Fall 2011 Property Outline

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# Possession, Competition, Creation, & Personhood & Law/Economics

* **Acquisition by Discovery (& Conquest)**
	+ Johnson v. Mc’Intosh
		- Facts
			* P had claim for property b/c he received grant from Indian Chiefs
			* D had claim for same property by grant from US govt.
		- Issue
			* If no one owns property before, how do we decide ownership?
			* When does someone “get” the land first? (Who was first in time?)
		- History of Possession
			* When Europeans showed up, the land became theirs by title by discovery, but this ownership is not complete b/c Indians still have right of occupancy (Europeans hold title w/ Indians having right to occupy)
			* With regards to later Europeans showing up, the “first come, first right” theory was used
			* At the end of the Revolutionary War, England, by treaty, gave all land it owned by discovery/conquer to US
			* US also became **monopsony** (only one that could buy land from Indians)
		- Court’s Ruling
			* Following the history of possession, the land belonged to the US, not the Indians, so D wins
			* Indians had no right to transfer title to anyone other than the US gov’t.
		- Notes
			* This system of acquisition by discovery/conquer was the accepted world practice at the time (among the world’s superpowers anyway)
			* Monopsony is an example of one right being withheld from the bundle of full property rights
			* Highlights first in time rule – clear bright line.
			* Problems w/first in time rule
				+ Hard to figure out who was actually first
				+ How do we define possession?
	+ Pierson v. Post
		- Facts
			* Post was out with dogs on a foxhunt and gave chase to a fox.
			* Pierson saw Post pursuing the fox and killed the fox in front of Post
			* Post sued for the fox carcass & won
			* Pierson appealed
		- Issue
			* Does flushing out and pursuing the fox give Post ownership of the fox?
		- Court’s Ruling
			* Pierson gets the carcass
			* Pursuit doesn’t grant ownership
			* Granting ownership to the guy who killed the fox provides a clear brightline
			* Post may have had more of a claim if he had immobilized the fox or mortally wounded it.
		- Dissent
			* We should award to Post to incentivize fox hunting; majority’s opinion de-incentivizes by promoting freeloading and penalizing hunters.
			* Chasing/hunting an animal removes it from nature and makes it no longer wild animal and, therefore, yours
			* We’ll minimize problems by sticking to convention & ruling how hunters would rule
		- Notes
			* Majority & dissent both claim their decision will minimize legislation and confusion
			* Majority b/c they provide clear brightline, dissent because they side with common practice
	+ Ghen v. Rich
		- Facts
			* According to Custom, whale hunters would harpoon a whale and let it wash up on shore, where a finder would receive a finder’s fee for alerting the hunter.
			* Here, a man found a whale and sold it to D instead of alerting P
		- Issue
			* Does Discoverer have title to a whale that someone else (P) has labored, at great expense, to kill?
		- Court’s Ruling
			* “Iron holds the whale”
			* P took possession of the property upon killing it and hasn’t foregone that title (eg: waiting for it to wash ashore doesn’t constitute abandonment).
		- Notes
			* Here, as opposed to Pierson v. Post, the court sides with industry standards to reduce conflict (recognizes pre-legal expectations or customs of a particular community)
			* Pierson v. Post relies on property by capture, where here we stick to industry custom to incentivize whaling.
		- How do we square this w/ Pierson v. Post?
			* Here, plaintiff pursued + killed animal, giving them more clear title to the whale (in PvP, one party gave chase & another killed)
	+ Accession
		- Notes
			* Labor on someone else’s property
			* If I chop down a tree on your land and make a flower box out of it, what title do I have, if any to it?
			* Locke’s labor theory – we have a right to our own bodies and, by extension, the fruits of the labor of our bodies.
			* Damages in Accession can be complicated by bona fides of owner and accessioner
		- Relevant Questions
			* How willfully did the accessioner act?
				+ Were the trees clearly marked as being private property?
				+ Did I have any reason to believe that I had a claim to the trees?
			* How much value did the accessioner add?
				+ If you weren’t using the trees for anything anyway, and I produce a cure for cancer from the bark, I have more claim to the product of my work.
	+ Keeble v. Hickeringill
		- Facts
			* Keeble & Hickeringill have duck blinds near one another
			* H shows up three separate times on K’s land and discharges a gun, scaring off H’s ducks.
		- Issues
			* Abuse of Right - Is something you have a right to do actionable if you do it maliciously?
			* Does K have any right to the ducks that were scared off, as he hadn’t actually killed or captured them?
		- Court’s Ruling
			* **Constructive Possession**: K had possession of the ducks, even if he hasn’t reduced them to capture (Constructive Possession isn’t quite as good as real possession)
			* Malicious interference with trade
			* H hindered K “in his trade or livelihood”
			* Court draws an analogy. If K owned a school, H would have a right to open a school next door to compete. H would not have a right to show up at K’s school and fire a gun to scare off students. That’s unfair competition.
		- Notes
			* PvP seems to not apply because K wasn’t hunting duck for sport – this is his trade, and H interfered with his trade maliciously.
			* Ghen v. Rich & K v. H are distinct from PvP because Ghen & Keeble are utilizing the property in question commercially (we want to promote).
			* Courts will sometimes conclude that landowners have constructive possession of wild animals on their property.
	+ Elliff v. Texon
		- Facts
			* Elliff owns and is drilling on land adjacent to land that Texon is using to drill (common well)
			* Texon well blew out, burning up all of the oil in the common well and causing destruction to Elliff’s land
		- Issue
			* Does Elliff have claim to the oil that came from under her land or did Texon own all of it via law of conquest?
		- Court’s Ruling
			* Elliff and Texon have right to drill for oil. Elliff has no claim to the oil that was captured by Texon via drilling.
			* Texon didn’t have a right to waste the oil
			* Oil is no longer analogous to a wandering wild animal
		- Notes
			* Both Elliff and Texon had a right to drill
			* Elliff didn’t have ownership of the un-capture (ie: not yet drilled oil), but the wasting of that oil, resulting from negligence, didn’t constitute capture, so it violated Elliff’s property interest in the oil.
			* Elliff has a right to a reasonable opportunity to drill for oil.
			* Oil is a commons – owners have a right & responsibility to drill responsibly
	+ Water discussion
		- East Coast Surface
			* Riparian Rights
			* Land owners along a water source can use it
		- West Coast Surface
			* First person to appropriate gets it
	+ Rule of Increase
		- Offspring follows the mother
		- Widely accepted because:
			* Contributes to economic utility and overall efficiency;
			* It is simple, certain, cheap, and easy to administer;
			* It is predictable for potential litigants and the broader public;
			* It fits in with or takes advantage of existing natural forces or tendencies and human habits, customs, or intuitions;
			* It appeals to widespread notions of fairness.
		- Rules other than the rule of increase will often meet some but not all of these criterion, so we have to pick and choose which are most important and relevant to the question at hand.
		- Carruth – if a pregnant cow wanders off of your land and births cows on your neighbor’s land and your neighbor cares for your cow and the calves, they’re still your calves.
* **Acquisition by Creation**
	+ International News Service v. Associated Press
		- Facts
			* INS bribes newspaper employees for AP content before publication
			* INS seeks AP content from AP employees before publication
			* INS copies AP content from bulletins & early editions
		- Issue
			* First two complaints are given injunctions and AP clearly wins. We’re only concerned w/#3
			* To what extent does AP own the news? Can they prevent competitors from republishing news they’ve collected?
		- Court’s Ruling
			* Granting exclusive right to report on a given news item is impractical
			* News is quasi-property – AP has a right to profit on it, but not an exclusive right to the information that constitutes “the news.”
			* Publishing news releases it for public consumption but not for capitalization by competitors
			* Some level of protection of news is vital, or there would be no incentive to gather news.
			* INS was involved in unfair competition because it was basically stealing AP’s labor.
		- Notes
			* Can’t own the information contained in the news. Only a presentation of the news.
	+ Cheney Brothers v. Doris Silk Corp.
		- Facts
			* P produces many different patterns. Business model is based on selling a several products bearing one or two popular patterns in a short amount of time (seasonal)
			* D admits to copying P’s successful patterns
			* P seeks short-time copy-protection (only a few months)
		- Issue
			* Does P have an exclusive right to their patterns, or does copying constitute unfair trade practice?
		- Court’s Ruling (L. Hand)
			* Rules for D
			* Legislation needed – Learned Hand acknowledges it’s kind of crappy that he has to rule for D, but says repeatedly that legislation is needed here
			* Limit INS v. AP to its facts
			* Copying is good for the marketplace and provides competition
		- Notes
			* **Chattel** = tangible personal property
			* We have to balance:
				+ Consumer Interest (copiers provide competition and cheaper alternatives to the expensive first-party goods)
				+ Economic Incentive – If it’s not profitable to produce goods (news, silk patterns, fragrances), they won’t be produced.
			* Common law rule (upheld here) – allow copying
	+ Smith v. Chanel
		- Facts
			* Smith is producing a knockoff fragrance and advertising that it’s as good as the Chanel original
			* Lower court rules in favor of Chanel
			* Smith appeals
		- Issue
			* Again, we must weigh incentive for Chanel to create perfume vs. consumer benefits of cheaper competition
		- Court’s Ruling
			* Smith may continue to advertise their knockoff as being as good as the original
		- Notes
			* Extends *Cheney* to not only copying products but also claims that the copy is = the original.
			* Even today, Chanel is still in business and people are willing to pay a premium for a brand name, so allowing copiers doesn’t necessarily eliminate profitability of producing.
			* First-movers still have advantages, even if widespread copying is allowed
			* Society may be better off if we allow copying – culture disseminates faster & cheaper
* **Property & Personhood**
	+ 13th Amendment to US Constitution
		- Abolished Slavery & involuntary servitude
		- Looked at as recognizing some sort of inaliable right to our body & the labor of that body (much like Locke’s theory)
		- Since Bailey v. Alabama, 1911, we have abolished peonage – involuntary servitude based on unpaid debts
	+ Moore v. Regents of University of California
		- Facts
			* Moore was treated for some super cancer at UC.
			* Moore’s excised pancrease was extremely rare and, without Moore’s knowledge or consent, it was sent to researchers after excision
			* Extremely profitable Cell lines were created and bio-engineering patents were granted based on research done on Moore’s cells and organs.
			* Moore sues for conversion (wrongful exercise of ownership rights over the personal property of another)
		- Issue
			* Does Moore continue to own his tissue after excision?
			* If so, to what extent?
		- Court’s Ruling
			* USSC: No, he doesn’t own tissues.
			* Even though he doesn’t own tissues, we can award judgment based on breach of fiduciary duty and informed consent on the part of the Dr.
			* Granting ownership of tissue would be bad for research because every researcher would have to worry about title to every cell or tissue that he works with/on.
			* Limiting liability to Dr for fiduciary duty/informed consent protects patients while still allowing research
			* Existing law that prohibits selling organs demonstrates intent to prohibit retention of ownership of tissue once excised.
		- J. Arabian’s concurrence
			* Nightmare scenario where we’re commercially harvesting and selling organs freely.
			* Invokes 13th amendment
			* While Arabian is concerned about empowering people to sell organs, Moore didn’t want to sell. Basically, his shit got stolen & sold
		- Mosk’s Dissent
			* Existing legislation only prohibits some types of selling.
			* There’s already property that can be:
				+ Given and sold
				+ Neither given nor sold (prescription drugs by patients, professional licenses)
				+ Given but not sold (sportsmen can give away their catch but not sell it)
				+ Sold but not given (your property if you’re in bankruptcy)
			* As such, removing the “can be sold” right from the bundle of rights doesn’t destroy the bundle entirely – even if we grant that Moore couldn’t sell his tissue, he could still have retained a right entitling him to claim of conversion
			* Dispose is just one of the sticks in the property rights bundle. There’s also Possess, Use, and Exclude
			* If Moore had known, he might have (and would’ve had a right to) hire his own researchers to do the work that UC did on his tissue.
			* Limiting liability to informed consent “would allow the true exploiters to escape liability”
		- Notes
			* **Conversion:** “wrongful exercise of ownership rights over the personal property of another”
* **Acquisition by Find**
	+ Armory v. Delamirie
		- Facts
			* P is a chimney sweep’s kid who finds a jewel in a setting and takes it to a jeweler for appraisal
			* D offers P some small amount of money, which P refuses and requests return of jewel
			* D returns the setting only without jewel
		- Issue
			* Does P have a claim to the jewel?
		- Court’s Decision
			* “the title of the finder is good as against the whole world bt the true owner” (or prior possessor)
			* D must either return the jewel or pay the maximum amount that the jewel could’ve possibly been worth
		- Notes
			* Bailment – Rightful possession by non-owner (coat check, valet, etc.)
			* Subsequent buyers may be screwed if/when true owner shows up
			* Winkfield Doctrine – say the goldsmith already paid the kid. He’s protected from having to also pay the original owner (thus, paying twice) should the original owner show up.
			* Unlike Anderson v. Gouldberg, wherein a guy was stealing trees, Armory only applies to honest claimants.
	+ Hannah v. Peel
		- Facts
			* D owned (but never lived in) a house in which P was stationed
			* P finds a brooch hidden in the house, turns it in to his police. They can’t find true owner, so they sell it and give D the money.
			* P sues D, claiming superior title to the brooch
		- Issue
			* Whether the finder of prop. has superior title to the find over the owner of the land on which prop. Is found.
		- Court’s Decision
			* P gets brooch
		- Notes
			* D owned land but was never in possession of brooch or land.
			* P did the right thing & we want to reward that
			* D did some work to find the brooch.
	+ South Staffordshire Water Co. v. Sharman
		- If you find something while under employ, you don’t get to keep it
		- Eg: if I find a ring while cleaning someone’s pool, it belongs to the pool owner
	+ Elwes v. Brigg Gas Co.
		- Elwes leases land for 99 years to gas co. who finds an ancient boat embedded below the surface
		- Ct: Landowner gets to keep the boat
		- Landowner is in lawful possession of everything in/under land, since true owners clearly would not claim, possession of boat gave landowner ownership
		- The boat was placed there long before the land was leased, so it belonged to the lessor
		- The landowner intend to control the land, even though he has no knowledge of the boat → he can be assumed to have constructive (assumed) knowledge
* **Law & Economics**
	+ **Externalities -** Those costs or benefits that arise out of your action, and which you fail to fully consider, because some of these costs or benefits fall on other people.
	+ **Transaction Costs -** the costs of arranging an offer or deal between parties.
		- When transaction costs are high, external effects of using resources are unlikely to be fully considered through bargaining
	+ **Coase Theorum** - in the absence of transaction costs, regardless of the initial assignment of rights and liabilities, parties will reach an over-all efficient, value-maximizing, result.
		- We can see how important transaction costs are and how they increase inefficiency in the real world
		- Wealth Effects (disparity between parties) and Endowment Effects (people over-value status quo) can screw up the Coase Theorum.
	+ **Tragedy of the Commons** – If you have a field and allow everyone to graise on it, it will be overgraised and become unusable by anyone.
	+ **Tragedy of the Anti-Commons** – If you have a strip center with everyone owning a shop in the strip-center, any one owner can act inefficiently for the entire center.
		- Imagine: Company A owns patent on cancer-curing serum. Company B owns patent on machine that administers serum, Company C owns software that machine uses, etc...
	+ Think of Property as a set of rules b/t ppl regarding things; not between people and things.
	+ **Public Good**
		- (1) Once the good is provided, it is impossible to prevent anyone from consuming it
		- (2) Consumption by one person does not diminish or otherwise affect the ability of oters to consume as well
* **Trespass & The Right to Exclude**
	+ Jacque v. Steinberg Homes
		- Π refused access across land, no matter what. ∆ intentionally tresspasses
		- Ct awards $1 nominal damages and $100k punitive
		- Right to exclude is one of the most fundamental in bundle of rights
		- State has to protect right to exclude so landowners don’t take matters into their own hands.
		- 2 arguments for strong R to exclude:
			* Economic Efficiency/Utilitarian – we need to protect private property to encourage industry and prevent land owners from taking law into their own hands.
			* Libertarian – something wrong with not giving ppl a strong right to exclude
		- “Right to roam” – exception to right to exclude
	+ State v. Shack
		- Shack is a lawyer and goes to Tedesco’s land to provide legal and medical help to Tejeras, a migrant worker there. Tedesco says they can only meet w/Tejeras in his office, supervised. Shack et al refuse. Tedesco calls the cops.
		- Ct overturns trespass conviction and holds:
			* Ownership != right to bar access to gov. services
			* Title to property != dominion over the destiny of persons owner allows to enter property
			* Maxim of common law that one shouldn’t use property to injure the rights of others
		- Diff from Jacque – R.E. ownership bundle of rights doesn’t include right to keep ppl (esp. poors) from gov. services
		- Notes:
			* Trespassers acting in good faith
			* Property rights should be societally beneficial
			* Marginalized class
			* By allowing tenants, some rights to exclude waived

