**Part I: Who Owns Property?**

**Acquisition by Discovery:**

Overview:

* Discovery doctrine: conqueror is the one that gets title to it (skewed through lens of Christian colonization)
* First in time, first in right
* Locke’s labor theory: ownership is derived from labor that goes into property, inconsistent with some goals of property law

1. *Johnson v. McIntosh*
   1. Facts: party purchases land from Indians in 1773 and 1775, a second party purchases the same property from the U.S. government
   2. Issue: Who owns the land? What is title?
   3. Title: union of all elements (such as ownership, possession, and custody), constituting the legal right to control and dispose of property, legal link between person who owns property and property itself
   4. Chain of Title: determine ownership, **first in time, first in right** 🡪 first civilized European country to discover/conquer party has right to it
   5. “Conquest gives title” – Indians still have right to occupancy ownership, bundle of rights
2. Themes of opinion in *Johnson*
   1. Fear of consequences, concern with implications of the ruling (pragmatically they couldn’t have ruled in the other way)
   2. Limit of the power on courts, where does Supreme Courts authority come from? Legitimacy comes from fact that the U.S. took the land to begin with “conquest gives title which the courts of the conqueror cannot deny”
   3. **Locke’s Labor Theory**: mixing labor with land, improve land, construct on land 🡪 entitles you to property, reward productivity
      1. Argument could apply to natives, downsides of Locke’s theory: makes it impossible to hold land, uncertainty, overdevelopment v conservation, ambiguous – how much labor?
   4. European cultural/religious superiority
3. Discovery doctrine: first European Christian County to conquer land claims it – “first in time first in right” (ie. patent application)
4. **Bundle of Rights** – includes right to possess land (formal ownership), right to exclude other, right to use land, right to dispose of property

**Acquisition by Capture**

Overview:

* Pierson: pursuer must have reasonable prospect – “certain control” over property to claim ownership 🡪 want to bring clarity, tension between clarity and “right result”
* Whale case: look to customs when normal rule doesn’t apply, moving resources

1. *Pierson v. Post*
   1. Facts: fox hunt, both parties pursuing fox, Post pursued fox first, Pierson captured fox
   2. Holding: mere pursuit was insufficient to constitute possession of fox
   3. Reasoning: want to bring *certainty* and *clarity* to the law, use *learned authorities*, must have control over resource (kill, capture, trap, ect)
   4. Dissent: fairness argument, **utilitarian approach**, people should act in a way to maximize well being, says ancient law outdated/irrelevant, want more modern approach
2. **Formalist**: nice, clear rules, certainty
3. **Functionalist**: complex balancing test to promote fairness
4. **Ratione soli**: private property owner has right to animals that are on their land, until animal freely leaves property, only applies to wild animals
5. *Ghen v. Rich*
   1. Facts: admiralty law case, discovery of fin-back whale, custom is for whale to be killed, then sinks, person who finds whale then seeks out person who killed it and receives small fee, Defendant in this case found whale and sold it
   2. Holding: court goes against Pierson ruling, utilitarian reasoning, nobody would go out to harpoon whales if finder got to keep it (Locke’s theory – person throwing harpoon did work)
   3. Pragmatic grounding: exception to rule of capture
   4. Rule: Where certain control is not practical, follow customary rules instead
      1. Pros: feasible, better for industry, community acceptance, local autonomy
      2. Cons: lack of knowledge, uniformity, groups get shut out, safety/public health issues, conflicts of law
6. Oil and Gas
   1. Compare to wild animals, moving resource, coveted
7. Water Rights
   1. Stems from English law, not well suited to U.S.
   2. U.S. rule – “reasonable use”, can’t harm neighbors
   3. Tragedy of the commons: multiple people own or have access to one resource, overconsumption, one aquifer for great number of people
   4. Surface water: in East – whoevers land is adjacent to water owns right to the water, in West – more conservative, first in time first in right approach
   5. Tragedy of anti-commons: underutilization of resources, fractured market
      1. Ex) 3 separate companies have 3 patents for cancer treatment 🡪 medical treatment never enters market

**Property in One’s Person**

Overview:

* Generally, if you give away your bodily organs or property then you relinquish ownership of it (exception for contractual deals)

1. *Moore v. Regents of University of CA*
   1. Facts: Moore sought treatment for hairy cell leukemia, without his knowledge or consent, hospital used his cells/tissue for research making UCLA millions of dollars, Moore argues it was his personal property
   2. Moore argues breach of fiduciary duty by failing to obtain proper consent, tort claim for conversion
   3. Court says Moore had no intention of retaining ownership of his bodily materials once they were removed, patented cell line does not belong to Moore, it was done through inventive effort of researchers
   4. Want to promote innovation, public policy, moral issues
   5. General rule: when dealing with someone’s bodily property, once you donate it, you no longer have property rights to it

**Acquisition by Find**

Ownership:

* Lost, mislaid, abandoned property
  + Abandoned: finder becomes new owner
  + Mislaid: if you set wallet down on table and don’t return, person who owns the location can claim ownership over it if true owner doesn’t return (mislaid requires deliberate action)

1. *Armory v. Delamirie*
   1. Facts: plaintiff is chimney sweet, finds jewel and brings it to jeweler (defendant) to be appraised, when jeweler returns it the stones are missing, plaintiff brings suit in trover, wants monetary value of jewels
   2. Holding: finder is entitled to possession against everyone but the true owner
      1. Even if plaintiff has stolen he jewelry, he still had more rightful ownership over it than the jeweler
2. *Hannah v. Peel*
   1. Facts: Major Peel buys house, gets requisitioned by government for soldiers, Hannah finds brooch in house, given to him. Peel claims he owns property because it was found on his property
   2. Precedent cases: (distinctions – public v. private property, scope of employment/purpose for being on property)
      1. *Bridges v. Hawkesworth*: shopper finds item in store, gives it to shopkeeper, original owner never claims it, court gives it to shopper
      2. *South Staffordshire Water:* pool cleaner finds 2 rings in pool, court says property belongs to owner of house
   3. Holding: Hannah was entitled to property. Because Defendant was not physically present in the house at any time, Plaintiff’s find was defensible against all parties except the rightful owner.
   4. Reason for ruling: [1] no physical possession; [2] lost property; [3] no true owner found
3. *McAvoy v. Medina*
   1. Facts: defendant barber, plaintiff finds money who asked defendant to find true owner, defendant kept money, money had been deliberately set down on the counter, mislaid property v. lost property
   2. Holding: barbershop owner (defendant) gets to keep the money as owner of premises because property was mislaid (distinguished from Bridges) not lost
   3. Policy: for mislaid property leave item with person whom owner might think to go back to
4. Abandoned property: whoever comes across it gets to keep it (ie. someone leaves item by dumpster), original owner trying to actively get rid of property

**Adverse Possession (6 Elements):**

Overview:

* 6 elements, look at what statutory period is

1. Actual entry: adverse possessor must use the property in a way that an average property owner would
   1. Ask what would an average land owner do? Fence the property, build a house, create a garden, harvest natural resources such as timber
2. Exclusive possession: allowing others to use your land is ok, however, other people can’t be using the land without your consent
3. Open and Notorious: could the actual owner have known about the use?
   1. Whether this requirement was met doesn’t turn on how observant the owner is. It is whether the owner *could* have known about the use
4. Adverse: you can’t get adverse permission for property you have permission to be on, you will not lose title to land merely by allowing a friend to live there
5. Claim of right/Claim of title: some states care whether you intended to adversely possess the property or whether you were an “innocent adverse possessor”. Turns on state of mind
   1. 3 different views: suppose X builds a garden 3 feet past the property line that X shares with Y. 3 possibilities:
      1. Most states don’t care what X was thinking
      2. Some states find AP only if X acted in good faith
      3. Some states find AP only if X acted in bad faith
   2. Note: this is not the same as “color of title”
6. Possession must be continuous: continuity of the possession need only be the continuity that an ordinary owner would have, need not be continuous in the literal sense of the word

**Part II: Eminent Domain and Zoning**

Overview:

1. Eminent Domain: must be public use, Kelo- what constitutes public use when taking property for economic use
2. Regulatory Takings: government enacts regulation that restricts use of property, often drops property value (no conceptual severance)
   1. Look at 3 categorical rules, then Penn Central Balancing Test
      1. Economic impact (diminution in value/current use of property/investment backed expectations)
      2. Character of government action
3. Exactions: look at essential nexus; is there a legitimate state interest? Is it roughly proportional to the exactment?

**The Power of Eminent Domain**

Overview:

* Eminent domain is governments way of taking private land
* Kelo: majority uses utilitarian approach, limitations: want to avoid taking something to be some kind of public use/benefit
* Dissent: transfer to public ownership; common carriers (easy cases), land goes to private party for public revitalization, economic benefit to public (hard to predict, controversial)
* What constitutes “just compensation”? When should the government pay more than fair market value?

1. Why does government have power to take land?
   1. Philosophical underpinnings –
      1. Hobbes: without government we would live in state of nature – kill or be killed, short brutal lives, we give up rights to government in exchange for protection
      2. Bentham: we have pain and pleasure, people want to maximize pleasure, letting government take land from a few people to make many people happy is utilitarian
      3. Locke: we have a natural law derived right to property
   2. 5th amendment takings clause: “nor shall private property be taken for public use without just compensation”
2. When can government take our land?
   1. “Public use” – when state or federal government needs land for some use that will benefit public as a whole
      1. Highway/freeway
      2. Landfills and other shared public facilities
      3. Parks, recreational, schools/hospitals
      4. Common carriers (railroads, cable)
3. When does government have to pay and how much?
   1. When the government “takes” the property – usually have a trial re: compensation, validity of “public use”, if government wins at trial, then taking has occurred and land has been condemned
4. *Kelo v. City of New London*
   1. Facts: City was in economic blight, needed economic rejuvenation; Once city developed comprehensive plan, Pfizer announced they wanted to be a part of the plan by building a plant, Kelo didn’t want to sell her property
   2. General procedure: city negotiated with most of homeowners to voluntarily sell property to city, for any hold-outs government begins condemnation proceedings
   3. City of New London argument: Eminent domain for purpose of economic development should be public use, statute authorizes eminent domain for economic development
   4. Kelo argument: project is “projected” to create benefits, Kelo’s house is in good condition, she maintained it well, made improvements to it, house had been in her family for 60 years, had water view- sentimental value
   5. Court observes government can’t take land from one person purely to give it to another party, in this case, city has a big redevelopment plan and Pfizer is only a small part of that, property is going to city for broad purpose
   6. Holding: promoting economic development serves public purpose and is therefore “public use”, States can draft legislation to narrow definition of economic development if they want to prohibit this type of taking by the government
   7. Dissent: reverse Robin Hood, taking property from the poor and giving it to private company, emotional concerns that come when government takes your property and gives it to someone else, dissent fears a power imbalance, unfettered eminent domain power, concern that whatever is the most lucrative use will give government power to take

