**Property Outline**

**Creation and Allocation of Property Rights**

1. **What is Property?**
   1. Ownership of “things”- but also relationships between people
   2. Deals with rights
   3. “**Bundle of Rights**”- there are many rights that come with property (use, destroy, alter, sell, etc.)
      1. Sometimes one owner has all of these rights
      2. Sometimes you only have some of the rights
   4. Property law- largely state common law
   5. Types of Property:
      1. **Real Property:** land and improvements thereto
      2. **Personal Property:** aka Chattels, physical items that aren’t real property
      3. **Intellectual Property:** type of property with special rules; think “ideas”
      4. **Natural Resources:** special category of property that often can’t be contained, like oil and gas
      5. **Other**: catchall for quasi-property for things society is not comfortable treating as property- organs, children, space in line.
2. **Acquisition:** 
   1. **First In Time:** principle by which person doing something first has ownership of property; drives Discovery and Capture
      1. Can be narrowed by restricting who/what has to be first- first European nation to set foot…
   2. **Acquisition by Discovery**
      1. **Discovery Rule:** Title to newly ‘discovered’ lands lay with the government whose subjects discovered the territory
      2. *Johnson v. M’Intosh*: Holder of title from United States government prevails over holder of title from Native Americans since the US got the land from England, who “discovered” it (as opposed to the Native Americans having right of occupancy.)
         1. **Title**: recognition from gov’t that you are legal owner of land
         2. **Chain of Title:** where title came from
         3. **Highest and Best Use:** traditional land use principle- land to be put to highest and best use (encourages development)
            1. Derives from Locke
      3. Conquest: taking property from others; no longer recognized
   3. **Acquisition by Capture**
      1. **Capture Rule:** property right comes from certain control- possession or mortal wounding, not mere pursuit
      2. *Pierson v. Post:* Hunter who killed fox, not man who pursued it with hounds and effort, owns it under capture.
         1. Dissent: Suggests looking to custom of sportsmen
         2. Benefits of Majority bright-line: efficiency
         3. Detriments: does not seem fair, labor theory, may discourage hunt instead of incentivizing it. (Utilitarianism)
            1. **Balance of certainty and fairness is central**
      3. *Ghen v. Rich:* In admiralty case where actual possession of killed whale is not possible, local customs on ownership of killed whale (to killer) is upheld.
         1. Exception to rule of actual-possession capture, but is to person who mortally wounded whale (Pierson v. Post capture
      4. **Industry custom on capture**/modifications:
         1. Benefits:
            1. Community autonomy
            2. Solution is already proven workable in community
            3. Courts lack expertise that community has
         2. Drawbacks:
            1. Fails to account for public/non-community interests

Whose custom it is = who it benefits

* + - * 1. May impose negative externalities on others
    1. **Capture on Owned Property**:
       1. **Ratione Soli**: you own what’s on your soil, including animals (craigslist dead moose example)
  1. **Capture and Natural Resources**
     1. Originally, oil/water/etc. considered “fugitive” resources- move from place to place, so are treated like wild animals
     2. Problems: incentivizes draining rather than using underground storage
        1. Note that “bottoming” a well under someone’s else’s land is trespass.
     3. Why these are not really fugitive: can be reinjected, bound and cannot move freely
     4. **Water Rights: Riparian (East) and Prior Appropriation (West)**
        1. **Riparian:** all owners whose land touches the river have water rights, subject to other owner’s rights
        2. **Prior Appropriation:** first diversion to beneficial use gets the rights- based on first in time, encourages water use/waste
        3. Both ration poorly. P.A. means water usually goes to biggest users in shortage.
           1. Some places allow resale of units of P.A. water to encourage water saving.
     5. **Groundwater:** 
        1. Some systems use capture, but others use regulatory schemes
        2. Acquifers (large underground lakes) analogized to oil and gas
           1. Some courts now make gov’t pay for loss of water property if using regulations
        3. Either tragedy of commons on capture, but also problems of private property in shortage.
  2. **Acquisition by Creation**
     1. **Creation:** people who first create something own it, derived from Locke
     2. **Purpose:** promote creativity and the “progress of science and useful arts”
     3. **Reasons to Restrict**: balance with rich public domain, scarcity and withholding problems, chilling effects on society.
     4. **Main types of IP: Copyright, Patent, TM**
        1. **Copyright**
           1. Largely statutory and federal
           2. *INS v. AP:* Newspaper that took hot news from AP is not allowed; news is not property relative to public, but is quasiproperty where facts are concerned.
           3. **Quasi-Property-** not actually property, but is given similar characteristics
           4. **Hot News Doctrine:** can recover when news is time-sensitive, requires significant expenditure, D freerides on P competing with P, and likely to de-incentivize gathering
           5. Registration optional.
           6. Facts, fashion cannot be copyrighted, but compilations can

Discovery of fact is not creation

* + - * 1. Life of author + 70 yrs, or for corp., 90 from publication or 100+ from some sorts of creation
        2. Elements

**Originality:** low bar (modicum of creativity)

*Feist v. Rural telephone*: A telephone directory arranged by last name lacked the originality requirement and cannot be ©.

Bar is low so that we don’t make courts the judges of good/bad art.

**Work of Authorship:** in one of the protected categories (so not fashion, etc.)

*Doris Silk:* commercial silk designs cannot be copyrighted, even if competitor steals.

**Fixation:** fixed in a tangible medium

* + - * 1. Defense: **Fair Use:** statutorily defined, often includes education, **de minimis use**. Multifactor balancing test
      1. **Patent**
         1. Elements:

**Patentability:** fits in the categories

**Novelty**

**Utility:** low bar; some use to humanity

**Non-Obviousness:** most important!

**Enablement:** ordinary skill in art = able to understand application.

* + - * 1. Formal and Expensive process- separate patent bar too
        2. *Diamond v. Chakrabarty:*Distinction between patentable & non is not animate/inanimate, but human/nature-made, and so a bacterium that was altered can be patented.
        3. **Nature** is public domain. Even discovery of a natural thing does not grant patent b/c sweat of brow is not sufficient
      1. **Trademark:** About preventing consumer confusion, NOT promoting science and useful arts.
         1. **Infringement:**  cause consumers to be confused about origin of materials or goods
         2. Common law and state law; also **Lanham Act** federal
         3. Anything capable of distinguishing product, including words, bottle shape, colors (as in sports)
         4. Trademark that becomes generic- you lose it

Ex: aspirin, Kleenex (almost did)

* + - * 1. Strength of trademarks may vary; saying it in comparative advertising is okay.

