created when a grantor transfers a defeasible fee simple and in the same instrument creates a future interest in a third party rather than in himself
         2. If a grantor uses the words necessary to create a fee simple subject to condition subsequent but, instead of retaining the corollary right of entry the grantor transfers that interest to a third party, the interest created in the third party is an executory interest and the interest created in the immediate transferee is a fee simple subject to executory limitation
   6. *Mahrenholz v. County Board of School Trustees* (Ps had reversionary interest in the property where the D’s school sat. The property needed to be used for school purposes or else it were revert)
      1. Holding: A grantor automatically obtains a possessory ownership of an estate only when a grant creates a possibility of reverter
         1. The court determined that Mahrenholz had a fee simple determinable (rather than a FSSCS) and remanded the case to determine if storing school supplies qualified as school purposes
      2. Majority rule – Both possibility of reverter and right of re-entry are fully alienable
   7. *Mountain Brow Lodge No. 82 v. Toscano* (Habendum clause of the deed has a clause that restricts alienation)
      1. Holding: A restriction on the use of property that also has the effect of restricting its transfer is not void for being an invalid restraint against alienation
         1. Only the Lodge could use the property – not a restriction on alienation
      2. Reasoning: The right to use and right to alienation are different (bundle of sticks)
   8. Numerous Clausus Principle – Thomas W. Merrill
      1. In common law, the principle that property rights must conform to certain standardized forms has no name. In civil law it is called numerous clausus – the number is closed.
      2. Numerous Clausus is a device for minimizing the effects of durable property interest on those dealing with assets in the future and in particular the effects of excessive fragmentation of interests or “anticommons”
         1. Limiting fragmentation is an incidental effect but it does not fully explain for the universal nature of the doctrine
      3. Prevents two parties from reaching a contractual agreement over property – courts have to pigeon hole the agreement into one of four recognized types
      4. Policy Justifications:
         1. Measurement-Cost externalities
            1. Parties who create new property rights new property rights will not take into account the full magnitude of the measurement costs they impose on strangers to the title.
            2. By allowing even one person to create an idiosyncratic property right, the information processing costs of all persons who have existing or potential interests in this type of property go up.
         2. Frustration costs
            1. Mandatory rules sometimes prevent the parties from achieving a legitimate goal cost-effectively.
            2. Standardization acts as a form of price discrimination – parties that are willing to pay more for an objective can achieve it by incurring higher planning and implementation costs
         3. Optimal standardization
            1. Somewhere in between maximum standardization and freedom of customization
            2. By creating a strong presumption against judicial recognition of new forms of property rights, the numerous clausus imposes a brake on efforts by parties to proliferate new forms of property rights. But permitting legislatures to create new forms allows for some diversification
         4. Information costs
            1. Technology lowers information costs and diminished the need for standardization
2. **Future Interests**
   1. Future Interests Retained by the Grantor
      1. Possibility of Reverter (follows a fee simple determinable)
      2. Right of Entry (follows a fee simple subject to condition subsequent)
      3. Reversion
         1. A future interest remaining in the grantor (or his heirs or devisees if he dies) who transfers a vested estate of lesser quantum than he currently owns –and the grantor doesn’t create a vested remainder interest in a third party
   2. Future Interests Created in Another Transferee/Grantee
      1. **Vested Remainder**
         1. Given to an ascertainable person
         2. This person is not subject to a condition precedent
         3. Three types:
            1. Vested Remainder

A remainder that is certain of becoming possessory

Example: O conveys Blackacre “to A for life, then to B and her heirs’.”

* + - * 1. Vested Remainder Subject to Open (Partial Divestment)

A remainder interest created in a class in which at least one member of the class is alive at time of conveyance

Example: O conveys Blackacre “to A for life, then to A’s children and their heirs.” At the time of conveyance, A has one child, B.

* + - * 1. Vested Remainder Subject to Total Divestment

A vested remainder that has a divesting condition – a follow on executory interest imposed on it.

Example: O conveys Blackacre “to A for life, then to B and her heirs, and if B does not survive A, then to C and her heirs.”

* + 1. **Contingent Remainder**
       1. A remainder interest that is either without any ascertained takers, OR subject to a condition precedent
    2. **Executory Interest**
       1. Grantee takes possession by divesting the prior estate
       2. Two Prohibitory Rules: No shifting or Springing interests
          1. Shifting executory interest: a future interest that divests or cuts short an interest in another grantee
          2. Springing Executory Interest: A future interest that divests the grantor of an estate or interest
  1. **Future Interests Absolute Rules**
     1. You must classify interest in sequence as they are written. Classify each interest before moving on to the next interest.
        1. Each interest is in its own clause – pay attention to commas
     2. If the first future interest following a life estate is a contingent remainder in fee simple, the second future interest will also be a contingent remainder.
        1. Example (p261): O conveys “to A for life, then to B and her heirs if B survives A, and if B does not survive A to C and his heirs.”
     3. If first future interest following life estate is a vested remainder in fee simple, the second future interest will be an executor interest
        1. Example 8: O conveys “to A for life, then to B and her heirs, but if B does not survive A to C and his heirs.”
  2. Rules Furthering Marketability by Destroying Contingent Future Interests
     1. Merger Doctrine - If Life estate and the next vested estate in fee simple come into the hands of same person -> the lesser estate is merged into the larger estate
     2. **Rule Against Perpetuities** (RAP)
        1. Common Law Rule
           1. No interest is good unless it must vest or not vest, no later than twenty-one years after some life in being at the creation of the interest.
           2. Validating/measuring life = a “life in being” in whom an interest within the 21-year time limit

Alive at the time of conveyance, and

Who affects the vesting of the future interest

* + - * 1. RAP only applies to the following future interests (involve contingencies)

Contingent remainders

Executory interests

Class gifts (vested remainder subject to open)

A class gift is not fully vested until ALL members of the class have vested

* + - * 1. RAP is a rule of logical possibility

If it is possible to conceive that an interest will not vest within 21 years of a validating life, no matter what a person’s age or physical condition, then the grant is void for violating the RAP.

* + - 1. RAP Analysis
         1. Do you have any future interests to which the RAP applies?

If yes, go to step (2)

* + - * 1. Who are the lives in being?

LIB = person(s) alive at time of conveyance and who can affect the vesting of future interests

From the class of LIB, you will hopefully find the “validating / measuring life,” i.e., the person in whom a contingent interest vests within the 21-year time limit (f.17, p246)

After you identify all LIB, go to step (3)

* + - * 1. Can you imagine a scenario in which you kill off all the lives in being and the future interest vests more than 21 years later?

REMEMBER: rule of logical proof(imagination)

Always remember: the case of the “fertile octogenarian” (age is not a limitation of whom can have babies)

* + - 1. RAP Reforms
         1. Wait and See Doctrine (majority rule)

You wait and see if the future interests vests within a life in being plus 21 years

New RAP Rule: No interest is good unless it DOES IN FACT vest no later than twenty-one years after some life in being at the creation of the interest

* + - * 1. USRAP (Uniform Statutory RAP): 90 years (majority rule (25 states, variation in 8 states)

You wait and see if future interest vest within 90 years

VA has adopted the USRAP

USRAP is not retroactive – RAP applies to wills prior to statute

* + 1. *Symphony Space, Inc v. Pergola Properties Inc* (NYC Theater case)
       1. Option – buyer chooses when there will be a sale
       2. Right of first refusal – seller chooses when there will be a sale
       3. Policy Argument against applying RAP – those who engage in commercial transactions have an incentive to maintain its value – but that is a legislative question
       4. Majority rule – RAP applies to both options and rights of first refusal
       5. Corporations do not count as a life in being – could conceivably live on in perpetuity