**Physical Occupations and Regulatory Takings**

Overview:

* 3 categorical rules
  + Permanent physical occupation 🡪 taking (Loretto)
  + Nuisance law drops property value 🡪 no taking (Hadacheck)
  + 100% diminution in value 🡪 taking (Lucas)
* If no categorical rule applies, look to balancing test

1. Government passes legislation/ordinance that impacts owner’s use of their property
2. First step 🡪 is there any categorical rule that is applicable? If no, look to balancing test
3. Regulatory taking: when government regulates private property to such a degree that it amounts to governments exercise of eminent domain power (even though no condemnation)
4. Ex: endangered hissing cockroach statute, can’t build any structures on land which has hissing cockroaches, you own large valuable property which you wanted to build on but can’t land, land is now essentially worthless but not technically condemned
   1. Inverse condemnation proceeding: seek difference between what property was previously worth and what is it worth now
5. Police power – idea that government has power to pass legislation regulating private rights in order to protect public health, welfare, and safety (ie. speed limits, outlaw farm animals in urban areas, noise regulation)
6. Nuisance law – tort action, unreasonable unwarranted or unlawful use of ones property which substantially interferes with another’s use of their without trespass or physical invasion to land (loud noises, bright lights, ect)
7. *Loretto v. Teleprompter Manhattan*
   1. NY statute said landlords had to allow cable companies to install cable boxes and wiring on building rooftops
   2. Landlord claims this is a “permanent” physical occupation
   3. Holding: it was a permanent physical occupation requiring just compensation
   4. **Rule**: if government permanently physically occupies your land in some way, this is a taking
      1. What constitutes permanent? Something without an end date, doesn’t matter subjectively how long someone plans on remaining on property
   5. *Pumpelly*: government permanently floods your land in building a damn, constitutes a taking
   6. *Cosby*: invasion of airspace over home, there was a taking
   7. *Pruniard*: shopping centers must allow individuals to exercise free speech, temporary 🡪 no taking
   8. Bundle of sticks: court acknowledges that a small portion of the land being taken 🡪 owner no longer has bundle of rights associated with it (sell, dispose, use)
8. *Hadacheck v. Sebastian*
   1. Facts: Hadacheck is a brick maker, buys land which has high quality clay, City of L.A. annexed his property, LA ordinance said he could not manufacture brick on land and charged him with a misdemeanor, without ability to make bricks land value went from $800,000 to $60,000
   2. Court said ordinance/annex didn’t really deprive him of his property, city should be allowed to exercise it’s power when it deals with public health/safety
   3. Any kind of nuisance regulation does not constitute a taking regardless of its effect on home value – want to protect health
   4. **Rule**: if you have legislation preventing/regulating a nuisance activity, government does not have to pay compensation
9. If you buy property aware that some kind of taking exists, you have accepted it
10. *Mahone* case: too far principle, while property may be regulated to a certain extent but when it goes “too far”, it constitutes a taking

**Rules Based on Measuring and Balancing**

1. *Penn Central Transportation Co v. City of NY*
   1. Facts: owners of grand central station want to build office space on top of station, landmark commission does not like it and says no
   2. None of current categorical rules apply, use balancing test
   3. 2 Factors to balance
      1. Economic impact of regulations on the property owner, what is diminution in value, how has it effected investment backed expectations
         1. How much has property value dropped?
         2. What was owner’s investment backed expectations? Loss of future profits, what was property owner planning when they bought property? Intended use
            1. What is owner’s ability in continuing to use property
            2. What about ability to recoup their investment? Sunk costs?
      2. Character of government action
         1. Is the government acting in good faith?
         2. Is there discriminatory zoning
   4. Court says Penn Central can still maintain rights to use their property, committee didn’t claim they couldn’t build anything, just not the 50 story plan they submitted, while some diminution in value has occurred, there is a high bar to show value has fallen significantly enough under balancing test (*Euclid*: if property value has not diminished by more than 75% then it doesn’t constitute a taking)
   5. “Conceptual Severance” – look at property as more than one thing, ground rights, air space, ect 🡪 look at value of property as a whole
   6. Transferrable development rights: NYC has rigid zoning laws, when they institute landmark status, city allows you more lenient zoning restrictions on any other land you own

**Regulations Creating Total Economic Loss:**

1. *Lucas v. South Caroline Coastal Council*
   1. Facts: Lucas owned property on coast of South Carolina, Coastal Zone Management Act restricted him from building on property for fear of hurricanes, Lucas argues his property is now worthless
   2. Court acknowledges Loretto rule and new rule 🡪 if you suffer 100% diminution in value, a taking has occurred 🡪 no longer just an adjustment of your ownership expectations, more of a wholesale taking
   3. Concern that cities and states can take advantage and not compensate owners
   4. Benefit conferring legislation v. harm prevention: fuzzy line, anything can be harm prevention or benefit conferring depending how you write it
   5. How do you decide when property has lost “all” of its value? If diminution is 99%, then look at balancing test
   6. J. Blackmun dissent: “court launches a missile to kill a mouse”, extremely rare that government imposes regulations that completely prohibit development of property
2. *Palazzolo v. Rhode Island*
   1. Facts: Palazzolo lived on coastal land in RI, purchased property from SGI Corp. after regulatory restrictions were put into effect, Palazzolo tries to use conceptual severance but court doesn’t like that
   2. Court says portion of property can still be built on
   3. “State may not put so potent a Hobbesian stick into Lockean bundle”
   4. Court says government doesn’t have to compensate owner because they moved in after statute was passed
   5. Ripeness issue: once statute is passed, you don’t necessarily encounter an issue or inconvenience right away, is an inconvenience and gives state too much power
   6. When evaluating “total economic loss”, don’t forget balancing test
3. *Tahoe Sierra Preservation Council v. Tahoe Regional*
   1. Facts: city put moratorium on Lake Tahoe property for at least 32 months for preservation purposes, property owners had purchased property for sole reason of developing it sued
   2. Holding: this was not a taking that requires compensation, Lucas doesn’t apply because it was only temporary
   3. Looked at Penn Central factors, court is afraid if they apply Lucas broadly then people will always be entitled to a payout, want to give agencies time to look into important environmental and safety matters
   4. Lucas only applies for permanent wiping out of usage of property, for temporary takings look at balancing test

**Exactions:**

1. City or state grants you something in exchange for some kind of concession (ie. easement), Many cities rely on this for public purposes (water rights, walking trails, ect)
2. Exactions have become a common substitute means of funding public improvements (must be a proportional exchange and essential nexus)
3. *Nollan v. CA Coastal Commission*
   1. Facts: Nollan wants to build a slightly larger house on his property, city allows development in exchange for easement on property which will allow public better access to beach, city says Nollan’s new house will restrict view of beach and have psychological effect on public
   2. Court says if Nollan hadn’t planned to rebuild home and city wanted an easement on his property, that would constitute a taking, city is trying to use exactment loophole (quid pro quo)
   3. Holding: city needs to pay for easement and let Nollan build his house, can’t infringe on owners right to exclude someone from their property
   4. Rule: issuance of permit conditional must have nexus between legitimate state interest and connection between harm homeowner is causing and the states interest in mitigating the harm
   5. “Nexus” – needs to be a link between harm being caused and what government is asking for, in exchange for you doing something you want to your property we want to do something to counteract the harm you are doing
   6. Court says no essential nexus between bigger house and easement through backyard
4. *Dolan v City of Tigard*
   1. Facts: Dolan wants to expand property by building addition to her store, city wants Dolan to put greenway and bike path on property, want to prevent floods and reduce traffic, exaction would reduce her property by 15-20%, Dolan requests a variance to get around ordinance
   2. Court holds there is a taking – exaction
   3. Test:
      1. Is there an essential nexus between harm being caused and what city is asking for? (If no connection, there is a taking, can stop here)
      2. Degree of connection
   4. Application of test:
      1. Preventing flooding and improving traffic are legitimate state interests, essential nexus exists here, request city makes related to harm being caused
      2. Is degree of exactions roughly proportional to impact of Dolan’s development? Flood plane is ok, directly related and proportional; court doesn’t understand why public should be able to access property at any time, takes away part of her bundle of rights, doesn’t buy argument related to traffic 🡪 not enough proof that a bike lane would reduce traffic

**Zoning**

Overview:

* Euclid zoning in general is constitutional, in some cases it may constitute a taking (75% depreciation not a taking, became standard for future courts)

1. Zoning: master plan to help map out land use, based on police power – state can regulate to benefit public safety, health, and welfare
2. State passes standard state zoning enabling act, city then creates zoning commission which implements a zoning plan (residential property usually cheaper than industrial areas/property)
3. *Village of Euclid v. Ambler Realty*
   1. Facts: Euclid on periphery of Cleveland, decides to start zoning for “use”, “height”, and “area” to try to avoid being incorporated into Cleveland, Ambler purchased property intended to be sold for industrial use, zoning resulted in 75% diminution in value, wants to be compensated for a taking
   2. Euclid zoning: U-1 (Single Family homes only); U-2 (SFH + duplexes); U-3 (SFH + Duplexes+ Apartments)….ect.
   3. Court says ordinance is valid, relate to nuisance laws, “while we may want people to be allowed to keep chickens, you may want to segregate them out from others”
   4. Is creation of residential districts a good idea? Yes, when you separate uses, increase safety and security, decreases noise and traffic, ect
   5. Court says there is no injury yet, you would have to show a lot to win at this point, court hasn’t seen practical effect yet
   6. Takeaways: Euclidean zoning, dividing into cumulative rigid use zones (higher uses are permitted in areas of lower uses but not vice versa – each subsequent category becomes broader, top category most narrow)
4. Nonconforming Use: already built on land that then becomes zoned so your property doesn’t conform to regulations
   1. Grandfathering – let non-conforming use continue until tenant leaves or business stops then apply zoning
   2. Amortization – give reasonable period of time when owner can stay then they need to leave
   3. *PA Northwestern District v. Zoning Hearing Board*
      1. Adult book store in PA, city ordinance changed 4 days after the store opens, gives store 90 days to leave, ordinance really only applies to the store
      2. Court says it is unconstitutional, 90 days isn’t reasonable, city didn’t prove it was a nuisance, can’t just shut down business you don’t like unless you want to exercise eminent domain
      3. Cant deprive property owner of lawful use of land without compensation 🡪 PA categorical rule only, minority of states say amortization is impermissible and require compensation, amortization doesn’t make up for fact that you zoned this person out of business
      4. Concurrence: look to certain balancing factors for amortization (majority of states use amortization and these balancing factors)
         1. Length of amortization in relation to nature of nonconforming use
         2. Length of time of amortization in relation to the investment, how much money is going to be lost
         3. Degree of offensiveness of nonconforming use in relationship to the surrounding neighborhood
   4. Texas zoning follows concurrence re: amortization, no problem with reasonable amortization period, if you have 25 year amortization period, you can sell to someone else within that time frame
   5. If large diminution, taking still exists
   6. If business gets destroyed under amortization, then business is ended, can’t rebuild
   7. Zoning ordinance is usually grandfathered in until it naturally comes to an end
   8. Amortization usually ok as long as it meets balancing test