1. **Theories of Property Rights**
   1. Theories of Property Rights
      1. Promoting utilitarianism
      2. Fairness
      3. Equality of Opportunity
      4. Individuality and Creativity
      5. Political Freedom and reduced dependence on state
         1. Reducing dependence on top-down gov’t
         2. May not be as “efficient” or utilitarian
   2. Property in One’s Person
      1. The Persona- Right of Publicity
         1. Protection historically recent, extends postmortem
         2. Labor theory justification, incentivizes people to create
         3. **Right of Publicity**: right to make $ from your persona
         4. *White v. Samsung Electronics:* Vanna White sues over Samsung parody ad that features bewigged robot in front of game board; dissent bemoans chilling effect on society.
            1. Reasons to grant: labor theory, incentive to be creative
            2. Reasons not to grant: suffering of creativity, chilling effect, diminished public domain
         5. Social Media: blurs line, increases concern. Is every brand tweet an ad? Can using a celeb image in a tweet be a violation?
      2. Property in One’s Body
         1. Bundle of rights- usually not allowed to sell body/body parts
         2. *Moore v. Regents of CA:* Man whose excised cells were used for research cannot recover for conversion, only for informed consent failure; property interest in body does not extend to commodified sales, plus property right taken away by CA law after cells excised.
            1. After consent to removal of parts, generally no right to them after excised
            2. Note that informed consent does not allow $ stake in research, and that most forms now sign away right to use in research (without $).
            3. Extending law, as in conversion- legislature’s role
            4. Dissent: can recognize his property right w/out sale right.
         3. Further example: Henrietta Lacks, cells used for Hela cell line
            1. Policy rsn for no legislation: industry and interest groups
            2. Stolen cells used to fight disease
            3. Most people don’t have this problem
         4. Organ Donation and Sales: currently no sales.
            1. Policy:

Adding new stick to bundle of rights

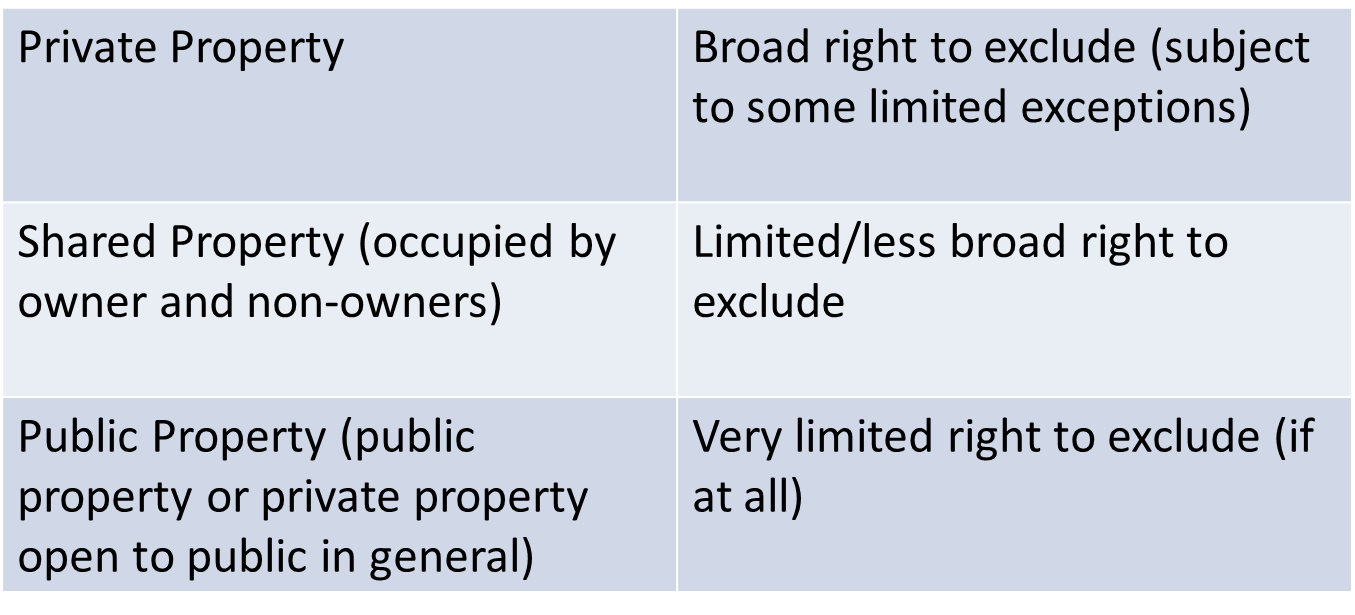
Exploitation and crime

Risks of surgery

* + - * 1. Can often donate what you cannot sell (organs)
  1. **Recognizing a New Property Interest**
     1. Increased use of **judicial resources** on new cases
     2. **Entitlement Effect:** easier to pass than repeal (2x easier)
     3. **Takings Clause:** 5thA means possibly having to compensate if you have to take that property away later.
  2. Tragedy of the Commons
     1. **Communal Property:** everyone has a right to use it, and no one can exclude
     2. **Private property:** right to use and exclude in owner
     3. **Limited-Access Commons Property:** more than one owner, so not a true “commons”, but technically communal (parking area for condos)
     4. **Tragedy of the Commons:** no incentive to conserve, resources are either overconsumed or overused (polluted)
        1. Utility of taking/polluting > share of distributed loss
        2. Difficulties with agreements:
           1. **Holdouts**: one person refusing to cooperate
           2. **Enforcement and Policing** costs are high with many people
           3. **Transaction Costs** of getting everyone together, legal costs, etc. (can also describe all of the costs)
           4. **Free-riding:** not contributing but taking benefits
        3. Solutions: make private property, or governance, or both
           1. **right to roam-** in Scotland and other countries, people can go on land as long as they don’t damage it.

**Semicommons:** private for some purposes only

* + 1. **Externalities**: property rights internalize them
       1. **Externalities:** costs imposed on others by an actor that are not taken into account by that actor
  1. Tragedy of Anticommons:
     1. Multiple owners makes it harder to reach decision
     2. Moscow Storefront example
     3. Something that would be beneficial to society doesn’t happen b/c of too much private ownership
  2. Benefits of Communal Property

1. **Bundle of Rights: Exclusion, Abandonment, and Destruction**
   1. **Exclusion**
      1. **“Sole and Despotic Dominion”-** Blackstone. Usually, owners may exclude people. However**, right to exclude is not absolute.**
         1. Exclusion is often considered the “fundamental” property right, esp. by laypeople
      2. *Jacque v. Steenberg Homes:* Court upholds punitive damages in case where mobile home company trespassed by bringing home across farmer’s field; holding that nominal dollar does not protect rights.
      3. Who may be excluded:
         1. See Chart 🡪
         2. State v. Shack: Trespass case; Farmer may not prohibit gov’t aid workers from reaching migrants who stay on property; right to exclude does not include right to infringe on workers’ rights to gov’t health and safety programs.
      4. Exceptions to Right to Exclude:
         1. Consent (remember fraud vitiates consent!)
         2. Gov’t Workers
         3. Necessity, public or private
   2. **Abandonment**
      1. **Real Property**
         1. No abandonment of real property in USA
         2. *Pocono Springs Case*: PA does not allow abandonment of real property, so owners of defective lot who defaulted on assessments told to pay (despite signing statement and not paying taxes, stopping mail, etc.).
         3. **Perfect Title:** aka “fee simple”, no mortgages, etc.
         4. Policy Reasons against abandonment:
            1. Confusion or violent squabbles of acquisition