1. **Concurrent Interests**
   1. **Tenancy in Common**
      1. Two or more persons have separate but undivided interests in property with no right of survivorship between them
      2. How to create: O conveys
         1. To A and B
         2. To A and B as tenants in common
         3. To A and B + specify relative size of interests
         4. TIC is default concurrent estate, and this if unclear then courts will construe grant as a tenancy in common
      3. Right to possess
         1. Each tenant has the right to possess and enjoy the ENTIRE property (i.e. , each interest is “undivided”)
      4. Right of survivorship
         1. None
      5. Nature of Interests between Tenants in Common
         1. Unequal shares in the property is okay
            1. Legal presumption: equal shares between tenants
         2. Interests of a different quantum are okay
   2. **Joint Tenancy**
      1. Two or more persons have separate but undivided interest in property with rights of survivorship between them
      2. Requirements: 4 Unities
         1. Time
            1. The interest of each joint tenant must be acquired or vest at the same time
         2. Title
            1. All joint tenants must acquire title by the same instrument or by a joint adverse possession. A joint tenancy can never arise by intestate succession or other act of law.
         3. Interest
            1. All must have equal undivided shares and identical interests measured by duration
         4. Possession
            1. Each must have a right to possession of the whole. After a joint tenancy is created, one joint tenant can voluntarily give exclusive possession to the other joint tenant.
      3. Create
         1. To A and B jointly – worked at common law, but not today
         2. To A and B as joint tenants
         3. To A and B with rights of survivorship between them
         4. As joint tenancy is no longer the default concurrent state, it must be created with express language indicating intent to create a joint tenancy
      4. Methods of creation
         1. Conveyance
         2. Devise (will)
      5. Termination
         1. Severance of joint tenancy - breaking any of the four unities or
         2. Judicial partition
      6. If the four unities exist but are later severed, the joint tenancy turns into a tenancy in common
      7. A joint tenancy avoids probate because no interest passes on the joint tenant’s death. Under the theory of joint tenancy, the decedent’s interest vanishes at death, and the survivor’s ownership of the whole continues without the decedent’s participation.
   3. **Tenancy by the Entirety**
      1. Joint tenancy between spouses which the law treats as one person which the law treats as one person
      2. Requirements: 4 unities + marriage
      3. How to create
         1. O conveys to A and B as tenants by entirety
         2. If at time of conveyance, A and B are not married yet, this creates only a joint tenancy
      4. Termination
         1. Divorce – converts into a tenancy in common
         2. Judicial Partition – only if both spouses agree
      5. Unlike tenancy in common and joint tenancy, courts will not grant unilateral petitions for partition
   4. *Riddle v. Harmon* (A joint tenant tried to terminate the estate by making a conveyance to herself)
      1. Holding; A joint tenant may unilaterally sever a joint tenancy without the use of an intermediary
      2. Majority rule – have to use a strawman to create/sever a joint tenancy
         1. Policy arguments in favor:
            1. Creation of joint tenancy imposes transaction costs
            2. Promotes ex ante certainty
      3. Minority rule – do not need to use the strawman
   5. *Delfino v. Vaelenics* (A tenant in common sought to partition of the property)
      1. Holding: A partition by sale is only available where (1) the physical attributes of the land make partition in kind impracticable or inequitable, and (2) the interests of the owners would be better promoted by a partition in sale
      2. Black Letter Law: In a partition action, a court will only order a partition by sale if evidence is submitted showing the necessity of a partition by sale
      3. The burden is on the party requesting a partition by sale to demonstrate that such a sale would better promote the owner’s interests
   6. *Spiller v. Mackereth* (Tenant used space as a warehouse after a lesee vacated. Cotenant wanted rent)
      1. Holding: In the absence of an agreement to pay rent or an ouster of a co-tenant, a tenant in possession is not liable to co-tenants for the value of the use and occupation of the property
      2. Ouster – a legal claim – the wrongful dispossession or exclusion of someone from property. Mere possession is not enough to establish ouster. Cotenant must physically prevent someone from entering the property.
      3. Require literal request for physical entry
         1. Fairness in the application of the right to possession
         2. Really easy for one co-tenant to exploit legal rules to stick it to another co-tenant
         3. Embracing transaction costs because it shows real conflict between cotenants
         4. If the cotenant is serious about reclaiming the property, they will go through certain motions
         5. Creates certainty
   7. *Swartzbaugh v. Sampson* (Tenant leased land to the D to build a boxing arena on his walnut farm. Wife objected)
      1. Holding: A tenant lacking express or implied authority from a co-tenant cannot bind or prejudicially affect the possessory rights of the co-tenant
      2. Lesee cannot assert adverse possession because they have permission to be on the land
      3. Each cotenant has an equal right to possession of the land
      4. A lease is not a conveyance – it does not break a joint tenancy
         1. A leasehold only has the right of possession
         2. The lesee stands in the shoes of the cotenant
         3. Least quantum transfer of an estate
      5. Lessor must share profits from rent collected
         1. All benefits and burdens must be shared equally between cotenants
         2. If a cotenant made improvements, they get to keep the benefits – rewarding labor
   8. Accounting for Benefits, Covering Costs
      1. A cotenant who collects from third parties rents and other payments arising from the co-owned land must account to cotenants for the amounts received, net of expenses
      2. A cotenant paying more than his share of taxes, mortgage payments, and other necessary carrying charges generally has a right to contribution from the other cotenants, at least up to the amount of the value of their share in the property
      3. No affirmative right of contribution from the other cotenants for necessary repairs or improvements absent an agreement
         1. The general rule is that the interests of the improver are to be protected if this can be accomplished without detriment to the interests of the other cotenants
      4. Owelty - Equality as achieved by a compensatory sum of money given after an exchange of parcels of land having different values or after an unequal partition of real property
   9. Co-Tenant Remedies
      1. Partition
         1. Partition in kind: physical division of land
         2. Partition by sale: sale of land and apportionment of proceeds among tenants
      2. Reasonable Rent (remedy for ouster)
         1. Ouster – a tenant attempts to enter into possession of estate and is rebuffed by co-tenant
         2. Ouster Elements: (1) exclusion of tenant by co-tenant, and (2) intent to exclude by occupying co-tenant
         3. Remedy: Non-occupying tenant recovers reasonable rent from tenant currently in possession of land
            1. Reasonable rent is determined by fair market value of property
      3. Accounting
         1. Any tenant that collects rent/profit from land has duty to account to cotenants
         2. All tenants have right to file equitable action that compels cotenants to account for any rents or profits
         3. If rents/profits not disbursed properly among the tenants, court further orders proper apportionment of proceeds
         4. Note: accounting based on actual receipts, not fair market value
2. **Leaseholds**
   1. Leasehold Estates
      1. Leases need to be in writing if it is for more than one year
      2. Primary covenant – pay rent
      3. Can impose restrictions on the tenant – dependent covenants – breach of one is a breach of the estate
   2. **Term of Years**
      1. An estate that lasts for some fixed period of time
      2. Creation: L conveys “to T for 10 years”
      3. Termination: no notice required at end of term
   3. **Periodic Tenancy**
      1. A tenancy for a period of time that renews automatically until one of the parties gives notice to terminate it
      2. Creation: L conveys “to T from month to month”
      3. Termination: requires notice (at least 30 days)
   4. **Tenancy at Will**
      1. A tenancy that can be terminated at any time by any party to the lease
      2. Creation: L conveys “to T with right of either party to terminate”
      3. Termination: At CL: no notice required, but T must be given reasonable time to vacate the premises
         1. Today: more than ½ states require notice, typically 30 days
   5. **Tenancy at Sufferance (Holdovers)**
      1. A leasehold that arises by operation of law when a tenant remains in possession (holds over) after the termination of the lease
      2. At common law, the Landlord has two options:
         1. Eviction (plus damages)
         2. Consent to create a new tenancy (express or implied)
      3. *Garner v. Gerrish* (Gerrish was leased a home “for and during the term of quiet enjoyment & Gerrish has the privilege of terminating)
         1. Holding: if a lease grants a tenant the right to terminate and does not provide a term, it creates a determinable life estate in the tenant
            1. The lease expressly and unambiguously grants to the tenant the right to terminate, and does not reserve to the landlord a similar right.
            2. In effect, the lease will only terminate when either (1) T Dies, or (2) T chooses to terminate
         2. In common law, if you transfer an estate to someone – create a livery in seisin - invalidates
   6. Delivery of Possession
      1. *Hannan v. Dusch* (Holdover tenants made it impossible for P to enter property leased to him by D)
         1. Holding: A lease conveys a legal right to possession to the tenant, but in the absence of an express covenant, there is no implied covenant to deliver possession (American Rule)
            1. English rule – landlord has most information regarding both parties