**Variances and Special Exceptions to Zoning (Spot Zoning)**

Variances:

1. Two Conditions to Variance Granting
   1. Variance must be necessary to avoid imposing undue hardship
   2. If variance is granted, wont be detrimental to area
2. Undue hardship occurs when no effective use that can be made of property if variance is denied
3. How to show undue hardship: property owner must show reasonable efforts to comply with ordinance; harm can’t be self-inflicted
4. *Commons v. Westwood Zoning Board*
   1. Facts: plaintiff wanted to build one-family residence on only undeveloped lot, when purchased land, no zoning ordinance, attempted to purchase additional land so they could build and applied for variance, board denied variance saying it would decrease property values and be aesthetically unpleasing
   2. Court says plaintiff made reasonable efforts to comply, board had no evidence that allowing plaintiff to build would have any detrimental effect on community, granted ordinance
5. Self-imposed hardship: if seller could have qualified for variance, buyer should stand in same position 🡪 once you get variance it “runs with the land” – exists in perpetuity with the property, want land to be alienable

Special Exceptions:

1. *Cope v. Inhabitants of Town of Brunswick*
   1. Facts: developers wanted to build apartment complex in suburban residential use area; 2 factors at issue: use will not adversely affect health, safety or public welfare and will not devalue or alter essential characteristics of surrounding property
   2. Court concerned about Boards amount of power in deciding who gets exceptions, language in zoning ordinance is too broad to give guidance to agency

Variance v. Special Exceptions:

1. Ordinances usually contain special exceptions for certain types of non-conforming uses to occur (ie. can have schools in residential areas)
   1. Allows uses that are complimentary
   2. Board foresees uses that are good but would go against original language of ordinance so specify
2. Takeaway: difference between variance (must meet certain criteria, difficult to get) and special exception (usually easier, specified in ordinance)

Spot Zoning:

1. *State v. Rochester*
   1. Facts: single tract of land bordered by SFH, want to build high rise condo on property, neighbors don’t want condo built, tract zoned for low-density residential use
   2. Administrative law problem: Rochester city council approved and rezoned property
   3. Spot zoning is bad – shouldn’t zone one tiny piece of land in different way than surrounding property
      1. Court says there isn’t a concern here, area already has several different uses, there are no good, rational reasons to allow for a condo to be built here
      2. Court defers to agency, can only overturn them if there is no rational basis

**Part III: System of Estates:**

**Possessory Estates – Life Estate/Remainder**

1. Rigid set of materials derived from English feudal system
2. Extent to which you own your property depends on your estate, how did you get deed to your property?
   1. Can be conditions to use of property
   2. Can be time conditions on use of property
3. System of estates: set of rules and based on those rules you look at conveyance to see what interests people have
4. Fee Simple: idea that there are present and future interests in property
   1. Present: person has right to use land immediately
   2. O: To Alice for Life, then to Bob and his heirs
      1. Alice has present possessory estate, Bob has future interest (can sell future interest, fully transferrable)
5. Absolute estates: no requirements/conditions (Fee Simple, Life Estates, Term of Years)
   1. Fee Simple: estate of indefinite or potentially infinite duration
      1. O: To A and her heirs 🡪 Fee Simple Absolute
         1. Property belongs to A for the rest of time, she can decide who takes possession next. Largest, most expansive estate you can have
         2. Really just goes to A, A has son Billy, if Billy needs cash he can’t use property as equity, A doesn’t need to give Billy anything if she doesn’t want to
   2. Life Estate:
      1. O: To A for life, then to Bob and his heirs
         1. A has present interest
         2. Bob and his heirs have future interest
   3. Term of Years
      1. O: To A for 10 years
         1. After 10 years, goes back to O
      2. O: To A for 10 years, then to Bob
6. Waste: idea that if you only have life estate and B is waiting for A to die, don’t want A to start stripping value of property 🡪 divide into affirmative and permissive waste
7. Fee Simple Determinable:
   1. O: To A so long as A farms blue acre
      1. Fee Simple
      2. Term of Duration
      3. Condition
8. Fee Simple Subject to Condition Subsequent
   1. O: To A**,** but if A stops farming Blueacre, O may enter and retake
      1. Explicit mention of O 🡪 Right of Entry

**Defeasible Estates**

1. Defeasible Estates: estate in land that ends or may end upon occurrence of certain events: Fee simple, life estate, term of years can all be D.E. if you tack on an interest to it
   1. Fee Simple Determinable: present possessory estate, person will automatically lose land if certain condition occurs (possible that condition never occurs)
      1. NO comma and a condition
      2. Terms of duration – “so long as”, “while used for”, “until” (3 most common)
      3. Creates a future interest, possible that condition will be broken 🡪 possibility of reverter (moment the condition is broken, title to land reverts back to O)
      4. Adverse possession issue
   2. Fee Simple Subject to Condition Subsequent:
      1. MUST have a comma
      2. “But if”, “provided however”, “on the condition that”
      3. Explicit mention of “O” isn’t automatic, right of [re]entry, doesn’t trigger adverse possession, O must go to court to show condition has been broken 🡪 not automatic
   3. Fee Simple Subject to Executory Limitation:
      1. At end, instead of reverting back to O, it goes to somebody else
   4. Want O to have as many options as possible
   5. *Davis v. Skipper*: church land was held for fee simple church purposes, “To A so long as property is used as a church” – found oil deposits under property, continued to hold services with company drilling oil at same time, court said that was technically ok
   6. Covenants: making a promise to another party, don’t necessarily lose title to land, can impose injunction or penalty instead

**Future Interests:**

1. 3 Types of Future Interests
   1. Reversion: conveyance with something left over
      1. O: to A for life
      2. O: to A for 10 years
      3. O: to A for life then to B
   2. Possibility of reverter
2. O: To A for life, then to B when she turns 21
   1. B = 18 years old (has a vested remainder)
   2. A dies, what do you do?
      1. Common law – property reverts back to O permanently
      2. Modern law – goes back to O until B turns 21
3. Future Interests
   1. Indefeasibly Vested Remainders: 2 rules/requirements
      1. Must be an *ascertained person* – identified by name, person must exist/be alive
      2. O: To Alice for life, then to Bob (Not indefeasibly vested remainder) 🡪 then to Bob’s heirs, B = alive, don’t know B’s heirs until he dies
      3. Must follow natural termination of preceding estate and not be subject to a condition precedent
         1. Something where future interest holder just has to sit back and wait
      4. O: To A for life then to C for life, then to B
         1. B has vested remainder in fee simple, follow natural termination of estate
   2. Vested Remainder Subject to Open: subject to rule of perpetuities
      1. Still have ascertained person, waiting for time to pass/someone to die
      2. 2014: O: to A for life then to B’s children
         1. 2014: B has one child, C
         2. 2016: A still alive, B has twins, D and E – C now shares estate with D and E, more people can come into it
         3. 2017: A dies, class now closes, only children alive at time A dies can be included (C,D, and E own Blackacre in FSA)
      3. Vested remainder: don’t need to be alive when the time comes due to take property, goes to heirs
      4. Subject to open: subject to partial divestment
   3. Contingent Remainder: can become vested remainder
      1. Class gifts where no member of class has been ascertained yet
         1. O: to A for life, then to B [condition] if B graduates college
      2. Contingent remainder 🡪 NO COMMA
      3. O: To A for 10 years, then to S when S graduates college
         1. O has reversion if S doesn’t graduate
      4. O: To V for life, then to Harry if Harry survives V, and if Harry doesn’t survive V, to Luna and her heirs
         1. V: life estate
         2. Harry: contingent remainder
         3. Luna: contingent remainder subject to complete divestment
      5. Vested remainder subject to complete divestment:
         1. When you have one CR and then in the event it doesn’t happen, it goes to someone else down the line will have another CR
      6. O: to V for life, then to Harry, but if Harry doesn’t survive Voldy, to Luna and her heirs
         1. Note comma placement – sets off conditions
         2. Luna has shifting executory interest
         3. Harry has vested remainder subject to divestment
      7. O: To A for life, then to B [condition], else to C (CR 🡪 RAP)

**Executory Interests**

1. Held by third party who cuts short someone else’s interests
2. Shifting executor interest, fee simple subject to executor limitation
   1. Doesn’t follow life estates OR term of years, MUST follow a condition
3. O: To A so long as no trees are cut down, then to B
   1. A = FSD
   2. B = shifting executor interest
4. O: To A, but if trees are cut down, B may enter and retake property
   1. A = Fee simple subject to executive limitation (because it goes to third party)
   2. B = shifting executor interest