Sale, gift, or land office transfer more organized

* + - * 1. Eyesore/nuisance property, burdens on others

Hazardous waste, crumbling houses

* + - * 1. Deterioration
      1. Policy Reasons for abandonment:
         1. Estate liability- not fair to stick heirs with it
         2. Welfare-Maximizing (person who can use more efficiently will take it if it has positive value)
         3. Better distributive justice than gift or sale
      2. Occasional limited immunities to rule for natural disasters- Katrina
    1. **Chattel/Personal Property**
       1. **Common Law Elements: Abandonment**
          1. **Intent** to leave it and not reacquire

Shows things were “meant” to be left, not “lost”

* + - * 1. **Voluntary Act** showing the intent- must be affirmative act
      1. *Hawkins v. Mahoney:* Despite prisoner’s affirmative intentional act of escaping prison, he was still entitled to recover for destroyed property, since state destroyed it after he requested it back and thus reacquired it.
         1. Note that policy of discouraging escape might justify
    1. **Policy on Abandonment**
       1. General rule: Land no, Chattel yes (all states)
       2. Trash is split as to whether it is abandoned
       3. Lew Alcindor Case- some courts hold that a name cannot be abandoned, and that right of publicity and prop rights exist even after the name is not used.
  1. **Destruction**
     1. A limited and disfavored right in property law
        1. Might be extreme form of right to use (until it breaks/destroyed)
        2. *Eyeman v. Mercantile Co:* On policy grounds (including drop in value of neighbor’s homes, landmark status, nuisance, historic loss to city, loss of asset to heirs), court holds that house cannot be demolished despite owner’s will to contrary.
           1. Dissent: Only neighbors sued and the evidence is not strong enough for public policy.
        3. While living, you might be able to actually use the right.
        4. Policy Reasons Against:
           1. Waste of resources
           2. Negative externalities on 3rd parties
           3. Deprives society of something culturally valuable
        5. Policy Reasons For:
           1. Practical- need to eliminate old, outdated, dangerous
           2. Expressive- creative destruction makes room for new and better things (Paris Boulevards a result of medieval Paris being razed in 1800s)
           3. Correction for Past Mistakes
           4. Privacy, autonomy
        6. Some cases allowed- like burying someone in jewelry.

1. **Subsequent Possession:** 
   1. The Law of Finders
      1. **Abandoned property**- generally belongs to the first person to possess, unless true owner reacquires/claims
      2. **Purposes of Finder’s Law**:
         1. **Protecting interest of true owners**/**returning goods** to owner
         2. **Honoring legitimate expectations** of finders and owners of places where things are found
         3. **Rewarding Honesty**- of finder who discloses his find, promoting the first two purposes.
      3. *Amory v. Delamiries:* Sweep who found jewel has rights against all but true owner, and is entitled to $ for stolen jewel.
      4. Relativity of Title:
         1. **Title of finder** usually good **against all but true owner or prior possessor**
         2. **Bailment:** Trusting property to someone temporarily; is NOT under finder’s law for purposes of determining title
         3. **Possession is an indicia of ownership** but not the end-all be-all.
      5. *Hannah v. Peel:* Owner who never occupied house cannot claim title to brooch found in house, despite some times when owner keeps item.
         1. **Owner of place** generally owns item when item is **embedded, buried (abandoned) on property, and when owner is occupying**
         2. Owner of place doesn’t always own when the place is public, like a shop (Banknotes example)
      6. **Mislaid Property:** generally belongs to owner of place/is to be held there to see if true owner claims it
         1. *McAvoy v. Medina****:*** Mislaid pocketbook in barbershop belongs to owner; easier for true owner to find it there than tracking finder.
         2. **Mislaid Property:** intentionally parted with, but unintentionally left behind
         3. **Lost Property:** unintentionally parted with
      7. **“Finders Keepers” rule:** efficient, clear, no litigation, but leads to “Christopher Columbus syndrome” (where everything up for grabs), investment in guarding tech.
      8. Treasure trove: “split the baby solution” that divides benefit between salvager and ship owner. (Barry Bonds bail case)
      9. Splitting- why not more common?
         1. Against: Efficiency, chattel that cannot be split, multiple finders
      10. Property law remains ancient for reasons of legislative efficiency (no one cares enough to change it)
      11. **SUMMARY**
          1. **Lost property**
             1. **Finder is entitled to possession against all except true owner and previous possessors (*Armory*)**

**Exception: Possessor/owner of private property can be entitled to possession against finder – circumstances/place of finding the lost item matter (*South Staffordshire*)**

* + - 1. **Mislaid property** 
         1. **Owner of property where found entitled to possession against all except true owner and previous possessors (*McAvoy*)**
      2. **Abandoned property**
         1. **Finder generally entitled to possession**

**Exception: Possessor/owner of private property can be entitled to possession against finder – circumstances/place of finding the lost item matter (*Elwes v. Briggs Gas*)**

* 1. Subsequent Possession: **Adverse Possession**
     1. **Adverse Possession:** legal mechanism that lets user of land acquire title
        1. Present in some form in all 50 states
        2. Not understood/liked by laypeople
     2. **Purposes/Arguments For:**
        1. Productive use of space- reward those who put land to use
        2. Punish owners who sleep on their rights/disregard obligations
        3. Quieting title for future transfers (chains of title)
        4. Holmes: “Natural Law” justification of peace + instinct of man
        5. Ballantine: Clarification of title
     3. **Elements:**
        1. **Actual Entry**
           1. Trespass, known or not, onto land
           2. Triggers statutory period beginning
           3. Must be an entry that a reasonable owner under the circumstances would recognize as entry onto property. Factors include:

Type of property- house, farm, gravel lot

Reasonable owner- don’t need to sleep in a field, but do in a home

Sets out scope and amount of property to be AP’d

* + - * 1. NOT ALL TRESPASSES ARE AP!
      1. **Exclusive Possession:** 
         1. Can be joint, but cannot be two separate AP
      2. **Open and Notorious:** 
         1. **Objective** standard- actions that put RSN owner on notice of trespass
         2. Usually evidence of actual entry satisfies, but not always
         3. Constructive notice is usual

(but see *Manillo* for a narrow exception in NJ for minor encroachment, where actual/**subjective standard** is required)

Not all states adopt *Manillo* rule; split on what kind of notice is required for minor encroachment

* + - * 1. Huge encroachments may violate b/c “too big to know” (*Howard v. Kunto*)
        2. Some JX may require payment of property taxes on AP’d property to satisfy this
      1. **Adverse:** without permission
         1. If permission, it is not adverse!
         2. Giving permission can stop the adverse nature, but filing a civil eviction is a better action if the period has not yet run

Can still file lawsuit if they can’t show all AP elements

* + - 1. **Claim of Right/Claim of Title**
         1. 3 possible standards:

**Good Faith:** AP’er thought, in good faith, was their land and they owned it

**Bad Faith:** knew it was not theirs and took anyway

Now disfavored for policy rsns

**Neutral/Irrelevant:** doesn’t matter what state of mind was, it’s too difficult to determine. This element is almost always satisfied under this standard.