Implied covenant to deliver actual possession

* 1. Housing Discrimination
     1. Civil Rights Act of 1866 (now known as 42 USC § 1982):
        1. This act forbids all racial or ethnic discrimination -- public or private -- in the sale or rental of all property, both real and personal.
        2. *See*Civil Rights Act of 1866, 14 Stat. 27.  Section 1 reads that “all persons born in the United States . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to *inherit, purchase, lease, sell, hold, and convey real and personal property*, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” (Emphasis added.)
        3. The available remedies for breach: injunction & damages
        4. This law was largely ineffective for first 100 years after its enactment
     2. Fair Housing Act of 1968 (as amended in 1974 and 1988)(42 USC § 3604):
        1. Makes it unlawful to refuse to sell or rent a dwellingto any person because of race, color, religion, sex, familial status, national origin, or handicapped status
           1. § 3604(a): rental or sale of dwelling
           2. § 3604(b): terms, conditions, or privileges of sale or rental (i.e., covenants)
           3. § 3604(c): advertisements or other public statements
           4. § 3604(d): representations in discussions or writings
           5. § 3604(f): applies prohibitions to handicap status
     3. Legal Analysis
        1. Proving Discrimination
           1. Rule: Proof of discriminatory effect is sufficient to establish a prima facie case (PFC) under either 3604 or 1982.

Discriminatory motive is not needed

* + - * 1. Burden Shifting: Once a PFC is established, a defendant can avoid liability only by justifying the action as one taken in pursuit of a bona fide, compelling government purpose, with no less discriminatory alternative available to achieve the goal
      1. Exemptions under the FHA (3603):
         1. 3603(a): General Exemptions for (1) private clubs and (2) dwellings for religious organizations
         2. Specified Persons/Types of Housing

3603(b)(1): Single Family Dwelling

A person leasing or selling a dwelling she owns is exempt if she

Does not own more than three such dwellings

Does not use a broker; and

Does not advertise in a manner that indicates her intent to discriminate

3603(b)(2) Small Owner-Occupied Multiple Unit

A person is exempt if she is offering to lease a room or an apartment

In a building of four units or less;

She occupies one unit in the building; and

She does not advertise in a discriminatory manner

* 1. Subleases and Assignments
     1. Basic Concepts
        1. Remember: leasehold = property + contract
        2. Privity: legal relationship
           1. Privity of Estate – relationship concerning rights and responsibilities in an estate
           2. Privity of Contract - relationship concerning rights and responsibilities in a contract
        3. Assignment: a transfer of a tenant’s entire property interest under the lease agreement
        4. Sublease: a transfer of less than the tenant’s property interest under the lease agreement
     2. **Assignment**
        1. Privity of Estate: Assignee <-> Landlord
           1. The Assignee has undertaken the leasehold from the Tenant
           2. This mean that the landlord and the assignee now have all rights and responsibilities between them that are inherent in a leasehold (e.g., rent payment, covenants that run with the land).
           3. The assignee (rather than the tenant) can now enforce covenants against the landlord
        2. Privity of Contract: Tenant <-> Landlord
           1. Tenant remains bound to the covenants in the lease (contract), which he duly executed with the Landlord
           2. Assumption: If assignee assumes the covenants in the lease, then the Assignee enters into privity of contract with the Landlord
           3. Novation: the Tenant remains in privity of contract with the Landlord unless the Landlord releases him
     3. **Sublease**
        1. Privity of Contract: Tenant <-> Subtenant
           1. Any contractual obligations (covenants) between the Tenant and Subtenant are enforceable between them.
           2. If subtenant assumes the covenants in the original lease, then this creates privity of contract between subtenant and Landlord
        2. Privity of Contract: Tenant <-> Landlord
           1. Tenant remains bound to the covenants in the lease (contract), which he duly executed with the Landlord
        3. Privity of Estate: Tenant <-> Landlord
           1. The Landlord cannot do anything with respect to the Subtenant: they are in neither privity of contract nor privity of estate
           2. Subtenant is not legally liable to the Landlord for anything – unless, of course, he assumed covenants from the lease – but he can be evicted if he doesn’t pay rent (he becomes a trespasser)
     4. *Ernst v. Conditt* (P leased a tract of land to Rogers to build a go-cart track; Rogers subleased it to Conditt; Conditt claims he received a sublease and not an assignment)
        1. Holding: An assignment arises when a tenant intends to transfer his entire interest under a lease
           1. A sublease is created when a tenant transfers an interest under a lease that is less than his own, reserving for himself a future interest
        2. The General Rule as to the distinction between an assignment of a lease and a sublease is an assignment conveys the whole term, leaving no interest nor reversionary interest in the grantor or assignor. Whereas, a sublease may be generally defined as a transaction whereby a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term
        3. *Jaber v. Miller* (common law)
           1. If the instrument purports to transfer the lessee’s estate for the entire remainder of his term it is an assignment, regardless of its form or the parties’ intention. If it transfers to the lessee less than the entire term, it’s a sublease.
        4. *City of Nashville v. Lawrence* (modern rule)
           1. In construing deeds and other written instruments, is to ascertain the intention of the parties
  2. The Tenant Who Defaults
  3. The Tenant In Possession
     1. *Berg v. Wiley* (D leased premises for use as a restaurant; D tried to retake possession after notifying P of lease violations)
        1. Holding: If a tenant has not abandoned or surrendered the premises, a landlord may not use self-help to retake possession of the premises on default by a tenant
        2. Modern Rule: A Landlord must use summary proceedings to evict a tenant who is in default
        3. Two prong common law test: (1) Landlord can use self help if the landlord is legally entitled to retake possession (2) use of self-help is peaceful
        4. Policy Reason: Preserve the peace
           1. Economic view: landlords unable to engage in self-help will just pass the costs onto other tenants
        5. The only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but no claims possession adversely to a landlord’s claim of breach of a written lease is by resort to the judicial process
        6. *Lobdell v. Keene*
           1. The law does not permit the owner of land, be his title ever so good, to be the judge of his own rights with respect to a possession adversely held, but put him to his remedy under the statutes.
     2. Summary Proceedings
        1. A legislative remedy to provide quick and efficient means to recover possession
        2. Problem: the remedy can be time-consuming and expensive
  4. The Tenant Who Has Abandoned Possession
     1. *Sommer v. Kridel* (D entered into a lease with P to rent an apartment but relinquished possession shortly after taking possession)
        1. Holding: A landlord has a duty to mitigate damages upon a tenant’s abandonment of the leased premises (majority rule)
        2. Doctrinal reason – shifting to a contract analysis
        3. Policy: Efficiency – letting apartments sit is wasteful
           1. No ex ante certainty under the new regime
  5. Landlord’s Duties v. Tenant’s Rights and Responsibilities
     1. Landlord’s Duties (The landlord has a duty to…)
        1. To deliver possession (English Rule) or to deliver right of possession (American Rule) at the beginning of the lease;
        2. Not to interfere with the tenant’s **quiet enjoyment** (watch for issues of actual or constructive eviction); and
        3. To provide habitable premises (at common law, the landlord generally had no duty, but courts today often find a duty imposed by an express warranty, implied covenant, or a statutory duty) (**implied warranty of habitability**)
        4. A landlord is generally not liable for torts unless the tort is related to a concealed dangerous condition, common areas, public use, or if the landlord has a statutory or contractual duty to repair. But landlords’ tort liability may be increasing.
     2. Tenant’s Duties
        1. The tenant must pay rent
        2. Tenant may not damage the premises
        3. May not disturb other tenants
        4. Remember that the tenant’s duties may be independent of duties of the landlord. Thus, the tenant may have a duty to pay rent even though the landlord has breached one of the landlord’s duties.
        5. Abandonment
           1. CL: Landlord has no duty to mitigate damages
           2. Modern contract rule: Landlord has a **duty to mitigate**. Some states do not recognize this. Some states also distinguish between commercial vs. residential apartments.
        6. Waste
           1. CL: Tenant has a duty to repair. This follows logically from doctrine of waste – tenant cannot reduce the value of the property.
           2. MR: Landlord has duty to repair – **implied warranty of habitability**
        7. Destruction of Building
           1. CL: Tenant still owes rent. Exception: if tenant only renting part of the structure (i.e. apartment), then no duty if entire structure burns down
           2. MR: **Doctrine of Frustration**: there’s a failure of consideration. Result: Lease terminates
     3. Landlord’s Remedies
        1. The landlord may use the common law right of distress (abolished or statutorily altered in many states) statutory liens, security deposits, or rent acceleration clauses. Of course, the landlord’s most common remedy if eviction.
        2. Rent and damages
           1. A landlord has the right to sue for back rent and for damages caused by the tenant’s breach of lease obligations
           2. Anticipatory breach remedy is not available absent a statute
        3. Security Devices
           1. Security deposits – to protect the landlord in the event that a tenant defaults in rent, damages the premises or otherwise breaches the lease. In principle, the deposit is returned upon termination of the lease. In practice, the landlord has the incentive to find damages that would enable him to retain the deposit.
           2. Advanced rent, liquidated damages, and rent acceleration