**Introduction to Tenancy in Common and Joint Tenants**

1. Co-Tenancy:
   1. Tenancy in common: each tenant has right to possess access to entire property, can have undivided, unequal interest
      1. Owners have separate but undivided interest in entire piece of property 🡪 through conveyance, deed, will
      2. O: To A, B, C, D as tenants in common (each have ¼ interest)
      3. O: to A ¾ interest in BA and to B a ¼ interest as TIC
      4. All TIC get to use *all* property as long as they don’t exclude somebody else (can’t actively block other TIC)
      5. TIC are free to sell property, leave property to someone else in will
      6. Courts assume TIC over JT
   2. Joint Tenancy: each tenant has right to survivorship over other tenants interest, intent plus four unities (same time, same instrument, same interest, right to possess entire property), if A dies, all passes to B, can sell interest at any time
      1. Treat group as a whole, when person dies, their interest vanishes
      2. O: To A and B as JT, with right of survivorship
         1. A dies, B now owns 100% of property in fee simple absolute
      3. O: To A, B, C as JT with rights of survivorship
         1. When A dies, now B and C have 50% interest
      4. O: To A, B, C as JT
         1. A sells to X before dying, now X is TIC and B and C are JT
      5. How to create Joint Tenancy, 4 requirements:
         1. Time: all must acquire interest at same time
         2. Title: each joint tenant must acquire title by same instrument
         3. Interest: must all have equal interest
         4. Possession: everyone has right to possess property as a whole
      6. 2014: Bob 🡪 Blueacre
      7. 2016: Bob 🡪 ¼ Blueacre to Jessica
         1. Violates JT requirement: same time, separate instruments, don’t have same interest (1/4 v. ¾)
      8. If multiple JT and one sells, new person is TIC, while other parties remain JTs
      9. *Riddle v. Harmon*
         1. Facts: Mrs. Riddle and husband are JT, Mrs. Wants to break into TIC so she can pass to son, common law requires strawman
         2. A, B Joint Tenants sell to strawman who sells back to them as tenants in common
         3. Minority rule: CA law says unilateral termination is ok, A can convey property back to herself to make it a TIC
         4. Policy behind secretly selling property to themselves to change to TIC
         5. Most jurisdictions require strawman
      10. Uniform Simultaneous Death Act (1940): if unknown who died first, distribute ½ property to X and half to Y who are now TIC (applies in all but 3 states, majority)
      11. To: A, B, C, D as JT, full rights of survivorship
          1. A sells rights to X, B dies
          2. A is now TIC, D and C own 2/3 as JT

**Relations Among Concurrent Owners**

1. Sharing Benefits and Burdens of Co-Ownership
   1. *Delfino v. Vealencis*
      1. Facts: unequal division of property, competing interests, one party wants to develop land for residential purpose, defendant wants to use part of land for trash disposal, P wants to sell land, D wants to partition land
      2. Holding: (minority view) prefer to partition in kind so you don’t displace anyone, better
      3. Court says if physical attributes of land make partition impracticable then force sale
      4. Possibility that sometimes owners’ overall interests are better served by sale, concern that if they partition, will have garbage hauling business next to residential neighborhood, hurts property values
      5. Partition in kind better because no trash on premises, just equipment in this case, no real “incompatible use”, D lived there for years
   2. Minority jurisdictions: partition in kind, divide up land – very subjective, time consuming
   3. Majority jurisdictions: partition by sale, sell and divide $ - easy to do, but consider emotional connection to land
   4. *Johnson v. Hendrickson*
      1. Uses majority rule, divide up property after death
      2. Partition decreases value of land, sentimental value doesn’t matter
      3. Sales are more efficient
   5. *Archland v. Harper*
      1. People have emotional attachment to property, take that into account
      2. Use minority approach
   6. Ouster and Adverse Possession
      1. “Ouster”: one co-tenant can oust or force off property other co-tenants by blocking access to property, exercises absolute dominion
         1. Point where statute of limitations runs on adverse possession
      2. At what point can other tenants claim rent or compensation for property that has been blocked?
   7. *Spiller v. MacKereth*
      1. Facts: Spiller and MacKereth own warehouses as tenants in common, lessee vacates property and D starts using it for personal storage, locks building to protect his belongings, P wants rental $
      2. Court holds D is not liable for rent, ouster has not occurred, no evidence P sought access or that D denied access, locking the warehouse and not providing a key was “not enough” for ouster, extreme case, set very high bar for ouster
      3. Court wants to encourage use of property
   8. *Swartzbaugh v Sampson*
      1. Facts: Swartz’s (husband and wife) are joint tenants, husband leases property to Sampson who tears down walnut grove for boxing pavilion, wife claims goes against lease, tries to cancel
      2. Issue: can one joint tenant unilaterally lease out property?
      3. As one joint tenant, he could do anything with land but other co-tenant could still access/roam property whenever they choose
      4. Broad approach – joint tenants can sell, rent their interest
      5. Wide can seek rent or ouster or use property or seek partition (can only seek rent if she has been ousted)
      6. Joint tenant can only lease out the portion of property they own

**Part IV: Leaseholds:**

**Leasehold Estates, Subleases, & Assignments**

1. 4 Types of Leasehold Estates
   1. Term of Years: O 🡪 A for 10 years (a least for 10 years)
      1. During this time, the landlord has no rights
      2. Lease ends at the end of time period – hybrid
      3. Ex: beginning 10/1 for a term of years. T moved out before 10/1 of the next year without any notice, but the Owner has no right under pure property law – now leases have contract and property provisions (30 days notice)
   2. Periodic Tenancy: lease for a fixed duration but it does continue for succeeding period until the tenant or landlord gives notice of termination
      1. O 🡪 T from year to year (or month to month) – as the year comes to an end either the T or the L is going to have to give some kind of notice if they want least to come to an end
      2. How much notice is needed?
         1. Common law: You give either the amount of notice is the length of the term if its less than 6 months. If the duration of the terms is longer than 6 months the maximum amount of notice is 6 months.
         2. Modern law: look to contract
      3. Texas Property Code: §90 or §70 – shows you how few rights you have as tenants, Texas extremely landlord friendly state
   3. Tenancy at Will: no fixed period of tenancy that lasts until someone terminates it or dies
      1. O 🡪 T for as many years as T desires (just any open ended type of lease) – not very common
      2. *Garner v Gerrish*
         1. Language stating that T has the privilege to terminate least at a date of his own choice – therefore a tenancy at will
         2. Issue: tenant has right to terminate whenever he likes. Does landlord have that right as well?
         3. Rule: if you have a lease that is tenancy at will and it explicitly gives the tenant the right to terminate at right, we do not imply the landlord has the same right
         4. If you give landlord the right to terminate at any time, the tenant has the right as well
      3. Policy: we want to construe contracts and leases in favor of the weaker party
      4. Texas: landlords are very crafty and make it explicity in the contract that tenant does have right, most loopholes can be closed out through the contract
      5. Problem: the provisions make the lease pretty much in tenants favor and if landlord died it would not terminate lease
   4. Tenancy at Sufferance (Holdover Tenancy) – when the least ends and the tenant is still there:
      1. Landlord can evict the tenant
      2. Tenant gives the landlord a check and landlord cashes lease
      3. Common law: goes to month-to-month lease with the same provision as the previous lease not to go longer than a year
      4. Ex: O 🡪 T for 2 eyars, if T pays and O cashes check after the 2 years then it is going month-to-month for another year
      5. *Ernst v. Conditt*
         1. Facts: lease from Ernst to Rogers, Rogers builds a go cart track, provision in the lease not to sublet without approval, Rogers sublets to Conditt and he defaults on rent
         2. Issue: E 🡪 R, R 🡪 C: is this a sublease or assignment?
            1. Sublease: give rights only to sublease a portion of the duration of your lease, if they default then burden is on lessee to cover that default – retaining some rights (right to renew it)
            2. Assignment: when a tenant transfers his entire interest in the property to someone else – has to be the entire duration of the lease and all your rights under the lease
      6. Issues of Privity of Contract v. Privity of Estate
         1. Privity of Estate: tenant is moving into position of landlord – modern way of looking at it, property interest has been created so landlord can sue tenant
         2. Privity of Contract: because you sign a lease, under contract law the landlord can recover
      7. Two situations when you give rights to someone else
         1. Assignment: transferring everything left in the lease. First, L and T1 no longer have privity of estate and all those obligations go to T2
            1. L and T1 still have the privity of contract, therefore the L can sue everyone if T2 doesn’t pay
         2. Sub-lessor: when sub-lessor stops paying there is privity of contract between L and T1 but privity of estate stays with T1, and L cannot sue T2 because they have no legal relationship. Privity of Contract between T1 and T2
2. Landlord-Tenant (2 Relationships)
   1. Privity of contract
   2. Privity of estate: based on common law system, property action where landlord can collect rent tenant didn’t pay
3. Assignment: occurs when you transfer all your rights to a lease to someone else
   1. Privity of Estate now belongs to tenant 2, landlord has relationship with both parties, if T1 stops paying, L can sue T1 OR T2
4. Sublease: you reserve some rights when you transfer rights
   1. L can only sue original tenant (T1) if T2 stops paying
5. Examples:
   1. Privity of contract stays with T1, privity of estate is with person who is living there at the time and stops paying rent
   2. If sublease, still on the hook
   3. If T2 stops paying, then assigns to T3 who stops paying, landlord can still sue T2 for the time period where he didn’t pay as well as T3
6. *Berg v Wiley*
   1. Wiley (L) unhappy with Berg (T) and enters property to change locks, can landlord engage in this “self-help repossession”? Yes- under certain conditions
   2. Majority rule/common law requires:
      1. L legally entitled to possession (T stop paying rent, violated lease terms, ect)
      2. Means of re-entry are peaceable
   3. Court held this was peaceable because tenant was away at time L entered, violence could have broken out if T had been there
   4. Minority rule: (court adopts in this case) L must *always* resort to judicial process, maintains peace and over exerting power, we have this system that works well, we should use it – reduce violence, prevent violations of the law

**Evictions and Abandonment**

1. Abandonment and Surrender
   * 1. General rule: If tenant leaves mid-lease they still must pay rent for remainder of lease
     2. What if landlord accepts abandonment and can release? L can accept surrender
     3. When does surrender and acceptance happen? Theory issue, when should original tenant be on the hook
   1. *Sommer v Kridel*
      1. L (Sommer) rejects new T interested in apartment and sues original T (Kridel) who abandoned property
      2. To what extent is there a duty to mitigate damages?
         1. Court wants to impose more safeguards, look to contract law remedies including mitigation
      3. Rule: landlord has duty to mitigate damages by attempting to re-let an apartment vacated by a T at fair market value
      4. L doesn’t have to lower their standards and accept bad T, must make reasonable effort
      5. Tenant is on the hook until new tenant comes in
      6. Is old tenant responsible for any deficiency in rent or has L accepted abandonment of property, court says L had burden of proof