* + - 1. **Continuous for Statutory Period**
         1. Not literal; how owner might use it

Summers only for vacation home = ok

* + - * 1. Book raises exception for 6 months dispossession by other AP over 10 year period
    1. *Van Valkenburgh v. Lutz*: In nonsensical ruling, court applies both bad and good faith standards to say there was no AP. Note that statute is silent, so court could use any of the 3 standards (and since L both mistakenly built a garage extension on the land and cultivated a garden on it, he actually meets both the good and bad faith standard). Court also argues that construction of a 1-bedroom living space and cultivation of a marked garden was not “open and notorious”
    2. *Manillo v. Gorski:* In case where extension accidentally built 15 inches onto land, court rejects bad-faith claim of title standard in favor of good-faith. Also rules that **owner must have actual notice of minor encroachment** for “open and notorious” (exception to normal objective standard for this kind of improvement).
       1. **Solution for innocent improver problem:** forced conveyance- market value for land instead of forcing removal.
          1. public interest/welfare maximizing justification
          2. Intentional/bad-faith improvements usually removed
       2. **Boundary Dispute Solutions:** 
          1. **Agreement:** parties agree
          2. **Acquiescence:** one party hasn’t objected over time, so it stands as is
          3. **Estoppel:** neighbor who makes representation on boundary can be estopped from denying it

**Stat of frauds:** if A agrees orally to give B land back, but does not comply, B cannot sue b/c no writing

* + 1. **Color of Title:** TYPE, not element of AP; AP claim founded on written instrument, judgement, degree that is found to be invalid or defective
       1. Many JX have more lenient requirements:
          1. Shorter statutory period for continuous possession
          2. More ways to show open/notorious (if statute limits ways)
          3. Able to claim **constructive AP** of entire parcel even if only occupying one portion thereof

Occupy 1/6 with bad deed but get whole

NOTE that if the **“whole parcel” is owned by multiple owners**, the constructive possession only extends to the whole of the land owned by the person whose land you are occupying, since other owners have no notice.

**Every owner of AP’d land must have notice**

* + 1. **Tacking:** adding previous owner/possessor’s time on land to yours to meet statutory period, permitted when there is privity of K or estate
       1. *Howard v. Kunto:* Tacking permitted in “domino effect” wrong deeds case; court rules that even if the deed does not match the property, if there was **a voluntary transaction and possession matches, tacking is permitted**.
          1. Here, there was privity of estate not privity of K b/c the K was technically for the parcel next door.
          2. Case also notes that “so big no one knows” could violate open and notorious.
          3. Example without privity of E: string of adverse possessors- neither type of privity, no K.
       2. **Texas Rule:** must have privity of estate to tack.
       3. Note that **many/majority states** toll statute on AP if the APer is forced out for 6 months of a 10 year period; A is allowed possession at 10 yrs 6 months as if it were continuous.
          1. Person forcing out another AP CANNOT tack for policy reasons- encourages force and violence.
    2. **Disabilities:** 
       1. **Types:** minor (age), unsound mind, serving in armed forces
       2. **Statutes are often tolled** until disability is removed (ex. If the disability existed at time of AP, you get an extra 5 years after disability removed).
    3. **Procedural Matters**
       1. Need not go to court to establish AP; happens if all elem. Met
       2. AP can be used as defense to actions
       3. Plaintiff can use AP in “**quiet title action**” to get the paper that shows you’re the legal owner of AP’d property
          1. Title paper might be needed for financing, etc. to show ownership
       4. **No adverse possession against government!** (nullius tempus occurit regit- no time runs against the
  1. **Liability and Property Rules**
     1. **Liability Rule**: rule governing some kinds of property; prop can be taken after paying damages. “nonproperty rule” for some property interests:
        1. Eminent Domain, forced conveyance in innocent improver
        2. Suggested for patent law due to patent trolls
     2. **Property Rule:** prop cannot be taken w/o consent of owner (Ex: most times cannot force sale of house)
  2. **Texas Adverse Possession Statute: 16.021, 16.026**
     1. Cultivate, use or enjoy = entry
     2. Actual and visible = open and notorious
     3. Claim of right = claim of title (neutral mental state in statute, check caselaw for good/bad spin by courts)
     4. “inconsistent with other” = exclusive
     5. Hostile = adverse
     6. 10 years, 3 under color of title = continuous
  3. **Adverse Possession of Chattels/Rules on Stolen Chattels**
     1. Key question- when did the SoL begin to run?
     2. **Common Law Rule:** thief cannot acquire good title to property and therefore cannot transfer good title to an innocent purchaser, unless the statute of limitations has run on owner’s cause of action
     3. **Discovery Rule:** some statutory period that may run, but it does not accrue until the reasonable owner knows or should have known about theft. (More protective of owner) (CA, NJ)
     4. **Demand Rule:** period does not start to run until owner makes a demand and possessor refuses to return (NY Rule)
        1. most protective of owner’s cause of action
     5. **After SoL Runs, New title is in innocent possessor**
        1. Tacking is generally permitted
     6. UCC may modify any of the rules, including to favor purchaser even before SoL has run.
        + 1. **UCC vests title in an innocent purchaser,** except if owner got a bounced check, merchant who usually sells such goods, etc.)