Rent acceleration – upon tenant’s default, all rent for the entire term is due and parable.

* + 1. Evictions
       1. Actual Eviction (Total)
          1. Physical expulsion or exclusion from possession of entire premises
          2. Remedy if by Landlord: Tenant may terminate lease, pay no more rent, and collect damages
          3. Remedy if by Others: If by person with paramount title – same (may terminate lease and pay no more rent and collect damages)
       2. Actual Eviction (Partial)
          1. Physical expulsion or exclusion from possession of part of premises
          2. Remedy if by Landlord: Tenant may stay in possession and pay no rent until possession is restored
          3. Remedy if by Other: If by person with paramount title – tenant may terminate lease and seek damages, or stay in possession and pay proportionate amount of rent
       3. Constructive Eviction
          1. Substantial interference with use and enjoyment of premises
          2. Remedy if by Landlord: Tenant must vacate in order to stop paying rent or receive damages
          3. Remedy if by Other: No remedy (i.e. no constructive eviction by third party) unless landlord has duty not to permit nuisance to control common areas
  1. Quiet Enjoyment and Constructive Eviction
     1. *Reste Realty Corp. v. Cooper* (Tenant had to constantly deal with flooding of office which new landlord did not repair)
        1. Holding: As all leases contain an implied covenant of quiet enjoyment, constructive eviction is an appropriate remedy for any substantial interference with the enjoyment and use of leased premises.
        2. **Covenant of quiet enjoyment**: you are left free to possess and use and enjoy your premises which you have leased without interference
        3. **Constructive eviction**: Interference with a tenant’s possession which renders the premises unfit for occupation
           1. Remedy for a breach of quiet enjoyment that is so substantial that you have to vacate the premises
        4. At common law, the only way you could breach the covenant of quiet enjoyment is by eviction by the landlord or a third party – must be permanent
        5. Modern approach covers both right of possession and right of use
           1. A landlord can breach the covenant and still have the ability to remedy it without having the tenant abandon the premises
  2. The Implied Warranty of Habitability
     1. *Hilder v. St Peter* (Terrible landlord wouldn’t repair multiple problems with the apartment)
        1. Holding: An **implied warranty of habitability** exists in all residential leases, requiring the landlord to deliver premises that are safe, clean and fit for human habitation.
        2. Before asserting a legal complaint for warranty of habitability, you must inform the landlord of the issues that need to be fixed
        3. Housing code violations establish a prima facie case – gets you passed the motion to dismiss
        4. In order to bring a cause of breach of implied warranty of inhabitability, the P has to prove that the landlord was notified of the deficiency or defect and allowed a reasonable time for its correction + the defect existed at the time the cause was brought.
     2. Implied Warranty
        1. Implied warranty of habitability does not render the doctrines of quiet enjoyment, constructive eviction and illegal leases pointless
        2. It is not necessarily applicable to all residential leases
        3. A majority of jurisdictions have refused to extend the idea to an implied warranty of fitness or suitability for purposes in commercial leases.
        4. Remedies
           1. Damages
           2. Rescission
           3. Reformation
           4. Question as to the calculation of damages
     3. Retaliatory Eviction
        1. Conventional common law doctrine gave landlords virtually unlimited freedom to terminate periodic tenancies and tenancies at will upon proper notice and to refuse to renew expired terms of years
        2. Landlord’s freedom to terminate leases is retrained
        3. Majority rule: Any breach of any covenant in the lease, the landlord must commence summary proceedings to evict.
  3. Waste Doctrine
     1. The action or inaction of a possessor of property, e.g., a life tenant, that causes unreasonable injury to the holder of a future interest in the same property.
     2. General Rule: A tenant should not use property in a manner that unreasonably interferes with the exceptions of the owner of the future interest in the land. (p217)
        1. This is a context-dependent legal doctrine, about which, as the casebook notes, “easy generalization are likely to prove inaccurate”
        2. In assessing whether waste occurs, you need to take into account several factors, such as (1) the nature of the property, (2) the nature of the interests held by the relevant parties, (3) the nature of the conduct, and (4) the remedy sought by the owner of the future interest
     3. Categories
        1. Affirmative or Voluntary Waste
           1. This occurs when the life tenant actively changes the property and its uses, resulting in a failure to maximize the property’s value
           2. Example: a life tenant owns an apartment building in an active downtown area, such as Manhattan, and proceeds to tear down the building and turn the land into a free park for local New Yorkers
        2. Permissive Waste
           1. This occurs when the life tenant is nonfeasant, i.e., fails to act to prevent some harm to the property
           2. Courts often employ a negligence standard (reasonable care) in assessing whether permissive waste has occurred.
           3. Examples:

The life tenant fails to make normal repairs to structures on the land, such as letting a water pump fall into disrepair, which resulted in dead grass, trees and shrubs. The life tenant was assessed damages for this waste. (*Kimbrough v. Reed* p218)

The life tenant fails to pay property taxes, resulting in liens or forfeiture of the land (*McIntyre v. Scarbrough*, p218)

* + - 1. Meliorating or Ameliorating Waste
         1. This is a variation on affirmative or voluntary waste
         2. This occurs when a life tenant makes changes to the property and its uses that results in an increase in the property’s value
         3. Example: A life tenant owns a mansion, although the surrounding area changes during the life tenant’s tenure into breweries and other commercial properties, making the use of the mansion as a residence no longer tenable. As a result, the life tenant demolishes the stately mansion, which was not capable of conversion to a commercial use, and replaces it with a commercial structure. (This was the underlying fact pattern at issue in *Melms v. Pabst Brewing Co*., which the casebook editors note is the “leading case in this country” on this issue (p221) but it is not discussed in any detail)
         4. The issue is whether such an action by the life tenant sufficiently injures the property and the future interest in it to justify calling it “waste” (and thereby holding the life tenant legally accountable)
         5. Here, England and the US rules diverge.

In England, any change to property by a life tenant is waste and a life tenant is liable

In America, courts permit reasonable changes in the use and condition of property by a life tenant.