**Implied Warranty of Habitability**

1. Duties, Rights, and Remedies
   1. Covenant of Quiet Enjoyment – right to undisturbed use and enjoyment of real property by a T or L
      1. T has right to freedom from serious interference with his tenancy, free from acts or omissions that impair character and value of leasehold
      2. Comes from property common law, don’t want L to interfere with tenancy or let property fall into disrepair
      3. Remedy: T can stop paying rent until problem is resolved, need to give L reasonable amount of time to make repairs
   2. Covenant of Constructive Eviction: sometimes comingled with quiet enjoyment
      1. Act or omission of L which renders premises substantially unsuitable for purpose which they are leased or seriously interferes with enjoyment of premises
      2. \*Can only claim if you move out and stop paying rent (ex. Move to a hotel temporarily and stop paying rent, say you were constructively evicted)
      3. Most cases involve lack of heat in cold winter months in North
      4. Must give L reasonable time to fix
      5. Partial eviction – if one room is flooded but rest of apartment is ok- some states let you claim partial eviction and can pro-rate rent
      6. *Reste Realty v Cooper*
         1. Space leased for commercial purposes, after first year lease is extended to five years
         2. Space would flood every time it rained, damaging T stuff
         3. L claims not an issue because it wasn’t “permanently” flooded, she renewed lease so she accepted the condition she already knew about
         4. Issue: was there a breach justifying T not paying rent and leaving?
         5. Yes- constructive eviction by way of quiet enjoyment, even though water wasn’t “permanent” in basement
         6. For exam 🡪 check if quiet enjoyment problem, then if T moved out, move to constructive eviction
   3. Breach of implied warranty of habitability
      1. For exam 🡪 Minority of jurisdictions don’t have IWH, mention on exam
      2. *Hilder v St. Peter*
         1. Facts: T renting apartment, kept asking L to fix major issues, he never did
         2. Oral lease – no specifics to what L promised re: who was expected to make repairs
         3. Minority rule: Caveat lessee – T takes land “as is”, if you take possession of property in disrepair then you accept those conditions and L not liable to T (if existed at time T took possession)
         4. Old property law based on feudalism, now city dwellers, L in better place to fix problems
      3. *Every lease* has implied warranty of habitability – safe, clean, appropriate for human living, CANNOT contract around this warrant, cannot waive
      4. Patent defects are obvious, latent defects take time to discover (both are covered under this warranty)
      5. Tenant can stay in possession and withhold rent, make repairs 🡪 DON’T have to leave like under constructive eviction
      6. Damages: difficult to compute, court must try, T can withhold rent
         1. If T makes repairs, can deduct the cost from rent
         2. Should possibly get punitive damages where L is slumlord
      7. Look to state, municipal, or city housing codes to bring case against L – inhabitability, major health/safety concerns
      8. Implied warranty allows you to stay on property and
         1. Sue for damages
         2. Withhold rent

**Part V: Land Transactions**

**Introduction to the Sales Contract – Buying and Selling Real Estate**

1. Purchase and Sales Contracts
   1. Sets forth the terms of the anticipated transaction and establishes the steps that must be taken prior to the actual transfer of land
   2. Signing of K starts attorney review, only governs for a short time
2. Attorney review
   1. Buyer:
      1. Title contingency: conducts title search to determine whether the title being transferred by the seller is “good” (marketable)
      2. Mortgage contingency: arranges for financing, generally a mortgage
      3. Inspection contingency: has property inspected to ensure house is in good condition
      4. Appraisal contingency: has property appraised to ensure contract price is fair-market value or less
3. Deed:
   1. Purchase and sale contract does not affect the transfer of property
   2. Property is transferred by a separate and permanent document, the deed
   3. Deed typically executed at “closing” during which all interested parties gather to sign the necessary transaction documents
   4. At closing, money is paid for property and possession of title to the property changes hands
4. Title Assurance and Recording System
   1. How do we keep track of the transfers that are being made?
   2. All states have a recording system, typically each county has a records office
   3. Recording is NOT required for a valid transfer BUT it puts everyone on notice that you own the property, otherwise buyer could lose property to a subsequent bona fide purchaser
   4. Similar system exists for recording liens that are secured against real and tangible property
5. Statute of Frauds and Sales Contracts
   1. Oral contracts = danger of fraud
   2. Sale of property is included under the statute of frauds, needs to be in writing
   3. Generally, K for the sale of real estate
      1. Must be in writing,
      2. Must be signed by the party to be bound (the seller, in this case)
      3. Must describe the real estate, and
      4. List price if one has been agreed to
   4. Example 1: O executes, delivers a deed of Blackacre to A as a gift. Deed is not recorded. O changes mind, asks for the property back, and A hands the deed back to O and says “this land is yours again.” Deed is torn up. Who owns Blackacre? A still owns, b/c transfer from A to O didn’t comply with statute of frauds
   5. Example 2: O creates deed giving Blackacre “to O and A as joint tenants.” A wants to transfer her interest to her son B, so she whites out her name and replaces it with his. Deed is recorded, O dies. Valid? No, conveyance needed to be signed by A as party to be bound. So JT not broken. Fact that it is recorded is irrelevant. So who owns Blackacre? A, as surviving joint tenant.
6. Exceptions to Statute of Frauds: Common Law
   1. Under Cl: partial performance and estoppel
   2. Partial performance: allows for specific enforcement of oral agreement when certain actions have been performed under the K
      1. Typically (1) provision of purchase price and (2) taking possession of land
   3. Estoppel: applies when unconscionable injury would result from denying enforcement of the oral K after one party has been induced by the other to change his position in reliance on the K
7. Exceptions to Statute of Frauds: Restatement
   1. A orally agrees to sell land to B, A backs out
   2. Specific enforcement if party B (1) in reasonable reliance on the K and continuing assent of A “has so changed his position that injustice can be avoided only be specific enforcement”
   3. Comment d: if parties agree that there was an oral agreement in place, then the purchaser must merely act reasonably in reliance of the promise before the seller repudiates
   4. *Hickey v Green:* 
      1. Oral K to sell Lot S to Hickeys for $15,000. Green accepts deposit check of $500, marked “Deposit on Lot…Subject to variance from Town…” (didn’t cash or endorse check). Hickey stated he told Green he was going to sell his house and move, and then does so. Green backs out of deal
      2. Seller had knowledge buyer was going to sell property
      3. “Unconscionable” injury would result from denying enforcement of oral contract after one party has been induced by another to change his position in reliance on contract
      4. Court applied restatement
   5. *Walker v Ireton*:
      1. Oral K to purchase farm for $30K, buyer gives seller $50 check which is never cashed
      2. Buyer sells his current home (without knowledge of seller), seller backs out
      3. Court refuses to grant specific performance, delivery of check does not in itself meet the SoF, sale of farm is not sufficient reliance on oral K, not within contemplation and understanding of parties, not foreseeable by seller
8. Multiboard Residential Real Estate K
   1. Purchase price and how it will be paid
   2. Legal description of property
   3. Evidence of good title furnished by the seller
   4. Any restrictions on the title
   5. Date of transfer of possession
   6. Proration of utility bills, property taxes, ect
   7. Name party responsible for natural disaster
   8. Basic terms of any escrow agreement
   9. Provision for return of $ if sale doesn’t go through

**Marketable Title and Duty to Disclose Defects**

1. Marketable title defined: title free from encumbrances and any reasonable doubt as to its validity, and such as a reasonably intelligent person, who is well informed as to the facts and their legal bearings, and willing to perform his contract, would be willing to accept in exercise of ordinary business prudence
2. Prior to closing: put down good faith deposit, sign purchase contract and enter attorney review
   1. Seller must provide marketable title, buyer wants land free of encumbrances that *reasonable* person would be willing to accept the terms
3. Problems that can arise: (seller does not disclose)
   1. Someone is a tenant on property and their lease continues
   2. Someone else has first right to buy
   3. Adverse possession claims
   4. Liens/mortgages/financial encumbrances
      1. Use property to secure loan for X corp, defaults on loan
      2. Part of bankruptcy estate
   5. If buyer discovers problem during attorney review, can get any money back or renegotiate contract
4. *Lohmeyer v Bower*
   1. Lohmeyer wants to purchase property from Bower, during attorney review, learns there is a restrictive covenant on house which says house must be 2 stories (currently only 1 story) in addition to zoning ordinance violation
   2. Public covenant: Court says mere existence of municipal ordinance that wasn’t disclosed on its own does not violate marketable title, but if property is in *violation* of that statute, it does violate municipal title
   3. Private covenant: mere *existence* of this violates marketable title, no matter what (seller should be very much aware of this v. city ordinance maybe not, generally these are recorded)
5. Majority rule: undisclosed easements violate marketable title, exception if easement really obvious and should have been known by buyer, usually ok
6. Equitable Conversion: After purchase and sales contract signed, before closing, if something catastrophic happens:
   1. Majority: buyer bears risk of loss (common law), most prudent people contract around this to put responsibility on seller
   2. Minority: loss is on the party who is in possession or seller before they vacate
7. Duty to Disclose Defects:
   1. *Stambovsky v Ackley*
      1. Minority approach
      2. Haunted house case, seller never disclosed to buyer had been widely documented and promoted as haunted, buyer was from out of town
      3. Poltergeist is a “latent defect”
      4. NY adheres to doctrine of caveat emptor (minority rule overall) and imposes no liability on seller to disclose info concerning premises unless confidential or fiduciary relationship between parties
         1. Exceptions: fraudulent misrepresentation, active concealment, fiduciary duty between parties, affirmative misrepresentation (statements inconsistent with truth)
      5. Court has equitable power to make things right under these exceptions
         1. New remedy: *seller created* this representation of house being haunted and was *uniquely within sellers knowledge* and *created materially impairing value* of property, *buyer unlikely to discover* on his own
   2. *Johnson v Davis*
      1. Issue with leaky roof, Davis’s bought home, Johnsons knew of roof but said it was not leaky
      2. Latent problem: roof leaks, sellers affirmatively/fraudulently claimed no problem with roof
      3. Seller knew leaky roof materially effected value of property
      4. Rule: Seller has duty to disclose where:
         1. Known defect/latent defect
         2. Materially effects value
         3. Not readily observable/known
      5. Court draws distinction between nonfeasance and malfeasance, ups the standard
      6. Shift from Johnson to a “disclose everything” approach
   3. Majority: some kind of affirmative disclosure is required, most are moving towards disclosing *all* defects
      1. What is “material”?
      2. Reasonable person standard: would disclosure make buyer consider I do want to buy this house at this price?
   4. Duty to disclose stigma: sex offender in neighborhood, rehab clinic nearby, ect.
      1. How far do you take it?
      2. States vary widely on disclosure of these things, sometimes place duty on realtor
   5. Allowed to have clauses say sell property “as is” so long as not actively concealing something
   6. Rights After Closing
      1. Merger: after closing, when deed is transferred, terms and sales K usually cease to exist and deed now takes over and reflects terms set by parties – trend to include language that keeps language in terms and sales K alive