Protects transactions and security thereof

Promotes econ

Burden on purchasers who can protect themselves/owner who can protect self

* + 1. **Adverse possession:** SoL begins when actual entry occurs/on date the property was stolen (“handful of states”)
       1. Helps innocent purchaser if the statutory period is short/met
       2. Problems:
          1. open and notorious is hard to define,
          2. as is actual entry (putting anyone on notice),
          3. possessor of art/item may not be aware it is Adverse
    2. *O’Keefe v. Snyder:* Paintings of dubious provenance; JX originally has AP rule, but this focuses on actions of possessor and purchaser, not of owner. O’Keefe delayed a long time before finding the paintings, so JX adopts discovery rule that focuses on actions of owner (rsn owner is protected).
  1. Gifts
     1. Definitions
        1. **Donor and donee**: gift giver and recipient
        2. **Inter Vivos Gift**: gift made from one living person to another
        3. **Testamentary Transfer**: made at death through will/law of inheritance
        4. **Gift Causa Mortis**: transfer made in expectation of immediate death; substitute for a will
     2. **Elements of Inter Vivos Gift:**
        1. **Intent** to transfer title (must be present intent)
        2. **Delivery** of possession
           1. **Actual:** handing it over to other person

**“wrench of gift”**- they know possession is gone

* + - * 1. **Constructive:** giving key or other way to access
        2. **Symbolic:**  written instrument that says you’re giving it
        3. **Common Law Rule:** MAJORITY- constructive and symbolic heavily restricted; any item that can be handed over should be.
        4. **Modern minority:** accepts constructive and sometimes also symbolic delivery.
      1. **Acceptance by donee-** generally presumed unless donee rejects gift
    1. **Accidental delivery:** can be validated with intent; if there is clear intent, no need to look into chronology
    2. **Bailors-** letting someone have the gift back for a specified time and purpose creates bailor, does not destroy actual delivery
    3. **Gifts are irrevocable once made**
    4. **Checks** are either gifts are delivery or at cashing; split in court
    5. *Newman v. Bost:* Young housekeeper held to be given bureau through key, and the explicitly-intended bedroom furniture as causa mortis gift, but not allowed to keep insurance policy inside bureau or piano due to lack of actual delivery.
       1. Note that **courts construe strictly for causa mortis gifts** due to fraud concerns.
       2. If it can be actually delivered, courts generally want it to be if causa mortis.
    6. **Restatement rule:** delivery is **presumed for parties with common possession** so long as there is evidence consistent with making a gift.
    7. *Gruen v. Gruen:* gift of future interest in painting was appropriately done through symbolic delivery; present intent and instrument sufficient.
       1. Gift would NOT be enforceable if a promise to give actual painting at death (would need will), but it IS enforceable for a present gift of a future interest.

**Part II – The System of Estates \*See Chart\***

1. Introduction to Possessory Estates
   1. Possessory Estates and Terminology
      1. **Conveyance:** can be either inter vivos or testamentary, gift/sale/will
      2. **Possessory Estates/Present Interests:** immediate possession upon conveyance; person has right to possession now
      3. **Future Interests:** holder has a right to possession in the future, if at all
         1. Interest is still created at conveyance- only possession delayed
      4. **Words of purchase:** WHO gets estate. “O to A”
      5. **Words of limitation:** what kind of estate/ inherent lims: “O to A for life”
      6. **Freehold Estates:** involve seisin/possession with some responsibilities like taxes; fee simple, fee tail, life estate
      7. **Leasehold Estates:** term of years, no seisin
   2. **Types of Possessory Estates:**
      1. **Fee Simple:** estate of indefinite or potentially infinite duration; not limited by any conditions for sale/conveyance.
         1. “O to A” or “O to A and his/her heirs”
         2. No future interest created
      2. **Fee Tail:** estate that passes to A’s issue (lineal descendants) on A’s death and expires when bloodline runs out. No conveyances.
         1. “O to A and the heirs of his/her body”
         2. Keeps estate/land in family; cannot be conveyed unless you use a statutory or common law way to “bar the entail”
         3. England has abolished; US **mostly eliminated (majority)**
            1. 4 states **retain, modified (minority)**
      3. **Life Estate:** estate that passes to A for lifetime only
         1. “O to A for life”
         2. **Life estate pur autre vie:** life estate measured by lifespan of another: “O to A for life of B”
         3. **Only people** can have life estates, not corporations/churches
      4. **Term of Years:** “leasehold” estate to A for some fixed period of time
         1. “O to A for 1 years” or “O to B for 2 months”
         2. Reverts to O/next future interest at end; if A dies, A’s heirs/devisees have the estate until end of term.
   3. Limitations added to possessory estates
      1. **Conveyances:** owner can only convey less than/as much as they hold
         1. Fee simple can convey anything
         2. Fee tail, life estate only during life (at death passes to issue, w/e)
         3. Term of years only the rest of the period of time
      2. **During A’s life** in fee tail, life estate, anything with a future interest, the heirs apparent or next holder of the future interest has NO possessory/present interest.
      3. **No added limitations:** Fee simple 🡪 Fee simple **absolute**; all other estates get no term added.
      4. **Defeasible Estates:** general term for estates that may end early
         1. **Determinable:** automatically end early when the condition is met
            1. Condition **within terms of estate itself** (w/in the punctuation) **AND uses words of temporal limitation: so long as, until, while, during.**
            2. Examples: O to A for life *so long as* the land is farmed.

O to B for life, *then to C until C marries*, then to D.

* + - 1. **Subject to condition subsequent:** can be interrupted by next estate, do not end automatically when condition is met
         1. Condition is found **in the next estate**, after the punctuation, and uses **words of condition: provided that, but if, however, on condition that**
         2. Examples: O to A for life, *but if used for a tavern*, to B.

O to A for 10 years, *on condition that A farms*…

* + - 1. Determinable v. Cond. Sub: often few differences, but matters for adverse possession or a tort on property (who is liable owner?)
  1. **Future interest in a Grantor** 
     1. Any right not conveyed by grantor is retained by grantor
     2. Fee simple absolutes create no future interest
     3. Estates that end naturally do create future interests:
        1. **Reversion:** future interest following estate that ends naturally
           1. Doesn’t interrupt A’s possessory estate
           2. Not speculative
           3. Example: O to A for life; A dies; O’s reversion kicks in
           4. If found with possibility of reverter or right of entry, we call the entire interest a reversion (bigger interest)
           5. IF nothing is written, a reversion is implied:

O to A for life – O has reversion

* + - 1. **Possibility of Reverter**: future estate following determinable estate. Often speculative (event might not happen)
         1. Doesn’t interrupt possessory estate
      2. **Right of Entry:** future estate following estate subject to condition subsequent; often speculative
         1. Does interrupt prior possessory estate
  1. **Future interests in third parties** 
     1. **Remainder:** label given to future interest in a grantee
        1. Follows a possessory estate with no added limitations
        2. Held by a 3rd party/grantee. Example: O to A for life, then to B.
        3. **Quick Guide to Types:**
           1. **VESTED: ascertained AND no condition precedent**
           2. **CONTINGENT: Unascertained OR condition precedent**
        4. Two main types of remainders: Vested and Contingent
        5. **Vested Remainder: certain** to become possessory in the grantee
           1. In an **ascertained** person **AND**

**Ascertained = born + ID’d** at time of conveyance

One member of group ascertained will satisfy the condition

* + - * 1. Does **NOT include condition precedent** other than natural termination of the preceding estate

**Condition precedent:** condition that must occur before remainder becomes possessory

**UNMET** condition

**IN DESCRIPTION OF ESTATE**

**Must be satisfied** before estate becomes possessory.

* + - 1. **Contingent Remainder: not certain** to become possessory
         1. In **unascertained** person **OR**

Heirs, surviving [group], widow= usually contingent

* + - * 1. Does include a **condition precedent**

O to A for life*, then to B if B survives* *A*.