* + - * 1. Again, the doctrine requires an assessment of the context in which the change occurred, including the remaining life expectancy of the life tenant in using the property. A long life expectancy remaining for the life tenant is a factor to be considered in approving of the change.
      1. Open Minds Doctrine
         1. This is an exception to the waste doctrine
         2. General Rule: A life tenant who receives property, on which natural resources are extracted, such as minerals, may continue to remove such resources if the grantor had already begun doing so before the life estate was conveyed.
         3. This is considered an exception to the waste doctrine, because the mining of natural resources likely reduces the long-term value of the property. Thus, despite the prejudice to the value of the property for the holder of the future interest, a court will find continued mining activities to be reasonable behavior by the life tenant.
         4. The exception is based in a legal presumption that the grantor intended the life tenant to continue using the property as the grantor has during his life, and thus if the grantor was mining the land, then the life tenant may do so as well.

1. **Law of Servitudes**
   1. Intro
      1. Servitudes – agreement that usually involves one or more parcels of land for the purpose of increasing the total value of all the parcels involved
         1. The effect of the agreement is usually to burden one parcel of land for the benefit of another parcel
      2. Prescriptive easement - An easement created from an open, adverse, and continuous use over a statutory period.
      3. **Easement** – An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road).
         1. Profits a prendre – rights to take off the land things that were thought to be “part” of it (timber, minerals, fish, etc…)
         2. Affirmative easement – permission to enter or perform an act on the servient land
         3. Negative easement – easements forbidding one landowner from doing something on his land that might harm a neighbor
         4. Appurtenant – gives the right to whomever owns a parcel of land that the easement benefits
            1. Dominant tenement
            2. Servient tenement
         5. In gross – gives the right to some person without regard to ownership of land
      4. Covenant – A formal agreement or promise, in a contract or deed, to do or not do a particular act.
      5. Real covenants – A covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely.
      6. Equitable servitudes – A private agreement, in a deed or lease, that restricts the use or occupancy of real property, esp. by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put
      7. Licenses
         1. A license is oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass.
         2. Exceptions:
            1. A license coupled with an interest cannot be revoked
            2. A license becomes irrevocable under the rules of estoppel
      8. Creation of Easements
         1. Express grant or reservation
         2. Implication
            1. Prior existing use (quasi-easement)
            2. Necessity

If there is any access to a public road, no matter how difficult or costly no easement is given

Only in effect so long as it is necessary

* + - 1. Prescription
         1. Use but not possession
         2. Rights can be acquired by the passage of time
         3. Lost grant theory – the owner of land is presumed to consent or acquiesce to the use. To secure a prescriptive easement under lost grant theory, the claimant must show that the use was not permissive and also that the owner acquiesced (did not object)
      2. Estoppel
    1. Five Types of Servitudes
       1. A is given the right to enter upon B’s land = easement
       2. A is given the right to enter upon B’s land and remove something attached to the land = profit
       3. A is given the right to enforce a restriction on the use of B’s land = easement
       4. A is given the right to require B to perform some act on B’s land = real covenant or equitable servitude
       5. A is given the right to require B to pay money for the upkeep of specified facilities = real covenant or equitable servitude
  1. Easements
     1. *Holbrook v. Taylor* (Holbrook sought an easement on Taylor’s haul road)
        1. Holding: A license may become an easement when the licensee has (1) erected improvements or made substantial investments in the exercise of the privilege with (2) the knowledge or acquiescence of the grantor
        2. Based on *Lashley*, the appellees use of the roadway to get to their home, construct their home, improvement of the premises, and the maintenance of the roadway – established estoppel
        3. The License to use the subject roadway may not be revoked
        4. Taylor didn’t have a prescriptive easement because he had permission
        5. Spending and erecting improvements on the faith and strength of the license creates a grant of estoppel
     2. *Van Sandt v. Royster* (Action to enjoin the Ds from using and maintaining an underground lateral sewer drain through and across P’s land)
        1. Holding: An easement implied if, prior to the time a tract of land is divided into two lots, a use exists on the “servient part” that is reasonably necessary for the enjoyment of the “dominant part,” and which the court finds the parties intended to continue after the tract is divided.
        2. Court created a legal fiction – **quasi-easement** – two estates that were divided out of one and prior to the division, the owner of the estate used part for the benefit of the other
        3. A court finds a quasi-easement to exist when parcel A is later split into separate parcels – A and B – and an implied easement based on prior existing use is inferred to exist between the two parcels
        4. English rule – only have a quasi-easement when the arrangement is of strict necessity
        5. Prior Existing Use Test (Comment J)
           1. Common parcel (quasi easement)
           2. “known” or “reasonably foreseen”
           3. Continuous use
           4. Reasonably necessary
        6. *Howley v. Chaffee*: Distinction between implied grants and implied reservations:
           1. To say that a grantor reserves to himself something out of the property granted, wholly by implication, not only offends the rule the one shall not derogate from his own grant, but conflicts with the grantor’s language in the conveyance.
           2. The rule is: one grants a parcel of land by a deed containing full covenants of warranty and without any express reservation, there can be no reservation by implication unless the easement is one of strict necessity
     3. *Othen v. Rosier* (Othen wanted an easement over Rosier’s land to egress and ingress from his home)
        1. Holding: In order to create an **easement by necessity**, it must be shown that (1) there was a unity of ownership of the alleged dominant and servient estates, (2) the use is a necessity, and not a mere convenience, and (3) the necessity existed at the time of the severance of the two estates
        2. There had to be a privity of ownership at the time the estate was created to create an easement by necessity
        3. Because the original grantor did not part with the title to the acres along the road until two years and five months after Othen acquired the property, the easement is not granted
        4. The rule is that expressed or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription
     4. *Brown v. Voss* (Ps tried to build a house bordering a nonservient estate)
        1. Holding: If a dominant owner increases the scope of an easement appurtenant by using it to benefit a non-dominant tenement, this is a per se misuse of the easement.
        2. Absolute rule – Can’t increase the scope of the easement appurtenant
        3. Analysis of the Brown Rule
           1. You can change the scope of the easement if it is in accord with the normal development of the dominant tenement
           2. Foreseeability
     5. *Preseault v. United States* (State tried to turn an abandoned railroad track into a nature trail)
        1. Holding: If a RR easement is converted into a nature trail, it is greater than the scope of the easement
        2. Rule in Vermont – when a RR acquires property through eminent domain, it acquired only the property interest necessary to run its RR
        3. It was not foreseeable that the railway would be converted into a nature trail
        4. Abandonment needs both nonuse and something that shows the nonuse indicates intent to abandon
  2. Termination of Easements
     1. Termination date or event expressly identified in original easement agreement
     2. Agreement to terminate between owners of dominant and servient tenements
     3. Abandonment by dominant owner
     4. Merger
     5. Termination by estoppel
     6. Termination by prescription
  3. Negative Easements
     1. The right of the dominant owner to stop the servient owner from doing something on the servient land
        1. American courts have rejected English barriers to the creation of servitudes

1. **Covenants**
   1. Restrictive Covenants
      1. A restrictive covenant is a promise between land owners concerning the use of land and the promise runs with the land
         1. Affirmative: A promises to B that A will take a certain action
         2. Negative: A promises to B that A will refrain from acting in a certain way
      2. Policy reasons for contracts in property – to develop land
         1. Ensure the long time marketability of the land (homeowner’s association)
         2. Transactions costs in negotiating many contracts
   2. **Real Covenants**
      1. A covenant concerning the use of an estate in land that law will enforce against an assignee or successor of the burden estate
      2. Elements:
         1. Intent to Bind successors or Assigns to Real Covenant
            1. Does the language in the original deed or agreement reflect an intent of the parties to bind their successors or assigns?
            2. Important terms showing intent: “assigns” “successors” “real covenant” “shall run with the land”
            3. If the writing is ambiguous, then look at (1) purpose of agreement, and (2) circumstances surrounding execution of the document
         2. Touch & Concern
            1. The promise to benefit or burden the actual estate in some way
            2. Rules for Covenants Requiring Payment of Money

American rule (majority rule): payment of money may be a real covenant if it benefits or burdens the land

Under American Rule, courts look at: (1) intent, and (2) substantial effect of the covenant on the estate

* + - 1. English Rule (minority rule): payment of money never touches and concerns land – it is always merely a personal covenant
         1. Exception: if the payment of money has a substantial effect on the estate and the parties intended it to do so, then it may meet the touch and concern requirement.
      2. Privity of Estate
         1. Horizontal Privity

Only when there was a transfer of interest in property

Majority rule: horizontal privity is required for the burden to run, but it is NOT required for benefit to run

Minority rule (3d RST): NO horizontal privity required for the covenant to run

* + - * 1. Vertical Privity

For the burden to run to promisor’s successors: the successor must succeed to the exact identical estate.