**Implied Warrant of Quality; the Deed**

1. *Lempke v Dagenais*
   1. Sellers recently repaired garage, new owner (buyer) notices serious problems with garage and sues (6 mos after purchase)
   2. 2 Issues 🡪 tort and contract issue – current owner didn’t have privity with garage repair company
   3. In Lempke, new buyer is 3rd party, wasn’t part of contract, court says warranty should still apply
      1. Public policy 🡪 want fairness, who can best take the fall, builder whose business it is to be in industry should be responsible
   4. Court holds subsequent purchasers can sue, reasoning:
      1. Latent defects take time to appear
      2. We move a lot in modern society
      3. Don’t want sham sales
      4. Holding to same standard
      5. Inequality of knowledge/information
   5. Latent defects – look to reasonable period of time, if defect is something that was seek or should have been seen then warranty does not apply, must be latent
2. Deeds
   1. Requirements for deed (Some states have short form deeds, long form uses old English)
      1. Deeds must be in writing
      2. Must state name of grantor (seller) and grantee
      3. Need words of grant
      4. Description of the land
      5. Signature of person selling/transferring land (Statute of frauds)
      6. Usually need notary
      7. Consideration – show consideration from grantee, not always required, want to show person is bona fide purchaser
   2. Types of Deeds
      1. Quitclaim Deed: buy land “as is”, no promises, seller isn’t even claiming ownership 🡪 can’t usually get mortgage or insurance on quitclaim deeds
         1. A 🡪 B1 (recorded)
         2. A 🡪 B2 – quitclaim
         3. B2 has no recourse against A
      2. General Warranty Deed: seller provides warranty against all defects in title to the buyer – provides most protection to buyer, has recourse against seller
      3. Special Warranty Deed: seller giving warranty in title related to grantors own acts, only things they personally screwed up (ie. granting easements)
   3. Covenants
      1. Present Covenants: subject to statute of limitations on purchase, depends on jurisdiction, can get damages – money back
         1. Covenant of Seisen – grantor warrants that he owns the property he purports to convey
         2. Covenant of right to convey – grantor warrants he has the right to convey the estate (in most cases, this covenant serves the same purpose as seisen, but it is possible for someone to have seisen and not right to convey)
         3. Covenant against encumbrances: grantor warrants that there are no encumbrances on the property (ie. mortgages, liens, easements)
      2. Future Covenants: can be breached after deed is executed, usually assignable, run from time you discover problem
         1. Covenant of general warranty – grantor warrants that he will defend against lawful claims and will compensate grantee for any loss the grantee may sustain by assertion of superior title (not much, basically get attorneys fees)
         2. Covenant of quiet enjoyment – grantor warrants that the grantee will not be disturbed in his possession by anyone with superior title (basically same as covenant of general warranty and is left out of several deeds for this reason) (not much, basically get attorneys fees)
         3. Covenant of further assurances – grantor promises that he will execute any other documents required to perfect the title conveyed (useful, seller makes certain promises for the future, protects you if seller flakes on providing title, can get specific performance)

**Warranties of Title**

1. *Brown v Lober*
   1. Owners of land conveyed it to Bost’s but retained 2/3 of mineral rights, Bost’s then conveyed to Browns by general warranty deed (containing no limitations) who were unaware they didn’t own all the mineral rights, Brown tries to sell mineral rights and sold they only own 1/3, brown brings action for constructive eviction by breach of quiet enjoyment warranty and breach of general warranty
   2. Court found no breach of quiet enjoyment because Brown has not been disturbed because no one has come to take the minerals – mere existence of paramount title does not constitute breach of quiet enjoyment
   3. No breach of general warranty because statute of limitations has run
2. *Frimberger v Anzellotti*
   1. Facts: D’s brother subdivided land and transferred it by quitclaim deed to D, D’s brother had developed on land considered wetlands, D sells by general warranty deed to P, P tries to improve on land and finds out about land violations, P does not diligently try to work with regulations dept – P just sues D
   2. Issue: whether latent violation of ordinance existing at the time of conveyance is a violation of warranty against encumbrances
   3. Ruling: D did not know about the defects (they were latent) and latent conditions on property in violation of government regulations are not encumbrances, so no breach of warranty against encumbrances – P has not really suffered injury yet, court wants to promote certainty
   4. Minority approach: allow government regulations to breach covenant against encumbrances, violation of zoning regulations existing at time of purchase breaches covenant if it injures landowner

**Mortgages**

1. Personal property: lender takes lien or interest in your property, mortgages not governed by UCC
2. Mortgagor: person buying property, borrowing money
3. Mortgagee: bank/lender
4. Mortgage Crisis:
   1. Government promoting ideas of home ownership, subprime, Alt-A loans
   2. Adjustable Rate Mortgages – starts at really low interest rate, hard to keep up with payments
5. Why take an ARM?
   1. Flip property
   2. Hope property values continue to go up
   3. Figure out later/refinance/actively misled
6. Majority: lien theory state – mortgagee (lender) interest is a lien on the property, deed to property stays with mortgagor, mortgagor still the owner but bank has lien as security
7. Minority: title theory state – bank has title to property until mortgage is paid in full (Deed of Trusts)
8. Standard Mortgage:
   1. Promissory note: establishes borrower and lender, amount of debt, terms of repayment and interest rate
   2. Mortgage: borrower conveys title or lien to lender for security
   3. Deed of trust bypasses court system – bad for homeowner, held by neutral third party
   4. Second lien bank put up defaulters house for sale, pay back bank one first – second liens have less favorable terms
9. Deficiency Judgments: if your house is foreclosed and its not enough to pay off liens, bank can go after all your assets – some states passed anti-deficiency statutes so only house could be taken (CA)
10. TX passed very weak anti-deficiency statute, after sell house court looks at how much is really still owed to bank
11. Mortgage Foreclosure
    1. Facts: Homeowners fall behind on mortgage payments, try to work things out with bank but unsuccessful, bank forecloses on home for failing to pay legal fees, on date of foreclosure and resale of house, bank makes only big on house for $27,000 (exactly what was owed to them), flip house the next day for $38,000 to Southern, homeowners sue to get damages, court finds Southern was a bona fide purchaser so don’t take house away, court finds fair market value to be $54,000
    2. Court said bank (as seller) had duty of good faith and due diligence 🡪 owed fiduciary duty to home owner, every reasonable effort to get best price, consider if it shocks the judicial conscience
    3. Due diligence is required – bank clearly could have done more
    4. Court gives damages to Murphys – difference between fair market price and purchase price (ie. what was owed to bank)

**The Recording System**

1. Title Assurance
   1. How does purchaser know if seller has good title?
   2. Every state offers recording of title, usually at a county level, system very messy
2. 2 Systems
   1. Minority states: tract index (useful), based on land location, few states have this
   2. Grantor/Grantee Index: messy system, look up by grantor/grantee surname, indices often inaccurate, criss cross indices
3. How far back do you trace title back?
   1. Adverse posessors help
   2. Most states have marketable title acts, tell you how much time you have to trace good title, anyone with greater claim past that time loses it (TX does not have this, have to go all the way back)
   3. Record notice of claim every so often
4. Abstracts: summarize and consolidate indices, buyers can order abstract from private companies- most commonly used system for determining title
5. General Rule: when multiple parties claim ownership, typically first bona fide purchaser who recorded the deed wins
   1. Bona fide purchaser: received title to property in good faith, must be purchaser – paid money for property
6. Notice:
   1. Actual Notice:
      1. someone definitively tells person of title problem
   2. Constructive Notice:
      1. regular due diligence including checking records office, reason for suspicion (inquiry notice) 🡪 nothing indicated tours had interest in this specific tract
   3. Inquiry Notice:
      1. Something tipping buyer off that should put them on notice (ie. someone living in house who is not the seller) – catchall category, varies heavily by jurisdiction
7. *Luthi v Evans*
   1. Owens grants all oil & gas lease rights in a certain county to Tours (**Mother Hubbard clause-** conveys whatever interest you have in property, doesn’t specify land), Owens later gave her interest in one of the tracts she had given Tours to Burris, Burris performed a personal inspection and researched for abstract of title and neither came up w/ Tours (b/c of the confusion over the Mother Hubbard clause – it didn’t list each plot by name, just all in that area), This was a notice recording system jurisdiction
   2. Mother Hubbard clause in initial transfer did not provide any constructive notice to Burris, no constructive notice unless property is sufficiently described in its recording
   3. Holding: Burris did not have constructive notice and is entitled to tract, Tours was in better position to figure out what they owned and record it
      1. Specific description of property in deed conveyed is required for constructive notice
   4. Kansas Notice Recording Statute: subsequent purchasers with no notice of previous sale get title over person who purchased before him, therefore last person without notice wins
   5. Notes:
      1. Fact that Tours never recorded property doesn’t change the fact that they purchased property, sale is still in effect, but purchaser is vulnerable if don’t record it – look at who to put the burden on
      2. Tours can try and sue Owens for their money back or try title insurance
      3. Policy: if subsequent purchasers were required to go through and check Mother Hubbard clauses and then search to see what land was owned by grantor, it would be an inefficient result – Tours was the cheapest cost avoider
8. Recording Acts
   1. Common Law Rule:
      1. when we have property and it has been sold multiple times, first person to buy wins
      2. Ex) 1990: O 🡪 A; 1995: O 🡪 B (under CL, A wins - unfair to B)
   2. Race Jurisdiction: (only 2 states use)
      1. Between successive purchasers, first to record wins, regardless of what they know – person to win the race to record prevails
   3. Race Notice Jurisdiction:
      1. A subsequent purchaser for value is protected against prior unrecorded instruments only if the subsequent purchaser (1) is without notice of prior instrument and (2) records before the prior instrument is recorded
         1. No actual or constructive notice (innocence) AND
         2. Record first (1st to record)
   4. Notice Jurisdiction: (TX)
      1. An unrecorded instrument is invalid against a subsequent purchaser for value without notice, a subsequent purchaser without notice prevails (even if subsequent purchaser does not record), notice can be actual or constructive