# Adverse Possession

* O = Original owner
* A = Adverse Possessor
* Cases arise 1 of two ways
	+ Ejectment – O wants to get A off his property
	+ Quiet Title – A seeks title from O to land they’ve been APing
* 2 components
	+ SoL (Statutory) – amount of time APer has to be on land
	+ Adjectival
		- Entry
		- Open & notorious
			* Paying taxes is especially open & notorious
			* Ewing v. Burnet p. 121 – “The sort of entry and possession that will ripen into title by AP 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”
			* In Pettis v. Lozer, A did tons of open & exclusive stuff, but Ct denied AP – p. 121
		- Continuous for statutory period
			* May allow tacking (combining multiple As time) if there’s privity b/t As (Howard v. Kunto)
		- Adverse & hostile
			* Is A’s mindset relevant?
				+ Objective Rule

No. Motive Irrelevant

English Rule

French v. Pearce, Manillo v. Gorski, Nome v. Fagerstrom

* + - * + Good-Faith Rule – maybe we favor As who think they own the land

Occasionally used in US decisions

Cts may be lying to themselves when they say they’re objective. May be favoring Good-Faith

* + - * + Aggressive Tresspass Rule

Aka willful possessor

We favor As who know they don’t own the land (more hostile)

Maine Standard, from Preble v. Maine

A may receive title but be req’d to pay fair market value for egregiously trespassing

* + - * Sometimes, we read “Exclusive” into adverse & hostile
* Boundary Lines (Manillo v. Gorski)
	+ Agreed Boundaries – oral agreement is enforceable if it’s accepted for a long time
	+ Acquiescence – long period of time (maybe <SoL) w/o anyone raising hell is evidence of an agreement fixing the boundary line
	+ Estoppel – 1 neighbor seems to indicate a boundary line & the other neighbor changes their position as a result of their indication
* Color of Title
	+ A has some sort of flawed evidence of ownership
	+ Never required, but can be helpful
		- Maybe shorten SoL timer
		- Maybe give you entire lot, even if your APing a portion of it.
	+ Color of title = constructive possession
* Tolling SoL
	+ Disabilities
		- Minor
		- Unsound mind
		- In prison
	+ Generally, you can’t tack disabilities
	+ Have to be disabled at the time AP started
	+ Discovery Rule (below, O’keeffe)
* **ADVERSE POSSESSION CASE LAW**
* Nome 2000 v. Fagerstrom
	+ ∆ owned adjacent parcel and staked out into π’s land. Used disputed parcel for recreation – “every other weekend or so and occasionally during if the weather was good”
	+ Used northern part of parcel as a base camp & rest of parcel for recreation & adventuring
	+ Built a cabin in ’78, but period from ’77-78 still counted because they were using it as true owners would’ve
	+ They don’t get southern portion because their use of the southern portion wasn’t exclusive, open, or hostile
	+ Intent of the πs is irrelevant.
	+ Πs get property because they were using it as an average owner of similar property would.
* Mannillo v. Gorski (& boundary lines)
	+ ∆ had adjacent property & built steps that intruded 15 in. into π’s property
	+ ∆ thought the land belonged to her
	+ NJ SC remands to determine:
		- If π knew of encroachment (was it sufficiently open?)
		- If not, whether ∆ is obliged to convey tract?
		- If so, what should ∆ have to pay π?
	+ Ct says it’s irrelevant whether ∆ thought it belonged to her – don’t have to be willful possessor
	+ We can deviate from precedent here b/c precedent exists for predictability of future actors. Here, parties were confused as to facts, so they couldn’t have predicted the outcome anyway
* Howard v. Kunto p.142 (& Tacking/Privity)
	+ A hasn’t met SoL for AP, so wants to count previous resident’s time.
	+ O argues & Ct holds that where the deed doesn’t describe any of the land which was occupied, the transfer doesn’t establish privity, so no tacking.
	+ Seasonal use satisfies continuity
	+ Good-faith transfer of an erroneous deed grants privity
* O’Keeffe v. Snyder (& Replevin - AP of chattels)
	+ Painter’s paintings somehow go missing for a long time
	+ A had paintings and was displaying them at various shows (claims to be open & hostile)
	+ Does SoL timer start when paintings go missing? Is it tolled while the painter is diligently looking?
	+ Ct: Cause of Action doesn’t trigger SoL timer until she knows or reasonably should have known who has her paintings (Rule of Discovery)
	+ Gugenheim Rule: SoL starts when you track down property AND ask for it back AND get turned down (Guggenheim Foundation v. Lubell)

# Real Estate Transactions & The Recording System

* Statute of Frauds
	+ Requirements
		- Must be written
		- Signed by bound party
		- Description
		- Price or means to calculate
		- In some states, material & essential terms of transaction (hard to identify)
	+ Sometimes more laxe, depending on jd
	+ Don’t need specific price, but should incl. method to calculate price (eg: fair market value)
	+ Exceptions:
		- Partial Performance
		- Estoppel
* 2 primary functions of RE Ks
	+ smoke out problems with the property before it changes hands
		- Inspections are where most RE deals get killed
	+ Executory Nature – by requiring people to do shit before the sale, we’re building failsafes in place to keep transactions on track
* Some things a RE K should include:
	+ Purchase Price & how it’s to be paid
	+ Legal description
	+ Good Title furnished, title ins.
	+ Warranties of title incl. restrictions
	+ Date of transfer of possession
	+ Proration of taxes/utilities
	+ What if fire? Who’s responsible?
	+ Itemization of personal property included in sale
	+ Escrow details
	+ Provision for return of deposit
	+ Signatures
* Partial Performance is the equitable doctrine wherein we award relief to somebody who party performs, to their detriment, a contract that fails SoF (Hickey v. Green, Walker v. Ireton)
* Equitable Conversion
	+ Majority rule that B gets stuck in the event that the house burns down b/t K and closing
	+ B has equitable ownership of the property
	+ S has legal title as trustee for B
	+ Often K around or buy insurance
* Fiduciaries: (Licari v. Blackwelder)
	+ Must exercise fidelity and good faith
	+ Cannot put themselves in a position antagonistic to their principals’ interest
	+ Therefore, must make a full, fair, and prompt disclosure of all facts which are or may be material, or which may affect their principals’ rights and interests
	+ Fiduciary responsibilities transfer to sub-agents
	+ Fiduciaries can breach their duties by:
		- Making material misrepresentations
		- Making false promises likely to influence, persuade, or induce
		- Acting for multiple parties in a transaction without knowledge of all
		- Any dishonest, fraudulent, or improper dealings
* Marketable Title
	+ Black’s definition
		- Free from encumbrances and any reasonable doubt to its validity,
		- and a reasonably intelligent person, who is well informed as to the relevant facts and their legal bearings, and
		- who is ready and willing to perform the contract
		- would be willing to accept in the exercise of ordinary business prudence.
	+ Practical terms
		- Free from reasonable doubt in law and fact
		- Acceptable to a reasonable purchaser – not just valid in fact
		- Will not expose a purchasing party to hazards of litigation
		- May be freely made the subject of resale
		- Is the sort of title that will be deemed sufficient if a court is asked to provide specific performance of a contract of sale
	+ If S can’t convey MT, B may be able to rescind K
	+ Encumbrances
		- Any right or interest by 3rd party that decreases value
			* Mortgages & easements
			* “Hazards of Litigation” - zoning violations
			* Zoning Restrictions (aka Requirements) aren’t a hazard of litigation b/c buyer could easily find zoning req’s but if you sell them a violation, you’re selling them a lawsuit
			* Easements that are open, visible, available, or enhance property aren’t encumbrances (p. 551 #2)
	+ Marketability of title != marketability of land
		- Totally distinct
		- Can sell somebody barren land that can’t be farmed, but you can’t sell them encumbered or bad title to that land
	+ MT Duty can be implied, so parties try to K around
* Duty to Disclose
	+ 3 general approaches
		- Caveat Emptor – Buyer Beware (Strambovsky creates new equitable exception)
		- Duty to disclose latent (not obvious) & material defects known to the seller and unknown and not reasonably known by the buyer (Johnson v. Davis)
		- Duty to disclose all known material defects, latent or patent
		- Generally, Cts are trending further down this list. Why?
			* Single rule is cleaner & more efficient
			* Hard to prove exceptions to CE
* Doctrine of Merger p.563
	+ Basically, the sales contract doesn’t matter after closing
	+ When B accepts deed, B is deemed to be satisfied that all of the contractual obligations have been met.
	+ Contract merges into deed – B cannot sue S for promises in K but not in deed, but must sue on warranties in the deed
	+ Becoming riddled w/exceptions (namely fraud and contractual promises deemed collateral to the deed)
	+ Principally applies to questions of title or quantity of land (eg: If K calls for marketable title and B accepts deed w/no warranties, B cannot thereafter sue based on K for title defect – James v. McCombs)
	+ To get around, argue that duty was collateral, independent of contract
* Deeds
	+ General Warranty Deed – warranty vs. all title claims
		- 6 express warranties:
			* guarantee that you own property (Seisin)
			* Right to convey
			* Warranty against encumbrances
			* S warrants that she’ll defend herself against future claims (General Warranty)
			* Quiet Enjoyment
			* Further Assurances – S will do whatever else they need to
	+ Special Warranty Deed – Warranties against S’s own acts but not the acts of others (if defect is a mortgage against land executed by S’s predecessor, S not liable)
	+ Quitclaim Deed – no warranty
	+ Deeds should be in writing and contain
		- Name of grantor & grantee
		- Words of grant (make clear that it’s transferring)
		- Description of the land
		- Signature of grantor
		- Notary seal
	+ Deeds should also mention consideration (needn’t specify how much, just say that it was received)
	+ Forged deeds are void
	+ Deed obtained by fraud
		- Purchaser from a grantee that obtained deed by fraud gets to keep it
		- Grantor can take action against grantee but not a subsequent purchaser
		- Eg: B fraudulently obtains title to O from A. B sells to C. C gets to keep O and A can take action against B but not C
* Mortgages
	+ Generally, B signs deed of trust, granting title to 3rd party trustee who can foreclose w/o suing
	+ Otherwise, lender has to sue to foreclose & go through judicial foreclosure & auction
	+ If lender forecloses, it’s easier to get a deficiency judgment via judicial foreclosure than private sale
	+ Deficiency judgments are highly regulated
	+ Deed in lieu of foreclosure – Sometimes, you can just give the lender the deed to avoid foreclosure
	+ Moral Hazard – can’t bail out (banks, poor people, others) b/c you encourage them to take risks b/c they rely on getting bailed out in the future. Sometimes, we may want to bail out abhorrent banks to avoid catastrophic systemic consequences. (Commonwealth v. Freemont)
	+ Installment Land Contracts
		- S financed deals for B who can’t/won’t get bank financing
		- Very strict forfeiture provisions
		- Becoming more buyer-friendly
* The Recording System
	+ Here, O is the original owner of property. O sells to A. Then O sells to B.
	+ Title history can be very complicated – central recording system helps make research easier (and trustworthy).
	+ Types of notice: (Daniels v. Anderson & thereafter)
		- Actual Notice – you know property has been sold
		- Record notice – sale has been recorded
		- Inquiry Notice (less important) – maybe some aspect of deal or A’s use of land that let B know they should investigate further. (Harper v. Paradise & Waldorff Ins. v. Eglin)
		- 2nd & 3rd above are constructive notice
* Types of Recording Acts
	+ Race Recording Act – Whoever records first wins – efficient but not fair – (Rare)
	+ Notice Recording Act – Protects only subsequent purchasers w/o notice. No notice? Goes to the subsequent purchaser (B here)
		- FL’s Statute Text: “No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to the law.”
	+ Race-Notice Statute – B must record 1st AND must lack notice
		- CA’s Statute Text: “Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for valuable consideration, whose conveyance is first duly recorded, and as against any judgement affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.”
	+ Recording statutes often don’t protect donees or devisees as “subsequent purchasers” even in race jurisdictions – notice the importance of consideration
	+ Shelter Rule
		- Where we have a notice rule: O sells to A. A doesn’t record. O sells again to B. B has no knowledge of A’s deed. A records before B. Then B sells to C. Even though C has notice of A’s deed, as long as B didn’t have notice, C’s claim is > A’s.
		- A person who takes from a bona fide purchaser protected by the recording act has the same rights as his grantor
		- Cannot protect O if O buys back from B
* **REAL ESTATE & RECORDING SYSTEM CASE LAW**
* Hickey v. Green (& Partial Performance)
	+ Buyers enter into agreement to buy house for $15k
	+ They give seller deposit check with “To” line blank and they sell their own house in reliance on the contract
	+ When the buyers show up to complete transaction, seller says she’s found a new buyer and is selling to them for $16k.
	+ Buyers offer to pay $16k, but Seller refuses. Buyers sue for specific performance
	+ Ct says contract is enforceable b/c buyers acted in reliance on the contract
* Walker v. Ireton p. 546 (& When you don’t quite get partial performance)
	+ similar to facts above. S agrees to sell farm to B and refuses to sign written contract.
	+ B gives $50 deposit, which is never cashed
	+ B sells house and S refuses to sell
	+ Here, Ct sides with S because S had no way of knowing that B was going to sell his house or had sold his house
* Licari v. Blackwelder (& RE Agents as fiduciaries)
	+ Swartz was π’s broker. He entered sub-broker agreement with ∆s, who openly colluded against π.
	+ ∆s = brokers. Supposed to broker sale of π’s property, but instead bought & resold property
	+ ∆s withheld info from π to sell house for more
	+ ∆s intentionally misrepresented IDs of serious Bs to lowball
	+ πs insisted the house not be sold to a particular person. ∆s bought house and turned around and sold it to that person.
	+ Ct: ∆s violated fiduciary duty to πs. Π wins.
* Strambovsky v. Ackley (& Caveat Emptor)
	+ Out of town B buys house and finds out it’s haunted.
	+ S has advertised haunted nature in past but didn’t disclose to B
	+ Ct: even though NY is caveat emptor, the point of CE is to punish negligent Bs. Here, B had no way of knowing prop. was haunted
	+ 5 exceptions to C.E.
		- Fiduciary relationship
		- Active Concealment
		- Affirmative Representation
		- Fraudulent Representation (samesies as above)
		- Partial Disclosure
	+ Here, no exception exists, so Ct creates one – basically, “we think there’s something shitty going on & the idea of equity compels us to act. If we impose duty on S, not only is there no harm, but failing to place duty on S encourages shittiness.
	+ P. 555 – “it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.”
	+ If you represent things to the general public, you have to tell B about them as well
* Johnson v. Davis p. 557
	+ Πs entered into K to buy house for $310k. ∆s lied and said that the roof was fine. When π found out roof leaked and ∆s were lying, they sued to rescind K
	+ Ct: S must disclose all material defects unknown to B. Judgement for π (Latent Defects Rule)
* Commonwealth v. Freemont Investment & Loan
	+ Ct issues injunction to stop ∆ from foreclosing. ∆ was predatory lending.
		- (1) ARM w/intro <~3 years
		- (2) Artificially low intro rate
		- (3) Borrower’s DTI would’ve been > 50% had they used fully indexed rate in (2)
		- (4) LTV 100%(+) or substantial prepayment penalty
		- (1)-(3) mean that B will have to refi @ end of intro period. (4) means that they can’t refi.
	+ ∆ cries that they were following the fairness standards at the time
	+ Ct doesn’t care – should’ve known – doesn’t matter that everyone was doing it.
* Daniels v. Anderson
	+ Daniels (π) buys land from Jacula & has right to refusal for adjacent lot. Z buys adjacent lot & starts paying Jacula. While paying, Z finds out about Daniel’s right.
	+ Ct: Z != bona fide purchaser b/c he had notice when title was transfered.
	+ Pro tanto rule protects buyers to the extent of payments made prior to notice but no further. So we can:
		- Let π have land & pay Z for it
		- Award Z equity in land proportionate to what Z has already paid
		- Allow Z to complete purchase, but pay remaining balance to π
	+ Ct decides to go with option 1
	+ π tried to raise equitable conversion on appeal, but waived it b/c he didn’t raise it @ trial
* Lewis v. Superior Court
	+ Πs K’ed to buy land and paid a bunch of money in furtherance of K. ∆s filed notice of lawsuit affecting title (lis pendens) 1 day after title vested w/πs.
	+ Πs took title Feb. 28. S files lis pendens Feb. 29. Πs paid >$1mill over the next year renovating. After renovation, ∆ commenced suit w/proper service against π. Πs sued for clear title.
	+ Ct: Any purchaser without notice who makes a down payment and obligates himself to pay the balance, has every reason to believe that his rights are secure in the property.
	+ Ct: We don’t have to use Davis. If we apply Davis, we penalize an innocent purchaser & Davis is antiquated vs. current industry practice
	+ Here, Ct abandons 99-y/o Davis precedent
* Harper v. Paradise
	+ 1922 - S. Harper (SH) conveys life title to Maude Harper (MH) who loses deed. It stays disappeared for 33 years
	+ 1928 – SH’s kids, realizing the deed is missing, attempt to re-do. They quitclaim the property in FS to MH. Deed is recorded.
	+ 1933 – MH borrows $50 against property
	+ 1936 – Thornton forecloses and takes property via Sherriff’s deed
	+ Unbroken title from Thornton – Paradise
	+ 1955 – original deed SH – MH gets recorded
	+ 1972 – MH dies
	+ 1974 – SH’s kids sue for property
	+ 2 issues:
		- AP Claim (Paradise claims they started APing in 1940)
			* Ct says AP SoL doesn’t start running until MH died, so they’ve only been APing for 2 years
		- Title claim
			* Ct claims that since 1928 deed was recorded and referenced 1922 deed, Paradise had notice of 1922 deed & should’ve ventured to find what’s in the referenced 1922 deed. 1928 deed doesn’t actually convey an interest since the kids weren’t the true owners. Thus, the 1922 is the only valid deed. Since it conveyed life title to MH, SH’s kids get property when MH died.
* Waldorff Ins. V. Eglin
	+ Waldorff made K to buy & occupied condo unit in 1973. Subsequently, condo complex owner mortgaged property in 1974 and 1975. Bank (Eglin) sues to foreclose on Waldorff’s condo.
	+ Bank says Waldorff’s occupation was equivelant to all of the rented (non-owner occupied) units & they can’t be expected to investigate every single unit.
	+ Ct: occupation constitutes notice. B/c Waldorff was open in possession of unit, bank had inquiry responsibility. Waldorff wins.