For example: If B, one of the original parties to the covenant, owns a fee simple estate, then B must transfer to C a fee simple estate in order for there to be vertical privity to support the running of the burden

For the Benefit to run to Promisee’s Successor: Privity is NOT required

*Neponsit* was the first case that held that vertical privity of estate is not necessary for a plaintiff to sue; although the holding was limited to homeowner’s associations, which are merely agents of the landowners who are in vertical privity with the original real estate developer, courts have followed the logic of the decisions through to its end – the new majority rule of no requirement of vertical privity of estate for any party to sue on the benefit

* + 1. Termination
       1. Express
          1. Expiration provided in covenant
          2. release
       2. Changed conditions
       3. Abandonment
          1. Abandonment by owner general
          2. Failure to continue plan
       4. Merger
       5. Prescription
       6. Estoppel
       7. Condemnation
    2. *Neponsit Property Owners Inc v. Emigrant Industrial Savings Bank* (Property was subject to an annual charge for maintenance of the surrounding properties)
       1. Real covenant test
          1. It must appear that the grantor and grantee intended that the covenant should run with the land
          2. It must appear that the covenant is one “touching” or “concerning” the land with which it runs
          3. It must appear that there is privity of estate between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant
       2. The court uses equitable principles – substantive policy goals
          1. Allows NPOA to sue despite not having vertical privity
          2. Homeowners association creates efficiency in enforcing large scale covenants
  1. Equitable Servitude
     1. A covenant concerning the use of land (affirmative or negative) that equity will enforce against a successor in interest in the burdened land.
     2. Elements:
        1. Intent to Bind Successors or Assigns to Equitable Servitude
           1. The contracting parties must intend that the restriction be enforceable by and against successors an assignees
           2. No technical terminology is required, e.g., parties are not required to use “assigns”
        2. Touch & Concern
           1. This is the same analysis as the American Rule (majority rule) in real covenants
        3. Notice
           1. Actual
           2. Constructive

Record notice

Inquiry notice

Inquiry notice is used only for implying the existence of an implied reciprocal negative easement (*Sanborn v. McLean*)

* + - 1. Privity is not required to enforce an equitable servitude
    1. *Tulk v. Moxhay* (P owned a fee simple in land in Leicester square that he sold; the deed required the ground stay open)
       1. Holding: A covenant will be enforced in equity against a subsequent purchaser when that person has notice of the covenants
       2. Policy reason: Moxhay could have made an unjust profit – he lowered his price to buy the land after learning about the covenants.
    2. *Sanborn v. McLean* (D wanted to build a gas station on her property; P claimed there was an implied restrictive covenant)
       1. Holding: A restrictive covenant will be enforce din equity against a landowner lacking an express covenant if the parcel was developed as part of a common scheme with restrictive covenants imposed on the surrounding parcels in the community
       2. **Implied reciprocal negative easement**
          1. If the owner of two or more lots, so situated as to bear relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold
          2. Must start with a common owner
          3. A majority of courts imply negative restrictions from general plan
       3. Ex ante
          1. Implied creation of a covenant

Need a common owner – plat was filed at the county clear

Restrictions on lots sold before the lot sold in the lawsuit

Reciprocal – on every lot

* + - 1. Ex post
         1. Nature of the notice – inquiry notice
         2. Estopped in equity for claiming that you know – reasonably apparent that the houses in the community follow a similar plan
    1. *Shelly v. Kraemer* (Is a private restrictive covenant that excludes a person of race or color from the ownership or occupancy of real property violate the 14th amendment?)
       1. Holding: Judicial enforcement of racially discriminatory covenants constitutes unconstitutional state action
       2. Restrictive covenants enforced by the government results in state action
    2. *Western Land Co. v. Truskolaski* (Ps wanted to build a commercial building in a residential neighborhood; does a restrictive covenant remain enforceable given changes in the surrounding conditions?)
       1. Holding: As long as “real and substantial value” exists in the enforcement of a restrictive covenant, a covenant will not be terminated due to changed conditions even if the land may be made even more valuable from the prohibited uses.
       2. If the purpose of the covenant is frustrated, it can be terminated
       3. Policy: Residents have a reliance interest in keeping the subdivision residential only (think of the children) - certainty
       4. Resttrictive covenants were intended to reduce transaction costs
    3. *Rick v. West* (Holdout D refused to sell her plot to be used as development)
       1. The D relied upon the restrictions and has a right to continue to rely on them. It is not a question of balancing equities or equating the advantages of a hospital with the side effects it would have on D’s property.
       2. Holdout is deserving of protection

1. **Nuisance**
   1. Nuisance Doctrine
      1. A substantial and unreasonable interference in another’s use and enjoyment of land
         1. **Nuisance in fact**: the nuisance affects a single individual or a definite small number of persons in the enjoyment of private rights not common to the public given
            1. Location of activity, and
            2. Substantial and unreasonable interference caused to Ps
         2. **Nuisance per se**: An act, occupation or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings, as determined by
            1. The nature of the activity, or
            2. What is defined by statute
      2. Elements for Nuisance in Fact
         1. Substantial
            1. Large financial loss to plaintiff
            2. Observable physical damage to premises
            3. Persons or premises suffer physical harm or mental anguish
            4. Costly or difficult for plaintiff to avoid harm
            5. Harm is of long duration or unremitting
         2. Unreasonable
            1. Unintentional – negligence, recklessness, or activities that are abnormally dangerous

This is basic tort analysis. Almost no nuisances are of this type, as defendants are held accountable for knowing that their activities are impacting other people

* + - * 1. Intentional – defendant knows the activity is substantially certain to result from his conduct

Basic test: court must assess the level of the interference that results from defendant’s activity

Two approaches to determining liability when the nuisance is intentional:

Jost Test: did the level of interference cross a threshold of reasonableness? (note 1, p734)

Restatement: court must weigh whether “the gravity of the harm outweighs the utility of the actor’s conduct” (note 1, p734)

Factors to determine reasonableness of activity

The extent of harm

The character of harm

The social value in the use and enjoyment that is being invaded

The suitability of the use and enjoyment to the particular area

The burden on the plaintiff of avoiding the harm

* + - 1. **Balancing the equities**
         1. Basic Test: When asked to enjoin a nuisance caused by defendant’s activity, the court must balance the harm to defendant and to public in granting the injunction versus the harm to plaintiff if the nuisance continues unabated
         2. Economic Analysis: should the injunction be issued?