**Title Assurance**

1. Bona Fide Purchaser: race notice and notice statutes, innocent buyers who are paying for property – have strongest claim to property (nominal consideration probably doesn’t work)
   1. 2000: O 🡪 A (A doesn’t record)
   2. 2010: O gives property to B (B records, no notice)
   3. A owns property, B is not a bona fide purchaser
2. Wild Deeds: situations where there are split conveyances which would be difficult to determine (outside of the chain)
   1. *O – A (A didn’t record)*
   2. *A – B \*WILD DEED\**
   3. *B records*
   4. *O – C (no notice)(BFP)(C Records)*
   5. C wins – has no reason to know of sale from O to A, B should have told A to record his conveyance to O, reward BFP with no notice, would have had no way of finding wild deed
   6. 2010 Exam Question: Notice jurisdiction
      1. 1/1/2006: M 🡪 C (C does not record)
      2. 6/1/2007: C 🡪 G (G records) WILD DEED
      3. 1/1/2008: M 🡪 S (S does not record)
      4. 8/1/2008: S 🡪 A (A does not record)
      5. Who owns? A
         1. A is BFP and had no notice. G should have asked C to record
3. *Harper v Paradise*
   1. Facts:
      1. Susan Harper conveyed to Maude Harper by deed a farm for life. The remainder interest was to go to Maude’s named children, the Plaintiffs. This deed was lost for over thirty years, until 1957 when it was found and recorded. However in 1928, because the Plaintiffs could not find the deed, they executed another instrument which was recorded in 1928 stating that although they could not find the first 1922 deed, this deed conveyed the land to Maude. In 1933 Maude used the land in question to secure a loan from Thornton. When the loan went into default, Thornton foreclosed in 1936. There is an unbroken chain of title to the property from Thornton, which ends with the Defendants, the Paradise’s (Defendants) as owners. Plaintiffs sued to quiet title. The trial court found for the Defendants and the Plaintiffs appealed.
      2. Children sue to recover possession after knowing Maude only had life estate, state found constructive notice because new deed mentions prior deed
   2. Court found for plaintiffs, says you are responsible for your whole chain, no adverse possession here because life estate doesn’t start until death
   3. Rule: A deed in the chain of title, discovered by the investigator, is constructive notice of all other deeds, which were referred to in the deed discovered
4. O: To A for life then to B (X adversely possessed property – B has no way to fight this until A dies)

**Part VI: Land Use Controls**

**Nuisances**

1. What is a nuisance? Nuisance v Trespass
   1. Trespass usually physical intrusion
   2. Nuisance law gives remedies for non-trespassory invasion rights, interferes with use or enjoyment of property, noises, smells, vibrations, ect 🡪 things that are ugly don’t count, light issues are controversial
2. When is there liability?
   1. Intentionally invades land
      1. When D knew conduct would interfere with neighbors use and enjoyment or *substantially* certain to do that
   2. Unreasonable conduct
      1. Restatement (2d) – majority approach:
         1. Gravity of harm outweighs utility of conduct (from first restatement, second restatement adds prong 2)
            1. Social value of use
            2. Suitability to locality in question
            3. Burden on P of avoiding harm
         2. Is harm serious and can neighbor afford to pay off neighbors for damage done so they can continue activity?
      2. Jost – minority approach: set arbitrary threshold and if passes threshold it is unreasonable
3. Damages: Balancing of Equities
   1. If Injury (Defendant + Public) < Injury (Plaintiff) 🡪 Grant injunction
   2. If Injury (Defendant + Public) > Injury (Plaintiff) 🡪 Cash damages
4. *Morgan v High Penn Oil*
   1. Facts:
      1. High Penn has oil refinery which was emitting bad odors, making people sick
      2. Morgan owned property with restaurant on it which was effected by smells
      3. Court takes intuitive approach, cant use property in a way that injures neighbor
   2. Intentional nuisance: when person’s conduct is unreasonable
   3. Court issued injunction against High Penn, put cost on person committing the action
   4. General rule to apply (Restatement 2d)
      1. Gravity of harm v utility of conduct
      2. Pay person off? Can they compensate the other party?
   5. Holding: court found High Penn met all the factors – ruled in favor of Morgan – ordered injunction
5. Economics
   1. Pigou: if cows are destroying neighbors crops, government should force ranchers to stop causing harm otherwise he will keep doing it
   2. Coase: market will adjust to this harm, how much financial harm is it doing to neighbor v cost to avoid harm, either pay off neighbor or pay to fix, assumes rational thought
6. *Estancias Dallas Corp v Schultz*
   1. Apartment complex had giant A/C unit which made a lot of noise, shook house, devalued their land (loss of $15k), Schutlz’s damages $25K (harm + drop in value), Apartment complex: $150k - $200K to repair A/C unit
   2. Factors:
      1. Who can best absorb the cost?
      2. Total harm to neighborhood
      3. Incentive to avoid noisy A/C
         1. Schultz’s had been living there a long time
   3. Balancing of equities
      1. Total amount of injury v benefit
      2. Injury which may result to defendant (apt) and injury to public if liability imposed on D (lack of housing)
   4. Holding: Court granted injunction, city didn’t really need an apartment complex, court considered policy factors

**Nuisance Remedies, Public Nuisances**

1. *Boomer v Atlantic Cement Co*
   1. Facts:
      1. Cement company causing dirt, smoke, vibrations to enter surrounding property
      2. Ps damages: $185K (permanent damages), approximately $100K so far v. Ds damages: $45 million + 300 employees
   2. Should an injunction or damages be granted?
   3. Rule in NY like to give injunctions, even where dramatically different economic consequences (past rule)
   4. Harm (public + cement co) > Ps damages 🡪 cash damages
   5. Court acknowledges damage will continue, no foreseeable way for it to stop, doesn’t make sense to keep granting temporary damages, pay off permanently
   6. Next person to purchase property buys it subject to nuisance, drop in property value
   7. Cost/benefit opinion
2. Public Nuisance: unreasonable interference of legal right common to public as whole
   1. Liability same as private nuisance
   2. Differences with private nuisances
      1. Difference in degree, focus on damage to community, city, ect, involves multiple people, can always fall back on private
      2. Damages – want someone who is motivated to represent group, need to show *special damages* (different from that of general public)– show damages are particular or of a different kind than the group, additional/heightened showing (some courts relaxing standard)
         1. More people, more damages, more powerful
         2. Better chance of getting an injunction under formula
   3. Public Nuisance Uses – more powerful
      1. Used for drugs, prostitution, ect
      2. Demolishing rundown buildings – danger to community
      3. Environmental context
      4. Passing legislation
3. *Spur Industries v Del E Webb* 
   1. Facts:
      1. Spur had many feedlots, Webb purchases property nearby and makes it residential neighborhood for retirees (SunCity)
      2. Smells and flies waft into SunCity
      3. Spur had previously been in the middle of nowhere, nobody lived nearby for 30 years, they had no way of knowing surrounding area would grow
      4. Public health issue arises from feedlot, statute declared certain public health issues nuisances (flies)
   2. Issues:
      1. Should injunction be granted?
      2. Webb can no longer make residential sales, they can bring public nuisance claims (special damages)
   3. Holding:
      1. Court follows statute, has to grant injunction, neighborhood is already there with residents who are injured, required by statute
      2. Court says Webb could be held liable for Spur’s damages because they could have reasonably foreseen this nuisance, feedlot was already in place
      3. Webb has to pay Spur’s cost of relocating away from SunCity
   4. “Coming to the nuisance” – will be used against you, health code violation was issue here
4. Examples
   1. Idaho case feedlot was essential to local economy, court looked at balancing gravity of harm, did not grant nuisance, local laws are important
   2. P’s living together in suburban area, homes close together, neighbor builds kennel for 16 loud dogs as hobby, P sys dogs keep him up at night
      1. Is there a nuisance? Yes – sound
      2. Liability? Balance gravity of harm – no sleep, cant enjoy yard, no utility of having dogs, likely liability on D
      3. Injunction? Look to balancing of equities
5. Second prong of restatement: if serious harm and person can afford to compensate person harmed, can trigger liability – still look to Estancias test, most likely to issue permanent damages
6. Environmental Issues
   1. Federal regulations for environmental protections, TX bad about enforcing regulations
   2. Can you use nuisance law to counteract this? Houston passed air pollution statute – yes you can have independent control, local government can use nuisance law and pass legislation
   3. Class action suit against Exxon Mobile for ozone pollution issues, health related
7. Preventing/Regulating Nuisance
   1. Courts can impose injunctions prior to nuisance occurring if danger is imminent
   2. Cities can pass their own nuisance ordinances with states permission

**Easements**

1. Introduction to easements
   1. Servitudes: individual property owners want/need to make private agreements with their neighbor regarding their properties
      1. History – breakdown of common land ownership in England 🡪 enclosing of commons, new issues with private property ownership
      2. Modern servitudes/private land agreements acknowledge interrelated conflicts of private land uses
      3. Can complicate title issues
   2. Easement – explicit agreement allowing non-owner to enter upon and use property
      1. Want to be able to bind future successors, easement runs with land
      2. Considered to be for a certain amount or scope of use
   3. How to get rid of easement
      1. Pay person off
      2. Block access to adversely possess it back
      3. Buy out property
   4. Easements should be recorded
      1. A – B (E) – didn’t record
      2. A –C (all property) – takes easement from B
      3. C records (all property)
   5. Easement appurtenant: attaches to a particular piece of land, causes another piece of land to go up in value (the property without easement)
      1. Gives right to make specific use to whomever owns a parcel of land that the easement benefits
2. Implied Easements
   1. Easements Created by Estoppel
      1. Factors:
         1. License granted
         2. Licensee spends money or labor in good faith reliance
         3. Licensor has knowledge or reasonable expectation that reliance will occur
      2. B takes action based on assurance from A and relies on it, can convert into full blown easement
      3. Usually oral agreement from B to A saying they have permission to use property, usually revocable - Way to to revoke license (in some jurisdictions) 🡪 if house burned down or necessity ends
      4. Under some circumstances, license can be irrevocable
      5. *Holbrook v Taylor*
         1. Facts: Holbrook bought property and allowed easement for access to coal mine, Holbrook later built and leased house on property to Taylor, Taylor made improvements to the road, Holbrook blocked access to road to stop Taylor’s use, Taylor claims easement by estoppel,
         2. Holbrook gave Taylor permission to use roadway during construction of house and repair of roadway 🡪 license existed
         3. Taylor relied on license by making improvements and needing road to get to property, no other way for Taylor to access property
         4. Court held Holbrook was estopped from revoking license, easement will not run with land
   2. Easements Created by Judicial Implication – 2 kinds, can be extinguished
      1. Implied by Prior Existing Use
         1. One original owner
         2. Necessity at time of severance
         3. Prior use by original owner that was apparent, continuous, and permanent
         4. Reasonable necessity or strict necessity (depends on jurisdiction)
            1. Majority – show reasonable necessity, avoid delays, costs, ect, lower bar than strict necessity
            2. Minority – strict necessity required, was easement granted or reserved? Who benefits from easement? If you *created this problem* yourself then court wont grant you easement for free

Apply strict necessity if you caused problem, otherwise use reasonable necessity

Reserved easement: strict necessity, where seller should have reserved easement

* + 1. By Necessity – meant to be *high standard*
       1. One original owner
       2. Necessity at time of severance
       3. Strict necessity for entry/exit (landlocked)
    2. Example:
       1. By Necessity:
          1. One original owner, A – MET
          2. At time A subdivided, was there necessity for B to cut across her adjacent land? – yes, MET
          3. Is it strictly necessary for entry/exit? – yes, MET
       2. Prior Existing Use:
          1. One original owner, A – MET
          2. Necessity at time of severance – MET
          3. Is there prior existing use (by original owner) that is apparent, continuous, and permanent

Did Amy historically use plot A to get off plot B? How did original owner use the land?