# Acquisition by Gift

* 2 requisites:
	+ Intent &
	+ Delivery – affirms intent & proves gifting happened (Newman v. Bost)
		- Actual Delivery
		- Symbolic Delivery – handing over something symbolic (eg: here’s a keychain of a piano because I am giving you the piano whenever I can get it moved)
		- Constructive Delivery – eg: handing over the keys to the car
		- Grantor must relinquish dominion and control of gift
	+ Old Rule – if delivery is possible, it must be done – symbolic/constructive delivery no good
* Some practice problems on p. 166 w/answers as follows:
	+ Yes, delivery & intent were both made
	+ Yes, still a gift; O was borrowing A’s ring (O becomes the bailee)
	+ Not a gift – verbal promise to give after death to avoid fraud; needs to be written
	+ Traditional rule – if donor is @ fault, they can’t recover; otherwise, yes they can
* Gift cause mortis – on the deathbed – need witnesses & can be revoked if donor gets better
* Gift inter vivos – donor living & well
* **ACQUISITION BY GIFT CASE LAW**
* Newman v. Bost
	+ Van Pelt – would-be donor; old & sick. VP calls Newman (the help) in. VP has previously promised to marry Newman. He walks around, telling her he wants her to have everything & gives her keys to a bureau w/a $3k insurance policy in it. After VP’s death, executor sells everything (~$35k)
	+ Ct doesn’t respect πs relationship with VP. Considers whether she “deserves” stuff. Ct says it doesn’t believe in symbolic delivery
	+ Insurance policy – no. problematic delivery – he didn’t specify the insurance; just said “everything’s yours”
	+ HH property – yes to the stuff in her room & things the key opened.
	+ Piano – may be able to get it, but she’ll have to prove constructive delivery
	+ Intent is a Q of fact for a jury. Delivery is a Q of law for the Ct
* Gruen v. Gruen
	+ Π sues stepmother ∆ seeking declaration that he is rightful owner of a painting. Father wrote letter to son saying the painting was a birthday gift but that father wanted to keep possession of it until he died. This letter was destroyed, but there are 2 other letters indicating father gifted the painting to the son.
	+ ∆ argues gift was testamentary and letters don’t satisfy any of the req’s for a will and son doesn’t meet criterion for inter vivos gift.
	+ Issue: Can donor gift a remainder interest in a chattel while retaining a life estate? Is such a gift valid if donee never took physical possession of the chattel during donor’s life?
	+ Ct: π wins. Dad gave a future interest in the paintings.
	+ Acceptance is assumed when the gift is valuable to the donee.

# Possessory Estates

* 2 kinds of limitations that grantors may place on estates
	+ Use conditional
	+ Temporal conditional
* Terms:
	+ Intestate – dying without a will
	+ Heir – person who gets your shit if you die intestate
	+ Devisee – person who gets your shit if there’s a will
	+ Issue – all descendents
	+ Ancestors – parents/grandparents
	+ Collaterals – blood relatives when there’s no issue or ancestors
	+ Escheat – die intestate with none of the above; property goes to the state
	+ Forfeiture – olden days, lose your land by refusing to do feudal duties. Today, can forfeit by doing or not doing something that violates a duty.
	+ Fee Simple (FS) – property right that endures forever
	+ Present Interest – has possession
	+ Future Interest – if at all, in the future (can be subject to condition)
	+ Life estate (LE) – interest that expires at death
	+ Life tenant – person to whom LE is conveyed
	+ Pur Autre Vie – transfer of LE
	+ O – Here, the original owner. Grantor.
	+ Seisin
		- Like clear title (freehold, as opposed to leasehold estates)
		- At common law, someone had to be seised – performing enfeafment duties & enjoying property
		- Gap problems – today, we have gap-filling statutes
* Defeasible Estate – estate that will terminate prior to its natural end point, upon the occurence of some specified future event. 3 types:
	+ Fee Simple Determinable:
		- Words to look for: “while used for...” “during the continuance of..” “until A no longer...” – words with durational aspect
		- LEs are FS Determinable
		- Ends automatically on specific condition(s)
		- Future Interest is a possibility of reverter
	+ Fee Simple Subject to Condition Subsequent (FSSCS):
		- “If premises aren’t used for X, grantor may re-enter”
		- Not automatic, but may be cut short **by grantor** when stated conditions happen
		- Look for language that doesn’t automatically end estate and requires action by O to retake
		- When in doubt, favor FSSCS > FS Determinable
		- The future interest is the right of entry/power of termination
	+ Fee Simple Subject to Executory Limitation:
		- “...to A, but if it ceases to use land as X, to B”
			* A has FS Subject to Executory Limitation
			* B has executory interest
		- Estate created w/defeasible FS, & in the same instrument creates future interest in a third party (not grantor)
		- Future interest is executory interest
* Ramifications of Abstractions
	+ Imagine ownership interests & estates as somehow real unto themselves. A future interest is legally recognized as a real thing (transferrable & everything!)
* Pgs. 194 & 196 have problems, for which the answers are as follows:
	+ P.194 #1 – Doesn’t say “& heirs”, so both have L.E.
	+ #2 – C has FS
	+ #3 – No; B doesn’t have present interest...No; A has FS
	+ P. 196 #1 – 1800 – B2 (son of son) Today, ½ to A; 1/6 to each of 3 kids
	+ #2 - depends on other potential heirs (ancestors, collateral)
	+ #3 – escheats to state
* In common law, had to include “& his heirs” to convey FS. Otherwise, only LE was granted. No longer true, but people generally still include it out of habit. Today, “...to A” grants FS.
* Standardization of Estates p.197
	+ Fee tail is gone now (bloodline descendants) – now it’s a fee simple – allowed for too much dead hand control & fragmentation.
	+ Numerous Clauses Principle – we only allow people to create estates that fit into specific (relatively few) boxes. Why?
		- Avoids complexity
		- Avoids fragmentation by limiting choice.
		- Heller: Fragmentation inhibits deals b/c if they fragment property, who’s going to want your sliver of estate?
		- Miller: If we allow fragmentation, it’ll be really hard to figure out who has what (increases transaction costs)
* If O gives LE to A and then A sells their interest to B, B’s interest ends when A dies.
* LEs are evaluated via life expectancy tables – p.210
* 3 types of restraints on alienation:
	+ Disabling – any attempt to transfer is null
	+ Forfeiture – if you attempt to transfer, you forfeit property
	+ Promisory – upheld by promise – contractual or quasi-contractual
	+ Also two types of classifications of restraint:
		- Absolute – blanket restraints
		- Partial – may only be restricted w/respect to time/certain people
	+ Listed in reverse order of likelihood to be upheld (partial promisory restraint has a shot, while absolute disabling restraint doesn’t have a chance of being upheld)
	+ We can tolerate restrictions on use (see Odd Fellows for analysis factors)
* Why are restraints on alienation bad?
	+ Messes up marketable title
	+ Hard to use for credit
	+ Discourages making improvements
	+ Concentrates wealth in the hands of few
* Trusts
	+ Trustee has legal interest in corpus of trust
	+ Beneficiaries have equitable interest
	+ Legal life estate – life estate not created in trust (problem in *Baker*)
* Waste
	+ Affirmative – injurious acts, greater than trivial effect – Is it something the FS owner would’ve done? If so, it’s probably creating value
	+ Permissive – negligence – failure to take reasonable care – much harder to recover
	+ Ameliorative – somebody may be liable for doing something, even if it increases value (Woodrick v. Wood)
		- Maybe it has sentimental/idiosyncratic value
		- Historical landmark
		- Maybe we’re just skeptical of the alleged increased value
		- Why not sue? W/this doctrine, I get paid twice (Ct. Settlement for ameliorative waste + increased prop. value)
	+ Open Mines Doctrine:
		- If mine was open @ conveyance, LT can extract; otherwise, no.
	+ Length of tenancy may matter – things that might otherwise be waste may not be if the tenant has a really long tenure.
* Heirarchy of Estates
	+ Fee Simple
	+ Fee Tail
	+ Life Estate
	+ Leasehold
* **POSSESSORY INTEREST CASES**
* White v. Brown (& reading FS or LE from grant that prohibits alienation)
	+ Lide wills land to White but says she can’t sell it; “...to have my home to live in and not to be sold.” Grant later reiterates “my home is not to be sold.”
	+ LE or FS?
		- Statute against inaliable FS estate
		- When considering LE vs FS, assume FS when in doubt
		- Presumption against alienation of FS
	+ Since you can’t restrain alienation, Ct. gives white FS.
	+ Dissent
		- Have to read “to live in” as LE
		- When in doubt, read will in some way that’s legal (since we can’t give her FS w/o alienation, give her LE)
		- Lide knew how to grant a FS and she didn’t do that. She obv. Intended LE
	+ Here, two paradigms for interpretation: majority favors FS when in doubt. Dissent seeks to honor grantor’s intent.
* Baker v. Weedon (& whether life tenant can sell the farm)
	+ Weedon has LE in farm land. It’s no longer used for farming but is appreciating in value due to nearby developments. She wants to sell the property and live on the interest since it can’t be farmed. Future interest holders don’t want to sell.
	+ Ct. says factors to consider in issuing judicial sale:
		- Prevent waste of property
		- Is sale in best interest of all property holders?
		- Kicks case back down to lower C for consideration
	+ Necessity Doctrine- Ct can compel sale if it benefits everyone (in some states, even if it’s not in the best interest of all parties)
	+ Take-home lesson – should’ve used a trust
* Woodrick v. Wood (& Ameliorative Waste)
	+ Guy dies, leaves wife LE and 50/50 remainder to kids. Wife and 1 kid want to tear down barn. Other kid sues to enjoin them from doing so, claiming waste
	+ Ct: They can tear down barn but they have to pay you $3200, the value of the barn
	+ Amerliorative Waste – Daughter basically got paid twice - $3200 for settlement + improved value of lot
* Mountain Lodge Odd Fellows v. Toscano
	+ Odd fellows are granted property
		- “Said property is restricted for the use and benefit of the seond party, only; and in the event the same fails to be used by the second party or in the event of sale or transfer by the second party of all or any part of said lot, the same revert to the first parties herein...”
		- grant restricts both usage & alienability
	+ Odd Fellows: language restricts alienability & is therefore void. We get FS. Toscano: alienability lang. can be struck. Restriction on use still ok (FSSCS), so we get it.
	+ Ct sides w/Toscano. While outright limitations on alienation are void, restrictions on use are OK.
	+ Dissent: this restriction on use looks like a restriction on alienability in every substantive way
	+ 2 views – majority takes very formalist approach to read restraint on use as separate from restraint on alienation, thereby granting FSSCS while dissent takes more substantive view that use and alienability restrictions are substantively the same and, thefore, wholly void.
	+ Factors to consider in analyzing restrictions on use:
		- What’s the remedy that’s contemplated? (if something looks more like a covenant, maybe be more lenient)
		- What’s the effect on the # of buyers? (ie: the effect of the use restriction on alienation)
		- What benefits to other real property in area?
		- What’s it do to improvements on property? (extent to which restriction on use discourages potentially valuable improvements on the property)
		- If we strike down restriction on use, will we discourage charitable gifts (maybe people won’t want to give if the charity can sell or use the gift for non-charitable purposes)