If plaintiff’s burden is greater than the benefit from defendant’s activity, then nuisance abated by injunction

If benefit from defendant’s activity is greater than plaintiff’s burden, then the nuisance unabated (but award damages)

* + 1. Public Nuisance
       1. An unreasonable interference with a right common to the general public.
          1. Legal interest at issue: **the safety, health, morals, comfort or convenience of the public**
       2. Analysis: courts look at several factors in determining public nuisance:
          1. Primary factor: whether defendant’s conduct interferes with public health, safety, peace, comfort or convenience (which is the legal interest at issue in a public nuisance (see, eg., Spur Industries)
          2. Whether the conduct is continuous in nature of has long-lasting effects
          3. Courts also look at same issues and factors used in private nuisance, eg., nature of harm caused to plaintiff
       3. Enforcement
          1. Plaintiff: public authority, e.g, attorney general, DA
          2. A private landowner can sue for a public nuisance if and only if he can establish a “special injury,” i.e., an injury distinct from that suffered by members of the general public.
    2. *Morgan v. High Penn Oil Co*. (P sued D for nuisance due to nauseating gases and odors emitted from D’s factory)
       1. Holding: A nuisance is a substantial and unreasonable interference in the use and enjoyment of another person’s land
          1. Ps got $2,500 in damages and an injunction
       2. The issuance of an appropriate injunction is necessary to protect the plaintiffs against the threatened irreparable injury from constant emissions of noxious gases.
       3. Policy argument against injunction = High Penn Oil will be forced to fire people
    3. *Estanicas Dallas Corp v. Schultz* (Ds constructed a large A/C unit to power their apartment complex a few feet from P’s home)
       1. Holding: Although an activity may be adjudged a nuisance, an injunction will only issue if a court finds that it is warranted after balancing the equities.
       2. Someone may be found to be committing a nuisance but they can’t be enjoined.
       3. Ps opted for an injunction which creates a property rule – incentives to negotiate
    4. *Boomer v. Atlantic Cement CO*. (D operates a large cement plant near Ps and Ps sued for an injunction and damages)
       1. Holding: Although an injunction should issue to abate a nuisance, if defendant pays permanent damages to plaintiff, then the injunction will be lifted.
       2. Created a new remedy – injunction until damages are paid off
       3. Policy justification – The court is not competent in making broad public policy goals (pollution).
          1. Better left to the legislature
          2. Want to force a situation where the injunction is for sale
          3. Criticism: Court is undertaking large administrative costs – the court is the finder of fact for deciding damages
    5. *Spur Industries Inc. v. Del E. Webb Development* (Webb bought land near Spur to develop for residential uses; Webb sued Spur for the nuisance created by his lawful cattle feedlot)
       1. Holding: (1) P’s “coming to the nuisance” is a relevant factor in determining the remedy for a nuisance. (2) If defendant’s activities are abated, but plaintiff came to the location after the fact and thus precipitated the nuisance, plaintiff may be required to indemnify defendant for any losses resulting from the injunction.
       2. Spur was found to be a public nuisance – it precluded Spur from making the “coming to the nuisance” defense

1. **Zoning**
   1. Foundation for modern city planning
      1. Separation of uses
      2. Protection of single-family home
      3. Low-rise development
      4. Medium Density Population
      5. Citizens, business people, and social reformers decided that zoning was essential to healthy housing with light and air, to economic interest and to environmental planning
   2. Constitutional Challenge
      1. *Village of Euclid v. Ambler Realty Co.* (Euclid zoned Ambler’s property, resulting in a 75% loss in value. Ambler sued on the grounds the ordinance violates the 14th amendment and due process)
         1. Holding: A zoning ordinance is presumed to be constitutional in the absence of evidence that it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.
         2. Valid use of the police power
         3. Basis for the rational basis test – government action is presumed to be constitutional
   3. Constitutional Analysis
      1. Zoning power is found in the state’s police power
      2. Test of police power
         1. There is a presumption of constitutionality, and thus to overcome this, a challenger must establish that the state:
            1. Is clearly arbitrary & unreasonable
            2. Has no substantial relation to public health, safety, morals or general welfare
      3. Justice Sutherland focuses on prevention of nuisance (racist subtext)
         1. Uses bundle of sticks perspective – Ambler only lost a small portion of the use stick
         2. Fire trucks, burglars, decrease street accidents, decrease noise, protect children
         3. Focused on single family homes versus multi-family homes
            1. Only difference is money
            2. Prejudice against low income peoples
            3. Explosion in immigration at that time
2. **Eminent Domain**
   1. Constitutional Basis
      1. Fifth amendment – “nor shall private property be taken for public use, without just compensation”
         1. Not a grant of power, a limitation of it (affirms the power to eminent domain)
         2. Federal government has no expressed police power
         3. When government condemns property or regulates it in substantial ways, this implicates the constitutional limits imposed on the eminent domain power
         4. What is public use?
            1. *Hawaii Housing Authority v. Midkiff* (Oligopoly of land on Hawaii)

Holding: When the exercise of the eminent domain power is rationally related to a conceivable public purpose, the taking is a “public use” under the Fifth Amendment

Rational basis test – deference to the legislature

Justice Powell warned Justice O’Connor – her language sets up a deferential standard of review

* + - * 1. *Berman v. Parker* (blight action in DC)
      1. Can’t take property from A for the sole purpose of transferring to B
      2. Government can take property if it is directly use/directed by the public
    1. **Public Use: Broad View**
       1. *Midkiff* – when the exercise of the eminent domain power is rationally related to a conceivable public purpose, the taking is for “public use” under the Fifth Amendment
       2. *Kelo* – Legislatures are afforded deference by the courts in assessing whether the taking of property serves a “public purpose.” Including private economic development
       3. Is private economic development a “public purpose”?
          1. Increased taxation, increased jobs
       4. *Berman* – Blighted community
       5. “public use” essentially becomes irrelevant – no limits
       6. Defining public use as public purpose using the deferential test – governments abuse their power
    2. **Public Use: Narrow View**
       1. *County of Wayne v. Hatchock*
          1. Overrules *Poletown*
          2. Holding: A condemnations of property for the purpose of transferring the land to a private party for private development is not a “public use” sanctioned by the state’s eminent domain power
          3. 44 states have adopted the narrow view
          4. Courts will be forced into high administrative costs – asking judges to become land use regulators and decide law on their personal policy preferences
          5. Exceptions:

Necessity

Public control

Facts of independent significance (blight)

* + 1. **Public Use: Law and Economics Approach**
       1. High transactions preventing a voluntary transaction preventing lesser value resources shifting to higher value resources
       2. Narrow and broad views are ends tests – what are the means?
       3. Is there something about the nature of the transaction that justifies government intervention
       4. Test: When transaction costs are sufficiently high that it causes a maket failure -> government should intervene
       5. Market failure = due to high transaction costs, people are not engaging in voluntary transactions that would otherwise occur (i.e., they’re not maximizing efficiency in resource allocation)
       6. Government will also have higher transaction costs
       7. Limitation on Using Eminent Domain: The government must always weigh cost of intervention against cost of the market failure itself.
          1. If government actions costs more than cost of market failure itself -> no intervention
       8. Condemnation requires due process (per Constitution)
          1. Legislative enactment
          2. Agency proceedings
          3. Judicial proceedings
          4. Enforcement costs
  1. Constitutional Challenge
     1. *Kelo v. City of New London* (City condemned private property to give to private developers to increase economic values)
        1. Holding: So long as the condemnation was part of a comprehensive development plan that the has been subjected to thorough deliberation, the Court deferred to the judgment of government officials.
           1. Increasing economic values satisfied the “public use” requirement
        2. O’Connor Dissent:
           1. Beneficiaries will probably be those with disproportionate political influence
        3. Thomas Dissent – “public use” definition changed + change in the standard of review
           1. If you defer to the legislature,
           2. It makes no sense to have zero deference on the 1st Amendment and 4th Amendment – strict scrutiny
  2. Police Power
     1. *Loretto v. Teleprompter Manhattan CATV Corp*. (City ordinance allowed cable company to put a cable onto P’s property; sued for a taking)
        1. Holding: A permanent, physical occupation authorized by the government is a taking, regardless of either the public interests that it serves or the extent of the invasion.
           1. General rule – if government action is pictured as having worked a permanent physical occupation, it appears that there is always a taking, no matter how inconsequential or trivial the invasion
        2. Blackmun – bundle of sticks conception – emphasizes the right to use – degree of interference (similar to *Euclid*)
           1. Tenants have a countervailing property interest –right to use space
        3. Marshall – right to exclude – also the bundle of rights theory
           1. Certainty – physical occupation