BUT notice that “O to A for life, then to B, but if B does not survive A, to C” has a condition, but NOT precedent!

* + 1. **Executory Interests**
       1. **Executory interest:** future estate in grantee following estate with added limitation (any possessory estate as long as some additional condition is attached)
       2. Be sure to notewhat **kind of estate the executory interest is**
          1. O to A for life, unless A marries, then to B. B’s interest is an executory interest in fee simple absolute.
       3. Executory interests are **automatic**, even if they follow something that would take a right of entry in grantor!
    2. **Alternate Future Interests**
       1. Not consecutive, but two different paths depending on whether something is met
          1. Consecutive: O to A for life, then to B for 10mo, then to C.
          2. Alternate: O to A for life, then to B if B is married; and if B is not married, then to C.

In this situation, anything after the ; is C’s estate, both B and C have contingent remainders.

* 1. Estates followed by remainders and estates followed by executory interests
     1. Estates followed by remainders are called whatever they are normally called if the next estate is in the grantor
     2. Estates followed by an executory interest are called:
        1. **Determinable** if may end early on own terms
        2. **Subject to executory limitation** if the condition is built into next estate; unlike w/ subject to condition subsequent, these estates have an AUTOMATIC executory interest, not a right of entry.

1. Future Interests
   1. Future Interests – Accounting for Additional Future interests, class gifts and subsequent divesting
      1. **Condition phrasing**
         1. **Anyone with a letter name is ascertained**
            1. B is ascertained
         2. **Any condition with a letter name is personal**
            1. If B ever farms… applies only to B
         3. **Anything phrased generally applies across people**
            1. If the land is ever farmed… applies to all holders
      2. Classes:
         1. **Open:** more people can be added
         2. **Closed**: no people can be added
      3. Divestment (remainders)
         1. **Vested Remainders** can be:
            1. **Not subject to divestment/ indefeasibly vested**

Class is closed

Certain to become possessory

* + - * 1. **Subject to open/subject to partial divestment**

Open class = more people can be added

Fertile octogenarian- we assume people can have kids until they die unless modified by statute

This is called partial divestment b/c one particular person in the class gets less and less of an interest as people are added, but never loses the interest altogether.

* + - * 1. **Subject to divestment**

Subject to **condition in the estate after the remainder**

Condition **could prevent estate from ever becoming possessory**

* + - * 1. Example: O to A for life, then to B, but B owns a restaurant, to C. (B could own while A alive)
  1. The Rule Against Perpetuities and Modifications/Reforms to RAP
     1. **Rule against Perpetuities**
        1. No interest is valid unless it must vest, if at all, no later than 21 years after some life in being at the time of the creation of the interest.
           1. Translation: w/in 21 years after everyone alive/involved at the time of the conveyance bites it, it has to either vest or fail, or the entire conveyance is invalid.
           2. **Life in being:** involved person alive at time/ last person alive at time of conveyance
           3. **Problems with vesting: fertile octogenarian, unborn widow** (someone might not be born yet at time of conveyance, like an infant child’s widow).
        2. Only applies to contingent remainders, vested remainders subject to open (**class gifts**), and executory interests
           1. NEVER applies to interests in grantors and vested remainders (not) subject to divestment)
        3. Applied **at time of conveyance**; for a conveyance by will, at testator’s death
     2. Purpose: prevent “Dead hand control” by aristocrats that makes land value uncertain
        1. Purpose of modifications: b/c sometimes conditions don’t seem like a problem but are.
     3. Modifications
        1. **Cy Pres Doctrine:** court modifies to comply with RAP but also honor interest; sometimes not done b/c would be so against grantor’s intent.
           1. Modify “B reaches 25” to “B reaches 21”
        2. **Wait and see:** court recognizes that it is potentially a violation, but waits to see if it vests before striking as invalid
        3. **Statutory USRAP: (uniform stat rule against perpetuities)** sets a 90-year period for wait and see; **about ½ of the states use this.**
        4. Some states abolish RAP for **trusts** (**15 states; NOT TEXAS**)
        5. Book ads:
           1. Modification of common law presumptions- say instead no more kids presumed after age 65
           2. Reducing age contingencies to 21
           3. Focus on actual facts
           4. 2-generations approach from restatement
     4. Note on modifications: today, if you go to atty, in RAP-free states you can usually get your control. But usually only the wealthy do this, so more of the large properties get tied up in dead hand control.
     5. Cy Pres and Trusts: Barnes Collection
        1. Cy Pres also applies to trusts; idea is to “get at” grantor’s intent where there are problematic facts
        2. Question: honor grantor as much as possible, or put the grantor’s wishes out totally?
           1. In PA art collection case, court eventually cuts out most of grantor’s wishes in order to preserve art and it make it accessible.

**Part III – Concurrent ownership**

1. Introduction to concurrent ownership:
   1. Types of tenancy not discussed much in course:
      1. **Coparency:** form used for daughters under primogeniture; obsolete
      2. **Partnership**: complex form with several factors
   2. **Joint Tenants:** have right of survivorship; regarded as single owner; JTs have a shared joint interest in the whole. NO INTEREST PASSES AT DEATH;
      1. now disfavored by courts; must have intent to create, strict language
      2. **Right of survivorship:** interest extinguished upon death; survivor(s) take over the rest of property
         1. benefits: avoid costly **probate** (judicial administration of will)
      3. Created with **4 unities: (majority).** 
         1. **Time:** acquired/vested interest at the same time
         2. **Title:** by same instrument or joint adverse possession
         3. **Interest:** equal, undivided shares, identical interests
         4. **Possession:** right to possess whole just as in TIC
            1. **Minority** allows creation with unequal shares or something of that sort
      4. **Strawman:** using atty or 3rd party to create JT properly (formality); **majority rule and common law**
         1. **Minority:** can simply create, no strawman- just need a letter of intent. (Riddle v. Harmon)
         2. *Riddle v. Harmon:* Wife who wanted to create joint tenancy tried conveying it to herself; court decides that the majority rule is predicated only on outdated concepts like seisin, and adopts the modern trend. Can be done with only a letter of intent
            1. Unfair, but justified by **policy** **of valuing autonomy**
      5. **Can be unilaterally broken** by one tenant
         1. Cannot be broken by secret, hidden letter b/c of fraud reasons
         2. Even under **California/minority**, the **document must be legally valid, not a void deed.**
      6. **The 4 unities** are also needed to maintain the JT; if any break, the JT is converted to a TIC.
         1. **Uniform Simultaneous Death Act:** some JX provide for splitting of property 50/50 to heirs/devisees if this occurs, rather than try to sort out who died first.
      7. If there are **3+ tenants** in the JT, breaking a JT by one person only converts their part to TIC; the rest of the JT is fine.
      8. **Mortgages and things less than full conveyance** generally don’t break a JT**; 4 options**:
         1. Mortgage breaks the JT and is now TIC
         2. JT survives, but mortgage lives
         3. Temporary severance of JT during mortgage
         4. JT survives, and mortgage depends on who dies first (mortgagor dies first = extinguished; if other T dies first, it is enforceable against whole which now belongs to mortgagor) (*Harms v Sprague)*
            1. *Harms v. Sprague:*Court chose the outcome above when a brother mortgaged JT property without telling his brother/JT; mortgage extinguished