# Future Interests

* Interests retained by the transferor:
	+ Reversion
		- Interest left in estate when we carve out a lesser estate & don’t specify who gets it after lesser estate
		- Can be explicit or implicit
		- O’s interest in “...to A for life [, and then back to O & his heirs].” (implicit v. [explicit])
		- Transferable during life and descendible and divisable at death
	+ Possibility of Reverter
		- O’s interest in “O conveys to A so long as...”
		- A has FS Determ. O has possibility of reverter
		- O “carves out” FS determinable of same quantum
		- This is the future interest that follows a FS Determinable
		- Transferable inter vivos in most states, but some states hold common law rule that they’re not transferable except to the owner of the possessory estate (release)
	+ Right of Entry (also known as power of termination)
		- “...to A, but if they cease to do X, O may re-enter”
		- Here, A has FSSCS and O has a right of entry (FS)
		- This is the future interest that follows a FSSCS
		- Transferable inter vivos in most states, but some states hold common law rule that they’re not transferable except to the owner of the possessory estate (release)
* Interests created in a transferee:
	+ Vested Remainder
		- B in “...to A for life, & then to B & his heirs.”
		- Future Interest capable of becoming possessory – you get possession automatically by waiting out preceding estate.
		- Vested = no more conditions
			* 3 types:
				+ Indefeasible Vested Remainder – both certain of becoming possessory and cannot be divested

Ie: given to an ascertained person and not subject to a condition precedent, other than the natural termination of the preceding estate(s)

* + - * + Vested Subject to Open – one member ascertained but other class members may be created and there’s no condition precedent (“to A’s children” when A has 1 kid)
				+ Vested subject to Divestment – condition placed after grant – this one doesn’t matter

“O conveys to X for life, then to Y, but if Y divorces, then to Z”

* + Contingent Remainder
		- Unascertained or if there’s a condition precedant
		- “...to A & then to A’s oldest son & his heirs.”
		- Here, if A dies w/o a son, reverts to O
		- While not vested, you still get possession by waiting patiently. You can’t do anything to cut short the previous estate.
	+ Executory Interest
		- Follows a FS subject to Executory Interest
		- Shifting/springing – difference not important
			* Shifting – take it from another transferee
			* Springing – take it from the transferor
		- What to look for
			* In a transferee
			* Divests (or cuts short) another interest
			* Ex. 16 p. 269
				+ O conveys “to School Board, but if the premises are not used for school purposes during the next 20 years, to Library.”
				+ School Board – FS subject to executory interest that will automatically divest the Board’s FS if the condition happens
		- Another Ex: “...to A for life, then to B & his heirs, but if B doesn’t survive A, then to C & his heirs”
			* B = Vested remainder subject to divestment
			* C = shifting executory interest which can become possessory only be divesting B’s remainder
		- Executory interests are generally treated as contingent interests; don’t vest until they become possessory.
		- Ex: “...to A so long as used as X, then to B”
			* A = Determinable Fee
			* B = Executory Interest; not divesting interest; doesn’t divest determinable fee (expires automatically)
* Difference b/t Vested & Contingent Remainders p.263
	+ Vested accelerates into possession whenever preceding estate ends – contingent remainder can’t become possessory so long as it remains contingent
	+ @ common law, contingent remainder not assignable (& therefore unreachable by creditors). Generally today, they’re transferable. Vested remainders have always been transferable in life & at death
	+ @ common law, contingent remainders were destroyed if they did not vest upon termination of the preceding life estate whereas vested remainders aren’t destructible in this manner
	+ Contingent remainders are subject to the Rule Against Perpetuities. Vested Remainders are not.
	+ Sometimes contingent remainderman can’t sue for waste where vested can.
	+ These differences are why it’s really important to be able to ID contingent remainder vs. Vested remainder subject to divestment.
* Rule Against Perpetuities
	+ Designed to limit dead hand control
	+ Rule of Proof – applies to conveyance when made
	+ Create, Kill, Count.
		- Create someone in whom estate could vest
		- Kill everyone else
		- Count 21 years – can that person take estate?
	+ Perp. Reform
		- Extend time period (90 year flat term)
		- “wait & see” – can’t challenge on potential perp. Problem – have to wait until it actually illegit. Vests (cepray)

# Co-Ownership & Concurrent Interests

* Tenancy in Common (TiC)
	+ Can be conveyed via deed or will
	+ Each tenant owns and can use entire property so long as they don’t interfere with other tenants
	+ Separate but undivided interests in the property
	+ No survivorship rights of cotenants
* Joint Tenancy (JT)
	+ 4 unities:
		- Time, title, interest & possession
		- Must create equal, undivided shares starting @ the same time, by same instrument
		- Modernly, 4 unities have been relaxed
	+ Right of survivorship
		- Surviving JT’s automatically take on dead JT’s equity equally
		- If A, B, & C are JTs of X & A dies, B & C now automatically own X
		- If you’re in a JT, stay healthy. Whoever lives longest wins
		- If JTs hold unequal shares in property, when 1 dies, shares are equitably distributed to the others. eg: if A has 20 shares, B has 30 shares, and C has 50 shares and C dies first, then A gets 20 of C’s shares and C gets the other 30.
	+ Never assume JT – must intend to create (favor TiC if ambiguous)
	+ Can destroy JT (thereby destroying survivorship & reverting JT to TiC) by breaking any unity (eg: selling your interest)
		- Conveying non-fee simple interest (lease, mortgage, etc.) doesn’t sever JT
	+ Can also bring action for partition
		- In kind (Ct physically divides up land, giving different lots to each joint tenant)
		- By Sale (Ct sells property and JTs split $)
	+ Benefits
		- Can avoid probate (time-consuming & expensive)
		- Can avoid creditors
		- 1 JT (A) can take out mortgage against their interest & other JTs may not be burdened with mortgage interest when A dies (*Harms v. Sprague*)
* Tenancy by the Entirety
	+ JT + marriage
	+ Still survivorship
	+ 1 spouse can’t unilaterally convert property from this to TiC
	+ Harder to kill than JT
* Severing a JT
	+ We usually don’t require recording/notice to sever JT
	+ Deed to yourself as TiC (Riddle v. Harmon) – not best way
	+ Straw man – deed to a friend and have them deed it back
	+ Trust – deed it to your kid in trust, naming yourself beneficiary
* Ouster
	+ “Only when the cotenant in possession refuses to allow another cotenant to share the possession after the latter has made a demand for possession.”
	+ Wrongful dispossession of co-tenant
	+ Assertion of absolute dominion
	+ Can start AP SoL timer
	+ After ouster, cotenant may have to pay rent. General rule: a cotenant in exclusive possession does not owe rent to her cotenants, absent ouster
* **CONCURRENT INTEREST CASES**
* Riddle v. Harmon (& uniliaterally killing JT by deeding to yourself)
	+ Riddle is in joint tenancy w/husband & wants to get out. Tried to deed herself to switch estate to TiC.
	+ Ct: Yes. You can unilateraly sever a JT by deeding to yourself as TiC w/o knowledge or consent of other JTs.
	+ Riddle’s lawyer was kinda shitty. What could she have done to more clearly sever JT and avoid trouble?
		- Deed interest to a third party (straw man) and then back to herself
		- Deed interest to her kid in trust (naming self as beneficiary of trust)
* Harms v. Sprague p. 330 (& what happens when a JT takes a mortgage)
	+ Brothers hold property in joint tenancy. One of them takes mortgage against his interest, and then dies.
	+ Ct sides w/lien theory
	+ Is a joint tenancy severed when < all joint tenants mortgage their interest in the property?
		- No. p. 332 – “the execution of a mortgage by a joint tenant, on his interest in the property, would not destroy the unity of title and sever the joint tenancy.”
	+ Does the mortgage survive the death of the mortgagor as a lien?
		- No. “The property right of the mortgaging joint tenant is extinguished at the moment of his death.”
		- The surviving joint tenant gets full FS in property and mortgage dies with previous joint tenant.
		- The crucial difference b/t this case and *Riddle* is that the mortgage didn’t technically transfer title and, therefore, didn’t sever JT
* Delfino v. Valencis (& partition in kind vs. partition by sale)
	+ Π & ∆ own property as TiC. Π (99/144 interest) wants partition by sale. ∆ (45/144 interest) wants partition in kind.
	+ Ct: We should favor in kind > sale – Ct. seems to care that ∆ lives & works on land
	+ Now we tend to favor partition by sale,
* Swartzbaugh v. Sampson (& Ouster)
	+ Husband (H) & Wife (W) are JTs for a property. H signs lease w/∆ so ∆ can open a boxing ring on land. W wants to terminate lease and evict ∆.
	+ Ct: H can lease whatever he wants. It’s his property, too. ∆ has all of the rights of H. W must regard ∆ as cotenant.
	+ W is worried that ∆ could AP. Ct says not to worry b/c ∆’s presence is permitted via lease.
	+ What could W do?
		- Deny ∆ access to the land, but ∆ could claim ouster and demand rent from W
		- Use legal rights to annoy ∆ (picketing)
		- Possibly Waste argument, but it would be tough
	+ May’ve been different if decided by *Harms* ct. Why does lease survive JT’s death but mortgage doesn’t?

# Servitudes (& Easements)

* 5 types of servitudes (all fall into these functional types)
	+ A is given the right to enter B’s land
	+ A is given the right to enter upon B’s land & remove something attached to the land
	+ A is given the right to enforce restrictions on the use of B’s land
	+ A is given the right to require B to perform some act on B’s land
	+ A is given the right to require B to pay money for the upkeep of specified facilities
	+ (of the above, 4 & 5 more likely to be real covenants & eq. servitudes than easements)
* Courts aim to:
	+ Achieve Fairness b/t parties
	+ Respect intent expressed in easement
	+ Acknowledge the interdependence of some landowners, and
	+ Keep property marketable (w/o unnecessary encumbrances)
* Servitudes are broken into 5 categories
	+ Easements – agreement that allows non-owner to use property
		- Positive/Negative
			* Positive – I give you a right to do something on or with my property (eg:drive your truck across to get to your house)
			* Negative – I have a right to prohibit you from doing certain things with your property. Common law only had 4:
				+ Blocking windows
				+ Blocking air through defined channel
				+ Removing support of a building
				+ Interfering w/water in artificial stream
			* Now, we can get negative easements if someone blocks your view or solar panels.
			* No negative easements via prescription
			* Today, we have conservation easements:
				+ Statutory
				+ Prohibits bldg except by permission
				+ Big tax incentives
				+ Dead hand concerns
				+ Generally considered easements in gross
		- Appurtenant/in gross p.767
			* Appurtenant – gives right to whomever owns a parcel of land that easement benefits (benefits easement owner in the use of land which that person owns)
				+ Require Dominant Estate and Servient Estate
				+ Easement attaches to and benefits dominant estate.
				+ Usually transferable. Easement transfers along with dominant estate to successive owners
				+ Can be made personal to easement owner and not transferable
			* In gross – gives right to some person w/o regard to ownership of land (benefits easement owner personally)
				+ No dominant estate, only servient estate
				+ Generally transferrable. Old rule said they couldn’t be – may still be the case for very personal/recreational/family easements (“...but Timmy can still go out and hunt the ol’ family lot...”
				+ Even old rule sometimes allowed them to be inhereted.
			* If unclear, Cts favor easements appurtenant
		- Easements come about in 4 ways:
			* Express Grant
			* Easement by Estoppel – either *Holbrook* or, say, someone tells you that you can build a road through their land
			* Easement by prescription – AP Elements
				+ Exclusivity is a little different for easements then for AP – “Exclusivity doesn’t require showing that only the claimant made use of the way, but that the claimant’s right to use the land does not depend upon a like right in others” (ie: can still get presc. easement if servient owner uses easement, too as long as you don’t depend on servient owner)
			* Easement created by judicial implication (2 kinds) p.785
				+ Implied by prior existing use

1 original owner of serving & dominant estates

When a portion of the lot was whole, before partition, had an apparent and continuous use that was also there at the time of severance.

This easement is implied to protet the probably expectations of the grantor and grantee that the existing use will continue after the transfer.

prior existing use (prior & continuous)

necessity of easement at time of severance (reasonable necessity)

* + - * + Easement by Necessity

1 original owner

The necessary use arose as a result of the severance of the original lot

strictly necessary

arises “when the court finds the claimed easement is necessary to the enjoyment of the claimant’s land and that the necessity arose when the claimed dominant parcel was severed from the claimed servient parcel.