Apparent: worn path across property

Continuous/permanent: reasonable person would expect property to be used in same/continued way as original owner

* + - * 1. Is requisite necessity met?
    1. *Van Sandt v Royster*
       1. Facts:
          1. Owner builds private sewer across 3 lots to reach public sewer, Van Sandt purchases one of the lots, sewer line breaks and floos his home
       2. Issue: Do other lot owners have easement to have sewer under his home?
       3. Under implied by prior existing use:
          1. Yes
          2. Yes – only sewage connection at time of severance
          3. Was prior use apparent? Court says yes – you should have realized there was a sewer system, should be enough inquiry notice
          4. Reasonable necessity? Other lot owners prevail, would have to incur great costs to change sewer line, ect
       4. Person who benefits from easement usually has to pay for it/upkeep
       5. Court says Van Sandt should have known
       6. Notes:
          1. BFP are not protected by either of these easements outside traditional recording system, unwritten transfer of land
          2. Easements by necessity end when necessity ends
    2. *Othen v Rosier*
       1. Facts:
          1. Hill owns 4 tracts of land, sells 2 of them to Rosier and 2 to Othen; Rosier’s land cut off Othen’s path to the public road, Rosier’s build levy which makes it impossible for Othen to get to his property when it rains, Othen claims easement by necessity
       2. Holding: For there to be an easement of necessity, the necessity for the easement must have existed at the time the original grantor severed the two estates – no strict proof here that when original owner severed land there was necessity that was apparent and continuous
       3. What about *easement by prescription*? No – 3 reasons:
          1. Use of the road was *permissive*, not adverse b/c Othen and others had been using the road over Rosier’s land and closing the gate behind them – showing they were using it in accordance w/ Rosier’s claim
          2. TX/Minority Rule – no also b/c Othen’s use was not *exclusive* (didn’t interfere w/ True Owner’s use) (in most jurisdictions you can get a prescription w/o exclusivity)
          3. Location of road – the road had not always been in the same place so *SoL* would have to start running for the prescription whenever the current path started getting used, and no one really knows when that is
  1. Easements by prescription (adverse possession)
     1. Blocking access to easement will stop someone from this
     2. Land owner gets easement through adverse possession like factors to get title
     3. Factors
        1. Actual entry: must physically occupy easement in a manner consistent with ownership of an easement, lower bar than A.P.
        2. Exclusive control: only need to see if anyone else was hindering you from using easement, others can use it as long as they don’t interfere with your use of it, lower bar than A.P.
           1. Majority – exclusivity met if you and someone else are using easement at issue, no exclusive in terms of ONLY A using it (usually ok), sometimes more than one person has exclusivity under this
           2. Minority – require strict exclusivity (TX)
        3. Open and notorious: must be physical, open
        4. Adverse
        5. Claim of right/claim of title
        6. Continuous: only need to use as much as owner of easement would

1. Scope and Termination of Easements
   1. Scope: permissible uses of easements
      1. Can only use easement in manner reasonably necessary for convenient enjoyment of servitude for intended purpose
      2. Can be changed to accommodate normal development as long as it doesn’t substantially change nature of easement/interference substantial
      3. When you buy an easement, gives you broader rights than an implied easement
      4. Easements acquired by prescription are for exactly what you had been using it for
      5. Moving easements: generally common law says no, restatement says maybe possible if there isn’t too much interference
   2. Termination:
      1. Easements don’t last forever, some easements don’t run with land (use for 5 years…)
      2. Termination by agreement of the parties, A releases B from easement (can be bought/gift, ect) – release must be in writing
      3. Merger – B buys A’s property, easement goes away
      4. Try and get back through prescription
      5. Abandonment – high standard
      6. If easement falls into disrepair
      7. Usually if necessity goes away, easement is terminated – only exists as long as you need it (landlocked)
2. Negative Easements:
   1. A right to control another persons use of his/her own property
   2. 4 categories recognized as general easements and one more in US (have to pay for negative easements)
      1. Blocking windows/view/sunlight: agreement still permissible, no right to sunlight unless you pay for it
      2. Blocking air flow through defined channel
      3. Support of a building
      4. No interference with flow of artificial stream of water
      5. Solar panel easement – in some US jurisdictions
      6. Conservation easement – promise to leave land in undeveloped, natural state, often can get tax credits
   3. Real covenants used more often than negative easements
   4. Negative easements are type of covenant

**Covenants Running with the Land**

1. Real Covenants:
   1. Real covenants: product of contract law, deals with land, real property, can only get cash damages if violated 🡪 can bind future successors, negative easements cannot
   2. Requirements:
      1. Statute of frauds
         1. in writing and signed by party to be bound (or burdened)
      2. Intent for covenant to run with land
         1. “We intend for these promises to bind future successors”
      3. Privity of estate
         1. Common law requirement, not in 3rd restatement
      4. Must touch and concern land
         1. Needs to be promise tied to property itself (need to walk my dog – not tied to land)
2. Privity
   1. Horizontal: parties have to share some interest in the land independent of the covenant or promise being made
      1. Landlord tenant relationship
      2. Selling of property or easement
      3. If one party is transferring an interest of the land and promises are being made at the same time
      4. Party could sell property to neighbor (or straw man) and then sell it back in order to suffice horizontal privity
      5. HP is required to make a burden run to successors – do not need to make a benefit run to successors
      6. Burden:
         1. HP required to make burden run to successors
         2. Have to look at whose perspective of who wants to enforce the covenant
      7. Benefit: easy to make benefits run with you
         1. You don’t need horizontal privity to have a benefit run with the land – and mostly for vertical privity too
      8. Ex: A and B have a covenant to not cut down trees, B sells to C and A wants to cut down trees on his property – C considers trees a benefit and therefore A cannot cut down trees
         1. But if A sells, there’s way to break the covenant
         2. If C wants to cut down trees, A trying to enforce promise, B’s burden not to cut down tree therefore A can’t make that burden run to someone else – A cannot cut down trees
      9. When there is a benefit and a burden
         1. Ex: A covenant with B to make only single family home, and A sells to D, B sells to C
            1. D wants benefit of only having single family home, but also burdened by not being able to build an apartment

From perspective of person who is suing D is trying to make a benefit but also a burden

When four people, when trying to go after someone who didn’t sign the original agreement and cant enforce the covenant

* 1. Vertical: the interest between parties who originally signed the covenant and their successors
     1. For a benefit to run – any kind of privity will do
        1. Doesn’t have to be the same kind, duration, or size
        2. Ex: A – B and B leases to C and there is weak vertical privity if there is a benefit
        3. Only way you cant get a benefit to run is when you have an adverse possessor
        4. For a burden to run – must be a sale of the entire estate, or
           1. For landlord – tenant, there must be an assignment from the original tenant
           2. Ex: A – B (covenant), A sells to D and B sells to C

D starts cutting trees, C is angry

C wants to get the benefit of living next to trees to run – could run because there is strong vertical privity and will be able to enforce promise

**Equitable Servitude:**

1. Way of getting around privity, let you enforce problems, have them run with the land without privity, create workaround for not being able to get a negative easement
2. Damages:
   1. Cant get cash damages under E.S., usually get injunction
3. Real covenants can *never* be implied, easements and sometimes E.S. can be implied
4. When you have a situation where you don’t think there is sufficient privity for burden to run, check to see if they had notice so you can use E.S. instead
5. Requirements:
   1. Statute of frauds
   2. Intent
   3. Notice 🡪 don’t need to mess with privity like in real covenants
   4. Touch and concern land
6. *Tulk v Moxhay*
   1. Facts
      1. Tulk sold Leicester Square
      2. Limitations: they would maintain the gardens and keep it in good repair (affirmative covenant), keep it in an open state and contained a form of easement for others to use gardens
   2. Satisfies real covenant requirements 1, 2, and 4 – is there privity? Yes, horizontal privity, sale of property is strong vertical privity
   3. Person had notice of the issue, it wouldn’t be fair to let them get out of promise
   4. If you know about this, and other 3 requirements are met, we are going to enforce it with an injunction 🡪 origination of equitable servitude
   5. Can have:
      1. Record notice: in original sale, they record the fact that there is a covenant or promise of some sort that is attached to the sale
      2. Inquiry notice: enough evidence out there that you should have asked more questions, should have been clear to you that something was going on
7. *Sanborn v McLean*
   1. Facts:
      1. McClean owns 91 lots, trying to put development restrictions in place, for some of the lots there are the classic covenants, in other cases there are not
      2. From 1894 to 1910 they conveyed many of the lots but failed to put any restrictions in them with regards to it being residential property
      3. In 1920s someone bought property and wanted to build gas station on it, residents afraid of drop in property values but there is no stipulation on their deed which limits them to only residential property
   2. Issue:
      1. Will court imply an equitable servitude limiting use to residential property only?
   3. Rule:
      1. If there is an initial common owner who had a general plan or common scheme of development (plan to develop something into a neighborhood or master community, overall building plan), then the court is willing to imply it for ALL the remaining land
      2. Court is going to make those promises reciprocal
      3. When multiple lots are being sold off my the same person, we can imply that the restrictions on some lots are applicable to other subsequent lots that are sold – want residential restrictions to be mutual, balance benefits and burdens
   4. Does this satisfy the “notice requirement”?
      1. In this case there was inquiry notice, he should have known. The rest of the neighborhood was residential so he should have known that the property was restricted to use, there was documentation that suburb was intended to be residential, “evidence of a common scheme” – no evidence of actual notice
   5. Needs to be a plan for the development, your one plot of land is benefiting from everyone else being burdened so the burden flips on you as well