Policy; lender often better able to protect self by investigation

* + 1. Courts split on non-mortgage less-than-sale things
  1. **Tenants in Common:** separate but undivided interest in whole
     1. Interest can be unilaterally conveyed during life or death; there is a descendible interest and no survivorship right
     2. No consent needed from other owners to convey
     3. Extends to multiple people- if A and B are TIC and sell to C and Z, now C and Z are TIC.
     4. Each TIC **has right to possess whole** so long as no one tenant claims the property to the exclusion of others
  2. **Tenancy by the Entirety:** for married couples only, in some states but not all. Key features of JT, but cannot be unilaterally destroyed
     1. **Need 4 unities + marriage to make/keep**
     2. **CANNOT** convert property in TIC to TBE by marriage later.
  3. Relations among Concurrent owners
     1. Nothing below in this section applies to TBE unless specified
     2. **Cotenant-** generic term for all of the other ones
     3. TIC/JT- if 3 people, each of the has right to possess whole, not 1/3
     4. **Partition:** a remedy used to split property and dissolve tenancy
        1. **Two kinds:**
           1. **Partition in kind:** dividing the land physically by % interest

**Traditional Rule:** prefers in-kind if practicable (but courts usually ignore this and it gets lip service, but sale happens more)

* + - * 1. **Partition by sale:** land is sold and $ divided by % interest
      1. **Factors** on deciding which kind (Delfino v. Valencis)
         1. **Practicability:** can you physically divide the land (shape, buildings, etc.)?

For a chattel, like a rocking chair, alternating ownership for 6 months or similar may be hard to do, so it may force sale.

* + - * 1. **Interests of owners**

Economic

Large lot may be worth more than tiny lots as well

Other (staying in home, etc.)

* + - 1. *Delfino v. Valencis:* Trial court tried to force sale of square property where 1 T wanted to built apt complex and other lived and ran garbage business (no trash on property); appellate court found in-kind partition appropriate and practicable.
      2. Contracts not to partition land will NOT be honored usually (if not clouding title, might be- but inalienability of land is a policy implication)
    1. **Ouster:** ejection/deprivation of the estate, must be shown for certain remedies
       1. **Rent from Cotenants:** ouster addresses situation where one co-T must triggers requirement to pay rent to other Co-T
          1. **Majority Rule:** cotenant in exclusive possession does not have to pay rent unless there is either ouster or a prior agreement (Spiller v. Macbeth).

Encourages people to enter their property and take care

“Ouster” requirements vary

* + - * 1. **Minority Rule**: pay rent w/o ouster

Reduces volume of suits, no need to go to court for ouster showing

But no one wants to pay rent or go to court, so property sits empty.

* + - * 1. *Spiller v. Macbeth:*  Co-T Spiller moves his business in when last T moves out, and does not pay rent; co-T Macbeth wants to force rent payment. Court notes that ouster is needed, only shown if other T are excluded.
      1. **Adverse Possession:** if one cotenant wants to AP, must show ouster b/c ouster is the point where SoL begins to run against the other cotenants.
         1. **Exclusive, open and notorious, and “adverse”** are difficult with cotenants; ouster helps pin down. If no ouster, possession is permitted and not adverse.
    1. *Swatzbaugh v. Sampson*: Husband lets boxer build ring on part of walnut farm to distress of JT wife; she can:
       1. attempt to show ouster to get rent,
       2. seek partition (sale, in kind, or for duration of lease),
       3. ask for **equitable accounting** to get some of the benefits reaped from rent and recoup costs paid regarding property (court supervised payoff, basically)
          1. **no ouster needed for accounting**
       4. However, she **cannot cancel the lease made nor force leaving** since a JT can let someone else possess under their interest.
  1. Waste
     1. Any time there are people with multiple interests, whether concurrent or consecutive, there might be waste
     2. Factors:
        1. **Nature of uses involved**: balancing test on strengths of interests
        2. **Conduct:** FACT SPECIFIC
           1. Cutting timber on a 2-month lease might be waste/egregious impact on B; but if A has a 99 year lease, not so.
        3. Interplay of these factors --- VERY FACT BASED
     3. Types of Waste:
        1. **Affirmative:** acts that significantly reduce value of land
        2. **Permissive:** negligence, not taking care of property; reduces value
        3. **Ameliorative:** improvements/ changing value of land to co-owners or successors
           1. **Less common today; land value IMPROVES**
           2. Technically waste, but no damages due to improved condition of land
           3. Perhaps a cause for sentimental value, but usually additions aren’t considered waste today.
  2. Marital Interests: The common law system and community property system
     1. Marital benefits:
        1. TBE benefits: survivorship, protection from creditors
        2. IRS filing jointly, claim to wages, pension, social security benefits of deceased spouse
        3. Intestate succession rights
        4. Divorce laws for breaking up property and spousal support
        5. Homestead law exemptions for survivor
        6. Right of elective share and dower of surviving spouse (CL rights)
        7. Non property law benefits: visitation, insurance, spousal immunity, medical decision making, custody, etc.
     2. Possible rules on **TBE and Creditors**:
        1. **Creditors can reach TBE in entirety to satisfy debts of husband** (NO LONGER LAW IN ANY US STATE)
           1. Ignores married women’s property acts, reaches all marital property (once 3 states, now 0)
        2. **Creditor’s can reach debtor spouse’s TBE interest subject to other spouse’s right of survivorship**-
           1. Creditors reach “his half”; require claim against debtor’s half interest; **may force sale**
           2. Example: 25k debt, house is 100k; force sale, and take 25k of husband’s 50k share. If 75k debt, can still only take 50k, not any of wife’s share.
        3. **Creditors cannot reach anything at all while couple lives.**  Couple is free to convey interest with NO LIENS attached. (**majority and Endo)**
           1. No one can touch while both spouses alive
           2. Debtor spouse dies – other spouse owns free and clear
           3. Nondebtor dies first- they can take all with no protection from debtor’s fee simple ownership
           4. *Sawada v. Endo:* tort creditors seek to set aside conveyance of property to sons in order to seize it to pay judgement. Court adopts this rule for HI and won’t set aside conveyance.
        4. **Creditors can reach debtor spouse’s TBE right to survivorship**
           1. During life, lien can be attached to house or property

Differs from group 3 b/c lien is public and conveyance keeps lien!