* + - Quasi-easement (p.785) – easement is implied on the basis of an apparent and continuous (or permanent) use of a portion of the tract existing when the tract is divided.
	+ Covenants (below)
		- Real covenants
		- Equitable servitudes
	+ License
		- Oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be trespass (eg: plumber coming to fix a drain, guests coming to dinner)
		- License is to occupy, easement is to use
		- Unlike easements, revocable, except:
			* If licensed is incidental to ownership of a chattel on the licensor’s land (Profit, below)
				+ “O grants to A the right to take timber from land.” – A has an interest and irrevocable license
				+ Somewhat resembles doctrine of easement by necessity
			* If license becomes irrevocable under the rules of estoppel. (Holbrook v. Taylor)
			* Irrevocable license is treated as an easement (in restatement third)
	+ Profit
		- License that is incidental to collection of chattels from owner’s land (“you can come fish my pond” or “You can come harvest my trees”)
* Reservation/Exception
	+ Reservation – provision in deed creating some new servitude which did not exist before as an independant interest.
		- Eg: “O conveys to A, reserving a 20-foot wide easement of way along the south border”
	+ Exception – provision in a deed that excludes from the grant some preexisting servitude on the land.
		- Eg: “A conveys to B, except for the easement previously reserved by O”
* Ways easements can end:
	+ Merger – easement owner buys serviant property
	+ Release – easement owner gives up easement
	+ Abandonment – non-use & non-equivocal indication of intent to abandon
	+ Estoppel – Serviant owner relies on rep. by ease. Owner
	+ Condemnation – state, via em. Domain, takes it
	+ Prescription – AP
	+ Changed conditions – Ct can modify or kill easement if it no longer makes sense
* **EASEMENT CASES**
* Willard v. First Church of Christ (& granting easement to a third party)
	+ Old lady has 2 lots. She sells 1 lot to P. When π shows up wanting to buy both lots, P buys the other from old lady, who deeds it and specifies in grant that Church has easement to continue to use lot to park. P deeds both lots to π w/o the easement text. Π brings quiet title against church
	+ Old rule – since church wasn’t a party to the sale of the lot, they can’t reserve an easement in the transaction (“stranger to the title”)
	+ Ct abandons old rule, says easement is good – Old lady discounted price to P b/c of easement and π had notice of the easement b/c Church was parking cars there.
	+ Court could be avoided by selling to the church who then conveys to Willard, reserving an easement.
	+ Take-away – grantor can reserve interest for 3rd party who is neither grantor nor grantee (though some states cling to old rule)
	+ Why don’t we view grant as a defeasible estate?
		- Church was only using it for parking 1 day/week
		- May seem like an odd-fellows restraint on alienation (and defeas. Estate may, therefore, have been struck down)
* Nelson v. Bacon
	+ Terms reservation and exception are often used as synonymous, but the intent of the parties should be the distinction
* Holbrook v. Taylor (& easement by estoppel)
	+ Fight over a road – without the road, there is no access to Taylor house
	+ Ct establishes that there was a license and b/c the Taylor’s have relied on the license to their detriment, the license was made irrevocable via estoppel.
	+ Rule: We may have an easement/irrevocable license created by estoppel if the licensee improves or spends money to their detriment and the licensor has a reasonable expectation that this will happen.
* Van Sandt v. Royster (& Easement by implication)
	+ Π’s basement flooded. Sued to enjoin ∆ from using sewer
	+ Is there an apparent easement even when sewer pipe isn’t visible?
	+ Ct: Apparent easement existed – easement need not be visible to be apparent. Π knew ∆ had appliances and was using sewer. Π bought the house and knew it had plumbing, so was aware of sewer.
	+ Ct: Easement by implication was created – was necessary for enjoyment of original grantor’s property (Bailey who owned the lots when they were all 1 property and installed the plumbing for the benefit of all 3)
* Othen v. Rosier (& implied easements by necessity)
	+ Π was crossing ∆’s land via a road. ∆ built a levee which muddied road and made it unusable.
	+ To get implied easement:
		- Look back to the time of common ownership
		- Was easement a necessity then? (mere convenience is insufficient)
		- Was it necessary at the time of severance?
	+ Ct: no, π doesn’t get easement to ∆’s road. And they can’t get easement via prescription, either, b/c they had permission to use road.
	+ Extremely difficult for easement-seekers to prove necessity existed at time of severance
* Raleigh Avenue Beach Assn. v. Atlantis Beach Club (& beach access)
	+ Guy served for walking across beach club’s beach
	+ Public Trust doctrine requires club to allow public access to beach for a reasonable fee
* Preseault v. US (& Abandonment of an Easement)
	+ Π owns land w/old RR going through it. Gov. wants to convert RR to public trail. Π says easement doesn’t allow trail, only RR and the trail constitutes taking under 5th amendment.
	+ Did RR have FS to xfer to gov. or easement for use?
		- RR has FS deed, but we ignore that since they’re a RR and they did survey & location.
	+ Breadth of easement? Only RR or acceptable for trail?
		- RR easement != walking trail easement – new use wasn’t foreseeable by π.
	+ If they had an easement, is it already extinguished, or still good?
		- Easement ended in 1975 when RR removed track (abandonment)
	+ Thus, trail is a taking and we give π bucks.
	+ Note: term “right of way” can give you an easement instead of FS.
* **COVENANTS AND SERVITUDES**
* Real Covenants
	+ Started as a promise, but are now an actual interest in the land
	+ Can’t arise by implication (like w/eq. servitudes & easements)
	+ Parties must intend to create a covenant running w/the land
	+ Must comply w/statute of Frauds (SoF)
	+ Need Consent, Intent, & privity
* Equitable Servitude
	+ Traditional Requirements:
		- Intent of original parties for promise that runs w/land
		- Successors have actual or constructive notice of covenant
		- Touch or Concern
	+ Function like negative easements (privity got us around negative easements and now notice gets us around privity)
	+ No privity, so subsequent owners must have notice (notice has come to replace the need for privity)
	+ If you have a real covenant and there’s a break in privity, as long as subsequent purchasers have notice, you have equitable servitude
* Comparing Eq. Servitudes and Real Covenants
	+ Eq. Servitudes focus on notices, RCs focus on privity
	+ RCs meet SoF, ESs can be implied (Sanborn)
	+ RCs allow for damages at law, ESs for equitable relief (antiquated distinction since Tulk & “Fusion of Law & Equity”
	+ Both used to require T&C, but that’s being replaced by Restatement’s reasonability standard
	+ Both require intent at the time of formation
* Restatement (Third) of property re: real covenants & eq. servitudes p.853:
	+ Discards req. for vertical privity
	+ For both, it distinguishes b/t negative (restrictive) promises & affirmative ones
		- Treats all neg. promises as easements – all owners and possessors of burdened land are bound by negative covenants, no matter what
		- Aff. promises are different. Separate rules for lessees, life tenants, and APers. Distinguishes b/t burden and benefit.
* How do servitudes die (much like easements, above)
	+ Merger – benefit & burden owned by same person
	+ Release – written & recorded
	+ Acquiescence – failure to enforce servitude against breaches
	+ Abandonment – similar to acquiescence, but makes servitude unenforceable vs. entire parcel rather than only as to the π immediately involved
	+ Unclean Hands – Ct refuses to enjoin a violation of a servitude that the plaintiff previously violated
	+ Laches – unreasonable delay by π to enforce servitude (doesn’t extinguish servitude but only bars enforcement)
	+ Estoppel – if ∆ has relied on π’s conduct, making it inequitable to enforce servitude.
	+ Changed Conditions
* Unification of Servitudes (“the most important note in the book”) note 6 p.858
	+ Courts of law and equity have merged – Cts can give damages when π seeks injunction
	+ No longer matters Real covenant vs. equitable servitude
		- Restatement – merges the two terms into “covenants running with the land”
	+ Cts may enforce covenant by “any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens.”
	+ Restatements apply same rules to easements and covenants (lumped together as servitudes), unless there is a sound reason for differentiation
* Privity – (becoming antiquated & replaced by notice)
	+ Horizontal – b/t O1 & O2 (when they make agreement)
	+ Vertical – b/t subsequent purchasers
		- Original restatement says vertical privity req’d for the burden to be enforceable, & grantor-grantee relationship must be one in which the grantee succeeds to the same estate as the grantor
		- Req’d for benefit to be enforced, though the grantee may succeed to a lesser estate than grantor
		- This has been abandoned for distinctions based on the substance of the servitude & whether it contains affirmative or negative promise
	+ Old rule – need horizontal privity for burden to run w/land – not any more – this rule was espoused in the original Restatement of Property & has been criticized there since.
	+ Can sometimes have privity issues if < entire estate is transferred
* Touch & Concern (Shelley)
	+ Old rule – servitude must concern the land and use thereof
	+ Restatement wants to do away w/T&C and replace with reasonableness rule
		- Is the covenant unconscienable?
		- Is it w/o rational justification, or
		- Does it violate public policy?
	+ HOA rules have eroded old T&C rules (Neoponsit) = case where covenants for annual charges to common interest communities began to be upheld)
* Common interest communities
	+ Condos – everyone has their own mortgage but structures are communally owned
	+ Cooperatives – 1 mortgage for all units (also, very exclusive)
	+ HOAs – own mortgages and structures are privately owned; sometimes community (public) resources or code enforcement
	+ Restatement says their distinctive feature is the obligation that binds the individual owners to contribute to the support of common property whether or not the individual owner uses the common property.
* Some notes on Fair Housing Act:
	+ Protects from discrimination based on race, color, religion, sex, family status.
	+ Can’t discriminate in ads.
	+ There’s still some questions:
		- Illegal immigrants?
		- Sexual orientation?
		- Disabilities – (imagine a case where Landlord prohibits the installation of ramps or shower handlebars)
	+ Exceptions to FHA:
		- Mrs. Murphy still can’t use racist ads, but if she’s letting a room in a 4-unit-or-fewer structure where she lives, she can discriminate against FHA protected classes.
	+ 2 goals – anti-discrimination & integration
		- Sometimes these can be at odds (discriminating against whites to promote diversity)
	+ 1866 Civil Rights act in some ways goes further and in some ways less far than modern FHA:
		- Only applies to race
		- Doesn’t prohibit advertising
		- However, not limited to dwellings
			* Dwelling = residence to which one plans to return
			* Thereby, FHA may not cover homeless shelters, domestic abuse houses, or group homes
		- Doesn’t contain the exemptions that FHA does
		- Would let Mrs. Murphy advertise but not actually discriminate
* **REAL COVENANT AND EQUITABLE SERVITUDE CASES**
* Tulk v. Moxhay (& notice replacing privity)
	+ Π sells part of square to ∆ for rec. use. After buying it, ∆ changes mind and doesn’t want to use it for rec.
	+ Ct: ∆ had notice. Ct. must enforce servitude since everyone had notice
	+ This case symbolizes the circumvention of old prohibitions or rules that arose in other branches of servitudes law, as well as the importance of notice in eq. servitudes.
* Sanborn v. McLean (& equitable servitude by implication)
	+ 1892 – conveyed lots 37-41 & 58-62 w/restrictions
	+ 1893 – conveyed 17-21, 78-82, & 98 w/restrictions
	+ This attached reciprocal negative easement to the remaining (retained) lots.
		- RNE – held by an owner of a lot in a development to enforce restrictions that were part of the general development scheme
		- Must come from common owner
	+ ∆ wants to build a gas station on lot 86, which was conveyed w/o restriction. Πs want to enjoin him from doing so. Ct. grants injunction – he should’ve had notice b/c so many other lots had restrictions (& notice of the direction Cts were trending)
	+ Notice how eq. servitude can arise from implication
	+ Arguments against Ct’s holding
		- Fairness (he did technically buy an unencumbered lot)
		- Economic Efficiency
		- Ct is inferring plan – maybe original grantor wanted to build gas stations on those lots – he certainly knew how to grant land with restrictions and opted not to do so here
		- Ct. favors neighbors b/c ‘hood is fancy
* Shelley v. Kraemer (& the enforcement of covenants as police action)
	+ Racist restrictive covenant from 1911 for 50 years. Black π bought a house & ∆ wants to negate sale. Lower Ct upholds covenant and negates sale.
	+ USSC: Private agreements don’t violate 14th amendment, but the state violated it in taking Shelley’s property – reversed.
	+ Major common-law issues w/this covenant
		- Restraint on alienation (can’t sell houses to black ppl)
		- Some issues w/horizontal privity when established
		- Doesn’t “Touch & Concern” the land
	+ We’re not sure if the take-away is re: what constitutes state action:
		- Enforcing all covenants?
		- Racist covenants are especially heinous, so enforcing those doesn’t count as state action?
		- Enforcing any covenant that violates constitutional rights amounts to state action?
* Western Land Co. v. Truskolaski (& Changed conditions)
	+ WLC wants to commercially develop land restricted to residential. Claims changed conditions, so covenant no longer relevant
	+ Ct: haven’t changed that much & covenant still benefits residents. No shopping ctr. WLC must show subdivision is no longer fit for residential purposes.
	+ WLC must show changed conditions for all the lots; not just the border lots
* Rick v. West
	+ W owns house in the middle of Rick’s land. Rick sucks at selling houses, so he changes his mind and decides he wants to develop it commercially (first industrial, then a hospital). West holds out and prohibits him from any non-residential development in violation of the covenant
	+ Ct. sides w/West
* Pocano Springs Civic Assn v. MacKenzie (& Common Interest Communities)
	+ ∆s bought a lot that can’t be developed. Π won’t take it, they can’t sell it, city can’t sell it @ tax auction. π is suing for back HOA dues. ∆ claims they abandoned the property.
	+ Ct: can’t abandon when you have perfect title.
	+ Maybe MacKenzies could have:
		- Given lot to charity
		- Incorporate & transfer it to corp.
		- Give it to somebody who’s about to die intestate
		- Homeless person (judgement proof)
* 67th v. Pullman (& business deference to coop boards)
	+ ∆ is crazy tenant in coop who lies and causes problems. Coop board votes to kick him out. Ct must decide what deference to give Coop board’s decision:
		- Business Judgement Standard (most popular) – the coop is a business, so we should let them run their business as they see fit. We give deference to coop boards’ decisions if:
			* They are made in good faith
			* They are within the scope of the decider’s authority, and
			* They are plausibly within the decider’s business judgement
		- Look @ reasonableness of action – here, the court looks and determines if the board’s actions were reasonable; OR
		- Balance reasonableness w/value of corp. autonomy
	+ Ct. upholds business judgement standard and defers to coop board’s decision to kick the guy out.
* Mulligan v. Panther Valley (& “in violation of public policy")
	+ ∆ enacts no-sex-offender rule. Π sues saying it’s contrary to public policy.
	+ Ct says there’s not really sufficient evidence to decide, but does so anway:
		- Since change was by vote of members and not incorporated coop board, we use reasonableness instead of business judgement standard
		- Rule for ∆ - π hasn’t presented sufficient evidence