Brings it back to the capture rule

* + - 1. Average reciprocity of advantages is inferred – landlords don’t benefit.
    1. *Hadachek v. Sebastian* (P bought land for the purpose of manufacturing brock, but a city ordinance prevented him from doing so)
       1. Holding: A regulation controlling a nuisance is a valid exercise of the police power, even though existing property values and usage may be greatly diminished by this regulation
       2. Policy Analysis – support for the police power
          1. One of the most essential powers of government and one of the least limitable
          2. As long as it is not arbitrary or used with unjust discrimination
       3. Affidavits were included alleging smoke, gases, etc…
          1. Post hoc analysis that the land is a nuisance – not brought up before
       4. Public bad test
          1. Prevents harms (nuisance)
       5. Eminent domain confers a benefit, takings eliminates harm
    2. **Takings: Per se Rules**
       1. A permanent physical occupation authorized by the government is a taking requiring just compensation (*Loretto*)
       2. It is a valid exercise of the police power to regulate activities that create nuisances, even though a property owner’s investment may be greatly diminished by such regulation. (*Hadacheck*)

1. **Regulatory Takings**
   1. **Regulatory Takings Doctrine**
      1. The basic approach in regulatory takings doctrine is known as the “*Penn Central* Inquiry” (a mixture of factors from both *Mahon* and *Penn Central*).
      2. This approach is an *ad hoc*, factual inquiry that asks whether the *property parcel as a whole* is impacted negatively by the regulation in an extraordinary way, such that it takes the regulation out of the police power domain and within the purview of the protections and limitations of the Fifth Amendment.
      3. Three general factors used by the courts in their balancing approach:
         1. Economic effect of regulation on property
            1. Diminution-in-value Test
            2. No “conceptual severance” in determining the economic harm caused by a regulation. In other words, the “denominator” in one’s fraction in determining the percentage of economic value lost under a regulation must comprise the “property as a whole.”
         2. Character of government regulation
            1. Is this a run-of-the-mill police power regulation or is it a dramatic and unexpected act by the government that affects property in such a substantial way that it constitutes a taking of that property?
            2. Standard used by the Courts: “average reciprocity of advantages” (how to determine if the government is using its police power)
         3. Extent to which regulation interferes with distinct, investment-backed expectations
            1. Distinguish this from the diminution in value assessment under the first prong by adopting a backward-looking perspective
            2. This assesses whether the expected *use* of the property that has been restricted by the regulation has long been a stick in the bundle that the law has secured to the property owner. In other words, was it *reasonable* for the landowner to expect to continue using the property in the manner that is now prohibited under the regulation, and did the landowner objectively evidence this reasonable expectation by *investing* in the property accordingly.
   2. Cases
      1. *In re Jacobs* (NYC ordinance banned cigar manufacturing in tenement houses)
         1. Holding: A regulation that restricts property rights, but lacking any connection to a legitimate police power purpose, is unconstitutional
         2. Strict scrutiny test
      2. *Pennsylvania Coal Co. v. Mahon* (City passed an ordinance restricting mining under people’s homes)
         1. Penn Coal Co. had mineral rights and rights in support – not surface rights
         2. Holding: Although property may be regulated under the police power, if the regulation “goes too far” it is a taking – standard.
            1. Diminution in value
            2. Character of government action

Everyone should benefit from the restriction equally

Zoning

Nuisance control

* + - 1. Holmes – the act destroys the value of the whole estate – value in mining the coal
         1. When the diminution in value test reaches a certain magnitude, it becomes eminent domain
         2. Commercially impractical to mine the coal
         3. Right to use has been destroyed
         4. Conceptual severance – not allowed any more
      2. Brandies
         1. Wants to defer to the legislature
         2. Value is relative
         3. Bundle of sticks – can’t conceptualize the fee as only the right to use
      3. Kohler Act
         1. No public nuisance – only one party to the case
         2. Rent seeking by the larger electorate – shifting the burden to a private individual (public choice theory)

Bought property from coal co. and then passed a law preventing mining

* + - * 1. Only affected situations where the company didn’t own the surface rights, i.e. someone who owned the surface rights could also mine for coal
    1. *Penn Central Transportation co. v. City of New York* (NYC Landmarks Preservation Law restricted P’s air rights)
       1. Holding: As Penn Central retains the ability to continue using the Grand Central Terminal and has received valuable rights (TDR) in exchange for the foreclosure of certain development, the Landmarks Preservation Law does not work a taking of Penn Central’s property.
       2. Regulatory Takings Doctrine: “The Penn Central Inquiry”
          1. Assess impact of regulation on whole parcel of property

Economic impact of the regulation on property

Forward looking – what is the new market price?

The diminution in value of the property

Important: no conceptual severance

Character of the government action

How extreme or unexpected is the action?

Average reciprocity of advantages

Interference with distinct, investment-backed expectations (DIBE)

Backward looking – what were the investments made in expectation of using their property

* + - 1. Court calculated  the diminution in value caused by New York City's landmark protection ordinance not only against the total value of the restricted Grand Central Terminal Building, but also against the value of the owner's other properties in the vicinity.
  1. Third Categorical Rule
     1. *Lucas v. South Carolina Coastal Council* (P was prevented from building a home on his coastal lots due to regulatory protections of the coast)
        1. Holding: A land-use regulation that leaves property valueless constitutes a taking and deserves compensation unless the regulation controls the activities governed by traditional principles of nuisance and property l
     2. Regulations that leave the land owner without economically beneficial or productive options for its use – by requiring the land be left in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm
        1. Exception: If regulation proscribes activities already proscribed by traditional, common-law principles of nuisance or property law -> not a taking
     3. Harm test – whether Lucas’ construction of single-family residences on his parcels should be described as bringing “harm” to SC’s adjacent ecological resources thus depends principally upon whether the describer believes that the State’s use interest in nurturing those resources is so important that any competing adjacent use must yield.”
     4. New Test - Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.
     5. Stevens’ Dissent: – the new per se rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value…”
     6. Scalia Response: Stevens is right, 95% won’t get the benefit of the Lucas per se rule but they still have the Penn Central Inquiry – and would probably win if they lose 95%
     7. Policy
        1. Scalia – worried amount limiting government’s takings power
        2. Blackmun – worried about the flexibility of the State to engage in well-established regulations an other laws
        3. Kennedy – issue with DIBEs
     8. Denominator Problem – how to determine if all value is lost?
  2. Environmental Regulation
     1. *Palazzolo v. Rhode Island* (P bought waterfront property designated as wetlands and couldn’t build on it; lost 94.03% of his property value)
        1. Holding: Land must be “economically idle” in its entirety as a result of a regulation in order to constitute a taking under the per se Lucas rule.
           1. But government cannot maintain a token interest
        2. A regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title
        3. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.
        4. The **whole property** was not made worthless (part of it was possible to build on)
        5. Cannot assert conceptual severance
        6. The entire parcel in all of its physical dimensions must be destroyed in order to constitute a taking
     2. *Tahoe-Sierra Preservation Council Inc. v. Tahoe regional Planning Agency* (Planning agency put a stop on new development of new residences in Tahoe for a number of years)
        1. Holding: A temporary deprivation of all economically viable use of land is not a per se taking
           1. The entire parcel in all of its temporal dimensions must be destroyed in order to constitute a taking.
        2. Treating all land-use regulations as a per se takings would transform government regulations into a luxury few governments could afford
        3. The petitioners want to argue that you can sever a 32 month segment from remainder of each fee simple estate and then ask whether that segment has been taken in its entirety by the moratoria.
           1. Time is a stick in the bundle – the owners had a fee simple which goes on forever
        4. If there isn’t a full taking under *Lucas*, use the *Penn Central Inquiry*.
     3. *First English v. LA*
        1. If a government regulation results in a taking, then the government must pay just compensation from the time the regulation first worked the taking until the time the government rescinds the regulation or changes it in such a way that no taking occurs