# Landlord-Tenant & Leasehold Estates

* 4 types:
	+ Term of Years
	+ Periodic Tenancy – doesn’t terminate until notice is given
	+ Tenancy @ Will (T@W) – no fixed pd, either party can terminate at will
		- Ends when 1 party dies
	+ Tenancy @ sufferance – results from hold-overs.
		- Common law gives you 2 options:
			* Eviction w/damages
			* Consent (express or implied) to the creation of a new tenancy.
		- New lease is likely periodic– maybe for length of original lease or maybe based on how rent was paid for original lease (either way, limited to term of original lease)
		- New lease is usually subject to same terms as original
		- In drafting a lease, specify what happens @ end of lease.
* Sublease vs. Assignment – when T transfers his property interest to sub-T
	+ Assignment = transfer entire leasee interest (ie: entire remainder of term)
	+ Sub-lease = transfer < entire interest (ie: lease for 1 year in the middle of a 5-year term). Original T has reversion
	+ If L wants to end his original lease with T, he can & sub-T is SOL
	+ If T wants out/leaves, sub-T still has lease under L & T’s original terms.
* Summary Proceedings – fast-track adjudication for L & Ts
	+ May be bad for Ts
		- Record follows T around
		- Lack of access to counsel
		- Ls pass increased costs on to all other Ts
		- Unscrupulous Ls may threaten Ts who don’t know their rights
	+ Ls complain that they take too long
	+ Ppl seem to believe Cts favor Ls
		- > likely to have counsel
		- Repeat players
* L’s duty to mitigate damages (Sommer)
	+ Old rule – L doesn’t have to mitigate
	+ K law – lease doesn’t specify L must mitigate, but we have notions of good faith & fair dealing
	+ Mitigation can vary b/t types of Ls
	+ Burden is on L to show he has been mitigating
	+ If T abandons by vacating w/o justification, intent to return, and with accompanying default on rent, the tenant may still remain liable for total rental value of leasehold
* Quiet Enjoyment = undisturbed use of premises as intended
	+ Why do we care about QE if we have IWH?
		- IWH = only residential; not always commercial. QE covers both. Many places have Implied Warranty of Suitability (commercial IWH), but not all places and it can be waived, which IWH and QE cannot.
		- Small-time single family Ls may not be bound by IWH
* Constructive Eviction – L does (or doesn’t do) things & quiet enjoyment becomes impossible, thereby effectively evicting T
	+ Common law - Lease is separate from other covenants w/L , so L can violate other covenants & you’re stuck in lease
	+ Unless L or his agent makes property unusable (having effectively evicted you)
	+ Dependence of covenants:
		- Now we bring some K law in the mix
		- If L violates covenants other than lease, T can vacate
* Implied Warranty of Habitability (IWH)
	+ Common law IWH geared toward:
		- Land, not dwelling
		- T who can fix shit
		- Equal bargaining power b/t L & T
	+ IWH can’t be K’ed around, and covers both latent & patent defects
	+ T must give L notice & time to fix things
	+ In assessing potential IWH breach:
		- Look to building codes
		- Safety/health of T
	+ T may:
		- Sue for diff b/t rent charged & what rent should be
		- Sue for annoyance & discomfort
		- Withhold rent
		- Deduct costs of repairs by T from rent
		- Punitive damages
* **LANDLORD-TENANT CASE LAW**
* Garner v. Gerrish (& interpreting T@W as Life Tenant)
	+ Shows a little bit of flexibility w/numerous clauses principle
	+ L leased to buddy and gave T sole right to terminate lease. L dies and executor of will tries to evict T.
	+ Ct: When lease is T@W and grants sole right of termination to T, it’s a life tenancy.
	+ A lot of jurisdictions use Garner rule. Some go further to say when L has termination right in lease but not T, then T has it as well, but not vice versa (if lease gives T right but not L, they won’t read in L’s right)
* Kendall v. Ernest Pestana, Inc. (& L’s power to refuse sub-T)
	+ Lease requires L’s permission to sub-lease/assign. T wants out and finds sub-T, but L refuses.
	+ Issue: Can L unreasonably withhold permission to sub-let?
	+ We can view a lease as a conveyance or as a contract
		- Conveyance – unreasonable refusal = restraint on alienation
		- Contract – in a K, if 1 party can limit the other, they must do so in good faith & in accordance with fair dealing
	+ Ct: L’s have power to refuse permission for commercially-viable reasons. L’s can’t refuse unreasonably.
		- This is the new rule
		- May be able to explicitly state a freely negotiated provision in lease that L has absolute right to withhold
	+ Arg’s for old majority rule:
		- L has a right to choose T – it’s his property so he has a right to lease to whomever he wants
		- Unambiguous clause – very clear L has sole discretion here
		- Stare Decisis – ppl have relied on old rule in drafting lease
		- L has a right to increased value. Not T
	+ We should advise L to, in the future, specify when/how he’ll consent to transfer.
	+ Also, L can include “recapture of profits” clause in lease giving L a portion of increased value from future sub-T’s. Even if L isn’t interested in this extra $, it becomes a bargaining chip to dissuade T from sub-letting to undesirable sub-Ts.
* Berg v. Wiley (& self help)
	+ T violated lease. L shows up with cop when T isn’t there and changes locks. T sues for wrongful eviction
	+ Old common-law rule – L may use self-help w/o incurring civil liability for wrongful eviction provided L is legally entitled to possession and provided means of reentry are peacable.
	+ Ct: Self Help is never peacable. Ls must always use formal eviction process unless T has abandoned or voluntarily surrendered.
	+ L also tries to argue that T abandoned property. Not true. She went home for the night and intended to return
* Sommer v. Kridel (& Surrender & the duty to mitigate)
	+ Surrender = ask for permission to leave (what constitutes acceptance? We look @ intent)
	+ Abandonment = just leave
	+ T gave notice of surrender early on but L refused to lease apartment to another tenant and sued T for full 2 years’ of rent
	+ Ct: L accepted T’s surrender by not replying to letter. L not liable for full 2 years
* Reste Realty Corp v. Cooper (& constructive eviction)
	+ Lease specifies “as is” condition, but T signed based on promise to repair frequent basement flooding. Property changes hands and new L is unresponsive to flood-related requests. T notifies of intent to leave & leaves. L sues for rent
	+ Ct: flooding constitutes constructive eviction. T doesn’t have to pay rent after being evicted.
* Hilder v. St. Peter (& the Implied Warranty of Habitability)
	+ Hilder lives in a real shithole – gross & unsafe. Constantly fixing things herself. L doesn’t do shit.
	+ Ct: L must provide premises that are:
		- Safe
		- Clean
		- Fit for human habitation
	+ IWH cannot be waived
	+ Ct. awards T back all of the rent that she has paid.
* Chicago Board of Realtors v. City of Chicago
	+ Realtors sue city over new T-friendly anti-L legislation
		- Additional costs on L put squeeze on housing market
		- New rules hurt L and poorest Ts to benefit banks & middle-class Ts
		- Args here are the same as any L-T shift in power – IWH, rent control, etc.

# Nuisance

* Sic Utere – one should use one’s own property in such a way as to not injure the property of another
* Nuisance – Substantial & either:
	+ Intentional & unreasonable OR
		- Intentional (p. 733, 2nd paragraph)
			* Acts for purpose of causing it
			* Knows it’s resulting from conduct
			* Knows it’s substantially certain to result
		- Unreasonable
			* Threshold analysis (Jost v. Dairyland Power) – there’s some level of interference that is unreasonable. Just look @ behavior
			* Balance equities (Restatement) – Balance harms to πs vs. benefit nuisance provides ∆ & society
			* Many Cts say they’re doing #1 but are actually doing #2 w/balancing going on behind the curtain
			* Morgan is in b/t #1 & #2
	+ Unintentional &:
		- Negligent
		- Reckless, or
		- Ultrahazardous
* In Nuisance, Ct’s balance 2 times:
	+ First, balance public & ∆’s benefit from nuisance vs. harm to π to ID whether there is a nuisance
	+ Then, balance only ∆’s benefit vs. π’s harms to determine damages
		- Slide says that in Estancias, we balancd ∆ + public vs. π to determine if injunction is appropriate
	+ Some people claim Cts are doing the same thing twice
* Public v. Private Nuisance p.756
	+ Public nuisance: “an unreasonable interference w/a right common to the general public” – “unreasonableness” factors:
		- Whether the conduct in question significantly interferes w/public health, safety, peace, comfort, or convenience
		- Whether the conduct is proscribed by statute or ordinance (Spur)
		- Whether the conduct is of continuing nature or has produced a permanent or long-lasting effect
	+ For public nuisance, anyone in affected general public can bring suit, but usually only if the person bringing suit can show “special injury” – beyond what is suffered by other members of the public.
	+ Private nuisance – protects rights in the use and enjoyment of land
		- Use factors above
		- Nuisance is private, no matter how many land owners are affected. Only becomes public when it affects a general public right
		- Since private nuisance only interferes with finite number of land possessors’ use of land, only affected owners can bring suit
	+ Feedlot in *Spur* was both public and private nuisance
* **NUISANCE CASE LAW**
* Morgan v. High Penn Oil Co. (classic straight-forward nuisance)
	+ Basically, ∆’s business emits odors that are a nuisance to π’s nearby house, restaurant & mobile homes.
	+ Ct: π gets damages and injunction
* Esancias Dallas Corp. v. Schultz (& balancing)
	+ ∆ saved money by buying cheap AC units. They’re super loud, so π sues. Lower Ct gives π damages and injuction. ∆ appeals, saying lower Ct didn’t balance equities (“we’re an apt. complex! Ppl need a place to live!”)
	+ Have to balance public good from nuisance vs. harm to π. No shortage of apts. in Houston. You’re not providing that much good. Noise is a huge nuisance to πs and decreasing their prop. values. This balancing act tells us there’s a nuisance.
	+ Then we balance again to calculate damages. Ct decides injunction is appropriate (injunction will benefit πs and not harm society at large)
* Boomer v. Atlantic Cement Co. (& when nuisanceor is too important to enjoin)
	+ ∆ makes noise & pollution, π sues.
	+ Ct. says outright that ∆’s business is too great a public benefit to shut them down. While they typical default is to enjoin, we’re not going to do that.
	+ Workarounds:
		- Grant injunctive relief effective at a future date to allow ∆ to figure out a fix to the problem before becoming enjoined
			* Not practical. Cement is noisy. ∆ isn’t going to be able to fix that.
		- Grant injunction but allow ∆ to pay permanent damages to get out from injunction
			* This is what Ct does
			* Basically, forces π to sell a servitude on their land to allow ∆ to continue operating
* Spur Industries, Inc (∆) v. Del E. Webb (π) (& coming to the nuisance)
	+ ∆ operated a cattle lot away from everything. Π developed land near lot and then sued cattle lot to enjoin them b/c of noise and smell
	+ Can legal feed lot that’s a nuisance to residents be enjoined?
		- For Youngtown (residents further away who didn’t come to the nuisance), only a minor nuisance
		- For Sun City (residents who came to the nuisance), public & private nuisance - enjoinable
	+ If yes, can new res dev. Be indemnified to feed lot so enjoined
		- How about, since Webb brought development to the nuisance, Webb indemnify Spur and pay off all the complaining residents?
		- Webb caused the problem & has foreseeability since feed lot was operational before he came to the nuisance.

# Zoning & Regulatory Land Use Controls

* Sometimes, nuisance is insufficient:
	+ Cts don’t want to stifle development
	+ Don’t cover lots of annoying shit (pretty much just noise, smells, etc)
	+ Not pre-emptive – only retroactive
	+ Scares investors – they won’t know if they’re going to get enjoined until after investment has been made
	+ Not effective for regulating environmental problems
* Likewise, covenants can only protect new developments and are elective.
* So we introduced the Standard State Zoning Enabling Act in 1922 and zoning spread like wildfire
	+ By the mid-20s, a few state courts had struck down zoning as unconstitutional while others upheld it. It was only a matter of time until it went to the USSC (Euclid - 1926)
* Euclidian Zoning
	+ Cumulative Zoning – Category 1 specifies certain types of buildings that are OK. Category 3 includes everything in categories 1 & 2, etc.
	+ After Euclid, we have 1 case 2 years later saying that some particular zoning rules were arbitrary, then USSC goes silent on zoning for 2 decades
* Non-Conforming Uses – you’re using your land & new zoning ordinance makes your use a violation. (PA NW Distributors)
	+ Definition from slide: “a lawfully preexisting use that does not comply with subsequently adopted zoning requirements”
	+ Conflicts w/first in time rule, as well as fundamental ideas about prvt. Property & right to exclude
	+ Vested Rights Doctrine – bottom p.952
		- Like estoppel for non-conforming uses
		- Protect non-conforming uses that invested heavily in reliance on previous zoning laws
		- May protect unbuilt establishments if they’ve expended great resources planning in reliance on previous zoning laws
		- Vary from jurisdiction to jurisdiction but “the critical variables include how far the developer has gone in obtaining governmental approvals, how much money has been invested in good faith, and on what the money has been spent.”
	+ The right to maintain a nonconforming use runs with the land
		- Some jurisdictions allow you to change use to accommodate natural changes such as growth
		- Some allow you to change to another nonconforming use, but usually only if the change decreases (or at least doesn’t increase) the impact of the use on the zone
* Ways to provide flexibility in Zoning (for uses that don’t pre-date zoning rules)
	+ Variances – after zoning rules are on the books, you petition the board for a variance to build something that would break the rules
		- Area – When zoning requires specific size for developments
		- Use – Zoning requires specific use
		- Variance is “like a hard luck exception”
		- Standard for variance, at least in the ideal, is very high (*Commons*)
			* Necessary to avoid undue hardship
			* Won’t hurt public good
	+ Special Exceptions – built into the zoning rules are specific criteria for when an exception to the rules may be granted.
		- Means to deal with situations that can be anticipated in advance and resolved by a list of specific standards and requirements; without that specificity, the special exception arguably should not issue.
		- 2 SE paradigms:
			* Very broad standards (Ct finds unconstitutional in *Cope*)
			* Specific enumerated standards
	+ Zoning Amendments
		- When you try to get land re-zoned
		- Do we categorize this administrative power as legislative or judicial? (State v. City of Rochester) – when making laws (amendments), boards are acting in legislative capacity, and they receive deference as such
		- Have to watch out for spot zoning (creating a zoning island)
		- *Fasano* said we don’t give amendments legislative deference – focus on particulars of the amendment – this has long been widely rejected.
* Deference of zoning boards:
	+ Zoning boards are agencies – states give zoning power to municipalities who create and empower zoning boards
	+ If we see zoning boards as more legislative, we will give them more deference than if we see them as more judicial.
* Aesthetic Zoning – can we prevent people from building ugly things? (Stoyanoff)
	+ Give architecture board legislative deference b/c ordinance at issue was intended to:
		- Protect property values
		- Preserve the character of districts or neighborhoods
* RLUIPA
	+ Protect churches from land use discrimination
	+ Scope isn’t totally clear
	+ Will become more relevant to mega churches
* **ZONING CASE LAW**
* Village of Euclid v. Ambler Realty Co. (the landmark zoning case)
	+ Zoning laws were starting to proliferate, so Realty Co’s wanted to get a landmark stake-to-the heart of this trend. They chose Euclid:
		- Euclid’s zoning could be problematic as Cleveland expanded that way
		- Cumulative Zoning
		- Complicated (6 use & 3 height restrictions)
		- They claimed zoning decreased some property values 75%
	+ So they sue the city over a 68-acre tract. Trial court sides against city and enjoins city from enforcing zoning. Case goes to USSC
	+ Ct claims that police power is legitimized when the laws are reasonable (here, ct grants legislative deference) – as long as law is reasonable, we’re ok. It goes on to list the reasons why we would want zoning laws (which makes the law reasonable):
		- Increased safety by separating residences from industry
		- Decreased noise
		- Better environment, more wholesome for families
		- Helps us segregate “parasitic” apartment developments
		- Air & light, fire & safety
			* These are the oft-cited classics
	+ Ct makes comparison to nuisance – in Z & N both, we have to look at the connection w/the circumstances & locality.
		- Not solely use-driven – look @ context
* PA NWern Distribution, Inc v. Zoning Hearing Board (& amortization)
	+ Π opens adult book store. 4 days later, city zones area no adult stores & gives the guy 90 days to move or close.
	+ Π’s store is not a nuisance b/c no substantial invasion
	+ Ct. finds law unconstitutional because of amortization.
		- Any zoning amortization of previously lawful nonconforming use is per se taking (may be ok w/compensation, nuisance, or abandonment)
		- Nix’s concurrance – this one is taking, but not all amortization is, necessarily – have to evaluate each statute
			* Length of amortization period
			* How long business has existed & how much invested
			* Public v. private interest
			* Degree of offensiveness of nonconforming use
			* Additional factors on p.952
	+ Today, the Ct’s opinion (per se rule) is the minority and Nix’s concurrance is the majority rule
* Commons v. Westwood Zoning Board of Adjustment (& Variances)
	+ Builder has a lot. Zoning rules say is too small for a single-family home. Requests variance to build, otherwise lot goes unused. Sweet-heart π here; has tried everything to accommodate. Lot is longer than it needs to be, but a little narrow. Neighbors don’t want to allow variance
	+ Ct. uses 2-part test
		- Must show exceptional & undue hardship w/o variance
			* Undue hardship = “involves the underlying notion that no effective use can be made of the property in the event the variance is denied.”
			* Hardship – can’t be self-inflicted (here, π can’t have sold off part of the lot) & owner must’ve made reasonable efforts to comply – here, to sell the lot, to buy more space from a neighbor, etc.
		- Variance mustn’t be detrimental to ‘hood
	+ Ct didn’t consider air, light, fire, safety, or evidence. More just looked at BS reasons
	+ Ct kicks it back to re-consider based on evidence & 2-part test
* Cope v. Inhabitants of Brunswick p. 959 (& Special Exceptions)
	+ Π wants to build apartment complex in residential area & needs an exception. This particular board has 4 criteria defining exceptions:
		- 1 – the other requirements of the board are met
		- 2 – the use “will not adversely affect the health, safety, or general welfare of the public”
		- 3 – the use “will not tend to defeat the purpose of the ordinance or of the comprehensive plan for the development of the town...”
		- 4 – the use “will not tend to devaluate or alter the essential characteristic of the surrounding property”
	+ Board denies exception, citing that use would change the character of the neighborhood and be unsafe (bringing more traffic, etc.)
	+ On appeal, Ct says that criterion 2 & 4 are too broad & give board too much discretion & are, therefore, Unconstitutional. Since there were only 4, π’s apartments met 1 & 3, and 2 & 4 are unconstitutional, π gets his special exception
	+ “The legislative body cannot, however, delegate to the Board a discretion which is not limited by legislative standards. It cannot give the Boar discretionary authority to approve or disapprove applications for permits as the Board thinks best serves the public interest w/o establishing standards to limit and guide the Board...”
* State v. City of Rochester (& Zoning Amendments)
	+ City rezoned single lot in low density SFH zone to high-density to allow building of 49 unit condo development. Neighborhood association and individuals sued
	+ Ct: Boards act in legislative capacity, so we give them great deference. Even then, though, we can scrutinize them sometimes:
		- If it looks like spot zoning (odd”island”)
		- If amendment hurts community
		- If it’s inconsistent w/general plan, or
		- If it amounts to a taking w/o compensation
	+ Ct concluded there was a rational basis for believing new use would be compatible. Π’s complaints of safety, traffic, and character of neighborhood forced Ct to recognize that they make the reasonability debatable or even dubious, but fail to meet the high standard required to overpower Ct’s legislative deference to board.
* Stoyanoff v. Berkeley (& Aesthetic Zoning)
	+ Ladue is posh traditional town. Π wants to bring ugly house. City architectural board tells him no. He sues.
	+ Ct: Ordinance & architectural controls ok
		- Makes sense re: market values, general welfare
		- Looks more to prop. value impact, not so much aesthetics as zoning objective
	+ Ct relies on expert (architect) testimony that ugle house will decrease property values
* City of Ladue v. Gilleo (& Zoning Restrictions on Free Speech)
	+ G has anti-war sign. City has ordinance prohibiting signs. When G throws a fit about ordinance being arbitrary, city changes ordinance to enumerate public good of sign prohibition. G sues on 1st amendment.
	+ Ct: Ordinance does “too much and too little”
		- Claims to be very broad, but carves out a lot of exceptions
		- Doesn’t give G a reasonable alternative
	+ Rules can’t do too much to stifle speech – citizens need forums to express their opinions
	+ Also have to be careful about doing too little – lots of exceptions and caveats create discrimination

# Eminent Domain and Regulatory Takings

* 5th amendment protects our property from being taken by the government w/o compensation
	+ 5th amendment doesn’t give gov. power to take – they’ve always had that (Remember Johnson v. Mc’Intosh, about 50 pages up from here?)
	+ 5th amendment recognizes that power and provides citizens just compensation.
* Eminent Domain v. Regulatory Takings
	+ ED – power of gov. to compel xfers of land for public use (p. 1081 = ED condemnation procedure)
	+ Reg. Taking – O says gov. does something that amounts to condemnation (decreases value, restricts use, restricts transferability, etc.)
* Public Use:
	+ Public goods (schools, parks, etc.)
	+ Common Carrier (RR, road, etc.)
	+ “Public Purpose” (incl. economic development) (Kelo)
	+ Cleaning up urban blight (Berman)
	+ Breaking up land oligopolies in HI (Midkiff)
* Kelo statutes
	+ In reaction to Kelo, nearly every state enacted legislation to prevent the Kelo problem. Most of these statutes still contain Berman exceptions.
* Takings rules:
	+ Public Use
		- Eminent Domain – Kelo – must pay compensation
	+ Regulatory Takings
		- Categorical rules
			* Loretto
				+ Permanent physical occupation is a taking and requires compensation
			* Hadachek
				+ Removing a nuisance is never a taking and never requires compensation.
				+ Now we get to do the dance to figure out whether a law is providing a benefit by taking property or if it’s stopping a nuisance by taking property
			* Lucas
				+ Taking occurs when state destroys all valuable use of land. Requires compensation

Unless the proscribed use being prohibited by the state wasn’t part of the owner’s title anyway (as in the case of common law nuisance – prop owners don’t have title to nuisance behaviors)

* + - Balancing
			* PA Coal
				+ Holmes: “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”
				+ Look at the parties involved. Consider who would bear what costs as a result of the taking.
				+ Consider who we want to stick with the cost

“The question, at bottom, is upon whom the loss of the changes should fall”

* + - * + Here, we had a much higher cost to PA coal than to Mohan AND we kinda want to stick Mohan with the cost, lest they get a freebie since they bargained away their support rights.
			* Pen Central
				+ Ct & Dissent recognize takings is tough stuff & often seems inconsistent; characterized by ad hoc inquiry
				+ Introduce DIBE into the mix
				+ 3-prong test (below)
* Just Compensation
	+ US typically pays Fair Market Value, but some other countries pay extra for things like moving cost & idiosyncratic value.
* **TAKINGS CASE LAW**
* Kelo v. City of New London (the gov. can take your house for any reason at all)
	+ Kelo owned house in New London – relatively depressed community; new plan for community center, museum, and Pfizer plant. City is able to buy out most of the 70 lots. Kelo & ~15 others hold out.
	+ Ct holds that economic development is a public use
		- Kelo is in line w/Berman & Midkiff – natural extension
		- Doesn’t matter what the land is. State can take it if legislature wants to do it & it’s public use.
	+ Arguments:
		- Blurring line b/t public and prvt – need bright line
			* Ct: as long as “clear public purpose,” we give city legislature deference
		- You’re empowering rich private parties ED power
			* Ct: We’ll deal with that if it comes up. This is transparent & ok
		- Still a big give-away to a private entity who really wins. That’s not fair
			* Just b/c Pfizer gets rich doesn’t detract from public use
			* Somebody always wins. That’s unavoidable. Even if it’s a RR, school, road, etc.
	+ Ct explicitly says that there’s nothing stopping states from legislating around Kelo to prevent this kind of taking. Nearly every state has, but these statutes have exceptions that render them largely impotent (blight)
	+ O’Connor’s Dissent:
		- Should’ve drawn a line around Kelo. This decision allows state to justify anything. Midkiff & Berman were clear public harms. Kelo’s house wasn’t a nuisance. This is where we should draw the line – where there’s no harm.
	+ Following the Kelo decision, the city took Kelo’s house and demolished it. Pfizer has waffled on the deal and there is no new construction there.
* Loretto v. Teleprompter (& the categorical permanent physical occupation rule)
	+ NYC passes law requiring apartment building owners to allow teleprompter company to run cable to the building and install small boxes on some buildings. Loretto sues, contending this is a taking.
	+ Ct agrees.
		- Permanent physical occupation of private property by government or mandated by government is per se taking.
		- Clear bright line – if it’s physical & permanent, it’s taking
		- This protects the super-sacred right to exclude.
		- When the State blows up a dam or something and floods your house, that’s a taking and it’s a permanent physical occupation, so permanent physical occupations are per se taking
	+ Dissent proposes balancing test
		- Bright line not as clear as Ct says – inefficient litigation-breeder
			* What about fire extinguishers, mailboxes, & other mandatory permanent physical occupations?
			* Ct draws false dichotomy between “invasion” and “occupation”
			* Endless metaphysical struggles over whether a property has been “physically” touched.
		- One of 2 things is going on here:
			* This is a huge expansion on what constitutes taking and we’re going to have to pay a fuckload of money for all of these other things that are now per se taking or
			* Test isn’t as clear as Ct says it is
		- “Question cannot be solely whether the state has interfered in some minimal way...Any intelligible takings inquiry must also ask whether the extent of the State’s interference is so severe as to constitute a compensable taking in light of the owner’s alternative uses for the property”
* Hadacheck (& the Categorical Nuisance Rule)
	+ Hadacheck had a brick lot and LA passed a law making it illegal to operate brick lots.
	+ Ct: Not a taking – if state action addresses a nuisance, it can never be a taking – categorically
	+ Ct has some dicta basically saying that the brick lot was in the way of progress, & progress is a fucking freight train that will mow you the fuck over if you get in its way.
	+ Ct: he can still take his clay somewhere else to make the bricks (it’s just a lot more expensive)
	+ Now we have to look to see whether state is acting to receive a benefit or to stop a harm – if they’re acting to stop a harm, it’s never a taking.
* Pennsylvania Coal (or, “Who do we stick with the bill?”)
	+ Mahon buys house w/surface rights only; gets a deal by waiving that PA coal may some day subside the house
	+ Kohler Act prohibits mining that could subside a house
	+ Ct (Holmes) holds:
		- Kohler Act takes property interest away from PA Coal & constitutes taking
		- Really, only 1 house – not a public nuisance
		- Cost to PA coal would be > cost to Mahon (diminution of value)
		- Mahons knew what they were doing when they bargained – we should stick them with the loss
		- Basically, look at what costs would be borne by each party, & decide who we want to make pay the cost.
	+ Ct’s balancing test – When a government action causes a sufficient diminution in value of private property, a taking may be found.
		- Also important:
			* Character of government action
			* Its relation to nuisance control, well-recognized property interests, rights, and estates
			* The public interest and notions of fairness associated with any particular case will also be important
	+ Dissent (Brandeis)
		- Kohler act is OK. It protects public health. This is nuisance control.
	+ Conceptual Severance:
		- Holmes sees 3 separate rights, which the Kohler act completely demolishes one of:
			* Surface
			* Mineral
			* Support
		- Alternatively, Brandeis sees 3 rights together as 1 piece of property, so gov. is only taking part of a piece of property, not a whole property interest.
* Penn Central (& DIBEs)
	+ Owners of Penn Central Station in NYC want to build high-rise office space on top of it. City has designated Penn Station as a landmark, so they have to get city approval to build. City tells them they can’t build, since offices would destroy the character of the building, but gives them TDR credits as a consolation prize.
	+ TDRs – transferable right to build higher than otherwise allowed (Since we’re not letting you build on your building, you can sell this ticket to somebody and they can build their building higher than zoning laws allow!)
	+ Distinct, Investment-Backed Expectations (DIBEs) – What owners could & should have expected to get as a return on their investment
	+ 2 issues:
		- Has a taking occured?
			* Ct only looks here.
			* 3-prong analysis. Balance:
				+ Economic Impact
				+ Economic Impact re: DIBE
				+ Character of regulation – if it looks like zoning, we may be more likely to like it
		- If so, are TDRs just compensation?
			* Ct doesn’t get to this part. Somehow applies on first issue that the issuance of TDRs helps make it not a taking (maybe issuance of TDR fucks with economic impact analysis enough to make it not a taking)
	+ Dissent (Rehnquist):
		- Ct has singled out Grand Central – discriminatory and not typical of zoning
		- This action doesn’t prohibit nuisance
		- Ct is giving NYC a free servitude on PA station – requiring them to maintain it forever for free.
		- Here, Dissent tries to frame it as a servitude instead of a land use regulation or takings issue
* Lucas v. S.C. Coastal Council (& the categorical rule re: destroying valuable use)
	+ Lucas has coastal land and state enacts law prohibiting him from building on it. Lucas sues. Trial Ct. claims Lucas’s property is absolutely, 100% valueless.
	+ USSC sets forth per se categorical rule:
		- When the regulation absolutely denies economically viable use of land (total wipeout), it constitutes a taking
			* Exception for things that constitute nuisance under the common law
			* Exception if owner didn’t have full title in the first place
		- “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of common good, that is, to leave his property economically idle, he has suffered a taking”
		- Ct claims this will help alleviate the “public benefit or nuisance control” headache
	+ Blackmun’s Dissent:
		- “Today, the court launches a missile to kill a mouse.”
			* Missile = outrageous & inept per se rule (& equally outrageous & inept “common law nuisance” exception)
			* Mouse = the case at hand is really pretty innocuous & nuanced.
		- Lucas’s property value wasn’t totally lost – could still use it for lots of things w/o building on it
		- The way Ct wants to apply categorical rule & determine if 100% diminution of value is basically DIBE from Penn Station
	+ Since Lucas, Cts generally don’t find 100% lost value – use balancing test to find some amnt of value to dodge having to apply Lucas.

# Stuff that was Starred in my notes

1. p. 49 Footnote 32 – Coase Theorem
	1. When you eliminate transaction costs, you will achieve the most efficient, value-maximizing, outcome
	2. Becomes irrelevent whether X is liable to A for costly effects or not
	3. Helps show how important transaction costs are in the real world
	4. Wealth & Endowment effects can fuck up Coase Theorem
		1. Wealth effects – wealth disparity b/t parties can kill efficiency by favoring powerful parties
		2. Endowment Effects – We value something more when you already have it (eg: residents will pay more to keep a slaughterhouse out of their ‘hood than they will to close one that’s already there.)
2. 4 adjectival components of Adverse Possession
	1. actual entry (not constructive)
	2. open and notorious
		1. paying taxes is especially open & notorious
	3. continuous for statutory period
		1. We may allow tacking (combining multiple APers time) if there’s privity b/t APers (Howard v. Kunto)
	4. adverse or hostile
		1. Is the AP’ers state of mind relevant?
			1. Objective rule
				1. No. Motive irrelevant
				2. English rule
				3. French v. Pearce
				4. Nome v. Fagerstrom found state of mind irrelevant
			2. Good-faith rule – We favor APers who think they own the land
				1. occasionally seen in US decisions
				2. Cts may be lying to themselves when they say they’re objective. May be favoring good-faith
			3. Aggressive trespass rule
				1. aka willful possessor
				2. We favor APers who know they don’t own the land
				3. Maine Standard, from Preble v. Maine
				4. AP may receive title but be req’d to pay fair market value for egregiously trespassing
3. Difference b/t estoppel and partial performance p.542
	1. Partial Performance
		1. allows the specific enforcement of an oral contract when particular acts, such as paying part of the purchase price or making improvements on the property, have been performed by one of the parties to the agreement.
		2. Have an agreement that doesn’t quite satisfy Statute of Frauds
		3. Take possession or improve the land
		4. Agreed purchase price
		5. Note that in partial performance, B is doing stuff in the agreement (paying for the property, taking possession, etc.)
	2. Estoppel
		1. (1) Some representation is made b/t A & B re: a deal
		2. (2) B takes actions in reliance on (1) to his own detriment
		3. (3) A in (1) knows about B’s actions & lets him do it anyway (Walker v. Ireton)
		4. Again, don’t meet SoF
		5. Something going on makes us believe that there’s a deal and that somebody’s going to be fucked if we don’t acknowledge the deal.
		6. Different from partial performance b/c B is doing things to improve property or in reliance on contract that aren’t specifically part of the agreement
	3. Hickey v. Green & Partial Performance
		1. Buyers enter into agreement to buy house for $15k
		2. They give seller deposit check with “To” line blank and they sell their own house in reliance on the contract
		3. When the buyers show up to complete transaction, seller says she’s found a new buyer and is selling to them for $16k.
		4. Buyers offer to pay $16k, but Seller refuses. Buyers sue for specific performance
		5. Ct says contract is enforceable b/c buyers acted in reliance on the contract
	4. Walker v. Ireton p. 546
		1. similar to facts above. S agrees to sell farm to B and refuses to sign written contract.
		2. B gives $50 deposit, which is never cashed
		3. B sells house and S refuses to sell
		4. Here, Ct sides with S because S had no way of knowing that B was going to sell his house or had sold his house
4. Marketable Title
	1. Black’s definition
		1. Free from encumbrances and any reasonable doubt to its validity,
		2. and a reasonably intelligent person, who is well informed as to the relevant facts and their legal bearings, and
		3. who is ready and willing to perform the contract
		4. would be willing to accept in the exercise of ordinary business prudence.
	2. Practical terms
		1. Free from reasonable doubt in law and fact
		2. Acceptable to a reasonable purchaser – not just valid in fact
		3. Will not expose a purchasing party to hazards of litigation
		4. May be freely made the subject of resale
		5. Is the sort of title that will be deemed sufficient if a court is asked to provide specific performance of a contract of sale
	3. If S can’t convey MT, B may be able to rescind K
	4. Encumbrances
		1. Any right or interest by 3rd party that decreases value
			1. Mortgages & easements
			2. “Hazards of Litigation” - zoning violations
			3. Zoning requirements aren’t a hazard of litigation b/c buyer could easily find zoning req’s but if you sell them a violation, you’re selling them a lawsuit
			4. Easements that are open, visible, available, or enhance property aren’t encumbrances (p. 551 #2)
	5. Marketability of title != marketability of land
		1. Totally distinct
		2. Can sell somebody barren land that can’t be farmed, but you can’t sell them encumbered or bad title to that land
	6. Duty can be implied, so parties try to K around
	7. Strambovski – Ct cuts through “as-is” clause
5. Doctrine of Merger p.563
	1. Basically, the sales contract doesn’t matter after closing
	2. When B accepts deed, B is deemed to be satisfied that all of the contractual obligations have been met.
	3. Contract merges into deed – B cannot sue S for promises in K but not in deed, but must sue on warranties in the deed
	4. Becoming riddled w/exceptions (namely fraud and contractual promises deemed collateral to the deed)
	5. Principally applies to questions of title or quantity of land (eg: If K calls for marketable title and B accepts deed w/no warranties, B cannot thereaftoer sue based on K for title defect – James v. McCombs)
	6. To get around, argue that duty was collateral, independent of contract
6. Race-Notice Statutes (p.669)
	1. This is what a Notice statute looks like (FL)
		1. “No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to the law.”
	2. This is what a Race-Notice statute looks like (CA)
		1. “Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for valuable consideration, whose conveyance is first duly recorded, and as against any judgement affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.”
	3. Recording statutes often don’t protect donees or devisees as “subsequent purchasers” even in race jurisdictions – notice the importance of consideration
	4. Shelter Rule
		1. Where we have a notice rule: O sells to A. A doesn’t record. O sells again to B. B has no knowledge of A’s deed. A records before B. Then B sells to C. Even though C has notice of A’s deed, as long as B didn’t have notice, C’s claim is > A’s.
		2. A person who takes from a bona fide purchaser protected by the recording act has the same rights as his grantor
		3. Cannot protect O if O buys back from B
7. Difference b/t contingent remainder and executory interest
	1. Contingent Remainder “waits patiently” for previous estate to expire while Executive Interest “cuts in”
	2. Executory Interests
		1. Shifting/springing – difference not important
			1. Shifting – take it from another transferee
			2. Springing – take it from the transferor
		2. What to look for
			1. In a transferee
			2. Cuts short another interest
			3. Ex. 16 p. 269
				1. O conveys “to School Board, but if the premises are not used for school purposes during the next 20 years, to Library.”
				2. School Board – FS subject to executory interest that will automatically divest the Board’s FS if the condition happens
8. Mortgages – Title Theory vs. Lien Theory
	1. Is a mortgage a transfer of title or a lien against the title?
	2. Lien = only security interest in property
	3. Harms v. Sprague p. 330
		1. Brothers hold property in joint tenancy. One of them takes mortgage against his interest, and then dies.
		2. Ct sides w/lien theory
		3. Is a joint tenancy severed when < all joint tenants mortgage their interest in the property?
			1. No. p. 332 – “the execution of a mortgage by a joint tenant, on his interest in the property, would not destroy the unity of title and sever the joint tenancy.”
		4. Does the mortgage survive the death of the mortgagor as a lien?
			1. No. “The property right of the mortgaging joint tenant is extinguished at the moment of his death.”
			2. The surviving joint tenant gets full FS in property and mortgage dies with previous joint tenant.
9. What do we do if A&B are in a joint tenancy and A gives X some non-FS interest? P.334
	1. Sever joint tenancy
		1. X & B are tenants in common until interest ends and then A&B are tenants in common
	2. Don’t Sever & B not subject to X
		1. If B survives A, B takes free & clear FS when A dies, terminates X’s interest
		2. If A survives B, A gets B’s interest but is subject to X’s interest
	3. Don’t sever & B is subject to X
		1. If B survives A, B gets A’s interest, subject to X (Tenant in common w/X until interest expires)
		2. If A survives B, A is subject to X’s interest
	4. Partial or temporary severance
		1. If B survives A, go to (a) above.
		2. If A survives B, go to (b) or (c) above (looks the same; A is subject to X’s interest)
		3. If X dies first, then joint tenancy survives – no severance
10. Unification of Servitudes (“the most important note in the book”) note 6 p.858
	1. Courts of law and equity have merged – Cts can give damages when π seeks injunction
	2. No longer matters Real covenant vs. equitable servitude
	3. Restatement – merges the two terms into “covenants running with the land”
		1. Cts may enforce covenant by “any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens.”
	4. Restatements apply same rules to easements and covenants (lumped together as servitudes), unless there is a sound reason for differentiation
11. Ct’s justifications for allowing zoning in Euclid p.936
	1. Benefits of zoning
		1. **Air & light, fire & safety**
			1. Most important, classic, draws from old law, often cited
		2. Safety & security
		3. Noise
		4. Wholesome family environment
		5. “parasitic” apartment developments
	2. Look to nuisance law – top of p.935
		1. Nuisance maxim – *sic utere tuo ut alienum non laedas* – so use your own as to not injure another’s property
		2. The state’s power “to forbid the erection of a building of a particular kind ... , like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality ... like a pig in the parlor instead of the barnyard.”

# Scrapbook of Equity

* **Estoppel –** An representation was made from A to B and B acted in reliance on that representation to his own detriment
	+ Holbrook v. Taylor – Ct turned license into an easement
		- In Othen, Ct refused the same reasoning
	+ Mannillo v. Gorski – boundary lines can be changed via estoppel
* **Partial Performance** – like estoppel, but the acting party’s actions are representative of some sort of oral K or agreement
	+ Hickey v. Green – When Seller knew that Buyers were selling their house in reliance on RE K and then backed out of deal, Ct. upheld K
	+ (Denied) - Walker v. Ireton – In a similar situation, Ct. didn’t uphold K because Seller shouldn’t have reasonably known about Buyers selling their house in reliance on K
	+ Lewis v. Superior Ct. – When Seller filed lawsuit affecting title of property the day after closing, Ct held “any purchaser without notice who makes a down payment and obligates himself to pay the balance, has every reason to believe that his rights are secure in the property.”
	+ Reste Realty Corp v. Cooper – Ct rescinded lease when tenant signed & paid rent in reliance on landlord’s promise to repair and landlord didn’t uphold
* **Rule of Discovery**
	+ O’Keeffe – Ct holds that SoL timer doesn’t start running against artist whose painting was stolen until she knows or should know who has it
	+ Guggenheim Rule – timer doesn’t start until you know who has your chattel, you ask them for it, and they deny your request
* **Cy Pres** – If original intent of a grantor is no longer possible, we can reform grant
	+ Odd Fellows, White v. Brown
	+ I’m not so sure these next ones are cy pres – not the best examples:
		- Kendall v. Ernest Pestana – Ct found that lease gave too much discretion to landlord, and effectively modified it to reduce such discretion
		- Garner v. Gerish – After landlord’s death, Ct. interpreted lease to grant life tenancy (I’m not so sure this is cy pres – not the strongest example)
* **Laches** – When someone doesn’t exercise a legal right for too long, Ct. may bar them from exercising that right
* **Unclean Hands** – If π has violated a covenant, she can’t then sue ∆ for that same violation
* **Changed Conditions** – Cts may reinterpret or rescind servitudes if the land is no longer suitable for the original.
	+ (Denied) WLC v. Trusk – Ct. denies development in covenant-restricted area b/c conditions hadn’t changed enough. Area was still fit for covenanted use.
	+ (Denied) Rick v. West – same as above
* **Vested Rights Doctrine** – When state wants to shut somebody down, we should weigh investment into a property and tenure of occupant vs. public benefit
	+ PA NWern Distributors – Ct found amortization per se unconstitutional, even for a business that had only been there four days
* **Misc:**
	+ Strambovsky - Ct creates new equitable exception to Caveat Emptor
	+ Johnson v. Davis – Latent defects rule – Ct. rules that Seller must disclose all latent defects unknown to buyer

# Future Interests Cheat Sheet

When grant is ambiguous, favor FSSCS > FS Determ

* grants Greenacre to Z for life so long as the property is used for a farm.
	+ Z = LE Determinable; O has Reversion & Possibility of Reverter (Reversion when LE ends and possibility if Z stops using it as farm)
* grants Greenacre to Z and her heirs, provided, however, that if the land stops being used for farming, I have a right to retake the premises.
	+ Z = FSSCS; O = Right of Re-entry
* O grants Greenacre to Z until Z graduates from college, then back to O.
	+ Z = F.S. Determ.; O = Possibility of Reverter
* O grants Greenacre to Z for life, on the condition that Z does not drill for oil on the land, and if Z does drill for oil on the land, then back to O.
	+ Z = LE SCS; O = Right of Re-Entry & Implicit Reversion

O conveys Blackacre “to  A  and  her  heirs.”    A   has one child, B.

 A = FS, B = mere expectancy (nothing)

O conveys Blackacre “to  A  for  life,  then  to  B.”

 A = LE; B = indefeasibly vested remainder

O conveys Blackacre “to  A  for  life,  then  back  to   O.”

 A = LE; O = Reversion (explicit)

O conveys Blackacre “to  A  and  her  heirs  so   long  as  liquor  is  not  sold  on  the  property.”

 A = FS Determ.; O = Possibility of Reverter

“to  A  for  life,  then  to  A’s   children  and  their  heirs.”    At  the  time  of  the   conveyance, A has no children.

 A = LE; A’s kid – Contingent Remainder

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

 A = LE, B = Vested, subject to open

“to  A  and  her  heirs  so   long as A maintains the rose garden, then to B and  her  heirs.”

 A=FS Subj. to Executory Limitation; B = Executory Interest

“to  A  and  her  heirs,  but  if   A  cuts  down  any  trees,  B  may  enter.”

 A=FS Subj. to Executory Limitation; B = Executory Interest

“to  A,  but  if  A  sells  liquor   on  the  property,  then  O  may  reenter.”

 A = FSSCS; O = Right of Re-entry

# Charts

Types of Relief

|  |  |
| --- | --- |
| Injunctive Relief | Damages |
| No Relief | Reverse Damages(Spur Industries v. Webb) |

Crossovers between Real Estate Law & ...

|  |  |
| --- | --- |
| Eminent Domain(Government Action) | Tort(Nuisance) |
| Zoning(Government Action) | Contract(Servitudes) |

Possessory vs. Future Interests (p. 274)

|  |  |  |
| --- | --- | --- |
| Possessory Estate | Reversionary Interest | Non-Reversionary Interest |
| FS Determinable | Possibility of Reverter | N/A |
| FS Subject to Condition Subsequent | Right of Entry (Power of Termination) | N/A |
| FS Subject to Executory Limitation | N/A | Executory Interest |
| Life Estate & Term of Years | Reversion [indefeasibly vested] (when no remainder created) | N/A |
| Reversion [Vested subject to defeasance] (when contingent remainders created | Contingent Remainder |
| Possibility of reverter (if any) | Remainder vested subject to divestment |
| Executory Interest (if any) |
| Reversion [vested subject to defeasance or indefeasibly vested] | Remainder vested subject to limitational defeasance |
| N/A | Remainder vested subject to open |
| N/A | Executory interests in unborn class members |
| N/A | Indefeasibly vested remainder |