Less valuable property, less enticing, “buying a lawsuit” b/c lien

* + - * 1. Debtor dies- nondebtor owns whole, survivorship right means the interest the lien was on is gone, so lien is meaningless.
        2. Nondebtor dies- creditor can use lien to get fee simple
    1. Policy/notes on TBE and Creditors:
       1. Protecting family residences
       2. Protecting unity and wholeness of family over creditor interests
          1. Chilling effect on loans < family
          2. Harder to justify with tort creditors
       3. There is no limit to what property can be held in TBE in some TBE states (may lead to splitting insurance $, etc.)
       4. IRS and feds can break TBE
       5. Only in common law states, not community states!
       6. Lender often in a better position to see what is in a TBE, can protect self
       7. In some states, like NY, wife can stay in house until ouster but is in TIC with creditor- not comfortable.
    2. **Common Law Property System:** based on idea of separate property ownership; can choose to do otherwise, but in common law states, default presumption of separate property.
       1. Options for property:
          1. TBE in about ½ of Common Law Property states
          2. Individual
          3. TIC
          4. JT
          5. NO COMMUNITY HOLDING!
    3. **Community Property System:** spouses are a marital partnership and share “community” assets
       1. **Categorizing property:**
          1. **Acquired prior to marriage = separate**
          2. **“onerously” acquired/earned during = community**
          3. **Lucratively acquired/gift or devise during = community**
          4. Note that these are presumptions and can be changed by agreement
       2. Community property **cannot be unilaterally conveyed or converted** to another type w/o consent of both spouses
          1. Separate property may be conveyed as usual
       3. **At death or dissolution:** separate property is disposed of entirely at the will of the spouse who owned it, but community property goes half and half to each spouse.
       4. **TBE NOT available for community states** but can choose to hold property as JT/TIC/individual if you want
       5. Options for property: **NO TBES!**
          1. **Community property (default)**
          2. Separate/individual
          3. Jt w/ spouse
          4. TIC w/spouse
       6. **One spouse can manage** community property; this spouse acts a fiduciary and may be able to convey in that capacity
       7. *WC fields problem*- wife is entitled to half the community property that was improperly disposed of
    4. Mixing community and separate property:
       1. Multiple theories to resolve “house problem”- buying house w/ separate property down and then using earned income for mortgage
          1. **Inception of Right (Texas!):** at time of acquisition, status is determined by type of money used for acquisition

House would be separate property

Advantages: cuts out complex payment detail tracking

Disadvantages: less fair

* + - * 1. **Time of Vesting**: title doesn’t vest until fully paid, so status is determined then
        2. **Pro Rata (Cali Rule):** splitting asset by % done by community and separate $

Advantages: more fair

Disadvantages: must determine who/what/how/when payments made

* + - 1. **Migration of couples**: property status taken to reflect state where acquired.
         1. If community property sold and $ used to buy in common law state, it is SEPARATE/JT/TIC and lacks the same tax advantage (keep in mind when moving!)
      2. **Common Law Marriage**: only 10 states (including TX). Not enough to cohabit; had to hold out as married.
         1. **Often abolished** by majority; thought to generate litigation, perjured testimony at breakups.

Roads/transportation to courthouse improved also

Need certificate for benefits

Dignified immorality and living together among lower class

* + - * 1. Theories on Ks- K can provide for property division for cohabiting couples; some courts allow inference from conduct (ALI principles)

**Part IV – Leaseholds: Landlord/Tenant Law**

1. **Leaseholds: Landlord/Tenant Law**
   1. Leasehold estates
      1. 4 main types:
         1. **Term of Years:** lasts for fixed amount of time with an end date that can be ascertained (does not need to be year+)
            1. Ends automatically, no notice required
            2. Example: O to A for 10 years.
         2. **Periodic Tenancy:** lease for a period of time of fixed duration, without a start and end point; continues for successive periods until LL or T gives notice
            1. For period <1 year,notice = **length of period but no longer than 6 months**
            2. For period >=1 year, **6 month’s notice**
            3. Usually death has no effect; a few statesmodify if T dies
         3. **Tenancy at will:** tenancy of no fixed period, which continues until LL or T terminates OR until LL or T dies.
            1. **Modern rule:** typically requires 30 days’ notice by LL or T to terminate, but death ends immediately
            2. **Traditional rule:** “as long as the parties wish”, done when one party wishes or one dies. (contrast periodic)
            3. *Garner v. Gerrish:* lease appears to give unilateral terminantion rights to tenant Gerrish; after death of LL, question arises as to nature of tenancy. No such thing as a tenancy for life, but it’s not a two-way tenancy at will. Court decides it is a life estate determinable, with Gerrish’s desire to end lease as the condition.

*Note:* possible to add contract obligations to life estate, which would work for the rent

but then LL-T protections don’t apply.

**numerus Clausus:** CANNOT CREATE NEW PROPERTY INTERESTS (everything’s got to go in a box that already exists)- STRONG principle

* + - * 1. **Key language: “LL and T wish”**

**“T wishes”** creates LE Det (**NY rule)** or in some other states a term of years determinable

**As long as L wishes =** tenancy at will (**restatement rule)**

Bargaining power- L usually has more and writes lease

Also not possible to trap T in lease under cloud of eviction at L’s will

* + - 1. **Tenancy at sufferance:** created when T remains in possession after termination of one of the other kinds of tenancies
         1. **Typically short-** **may be limited to <=1 year**

Until LL completes eviction or agrees to new tenancy by new lease/accepting rent

**Holdover doctrine**: presumed to be a periodic tenancy not to exceed 1 year, but otherwise on terms of old tenancy (presumption, parties can change)

b/c we need to call the T something and also to protect tenants as a whole (old T can stay on familiar terms, new T knows it is temporary)

* 1. Dual Nature of the Lease: K and conveyance; duty to deliver
     1. **Property nature** is traditionally more prevalent
     2. **Contract Nature** more prevalent today
        1. **Statute of frauds** if more than 1 year
        2. **Inequality of bargaining power**
     3. Delivery: note the **rules can be circumvented by express provision**
        1. **English Rule:** majority; LL has duty to put T in ACTUAL possession but only on first day of lease; implied promise to deliver physical possession
           1. **New T has remedy against LL**
           2. Justifications:

New tenant expectations

LL in better place to know about holdovers

LL must draft around it, and is in a better place to do so; then T will be on alert from lease terms as opposed to not knowing.

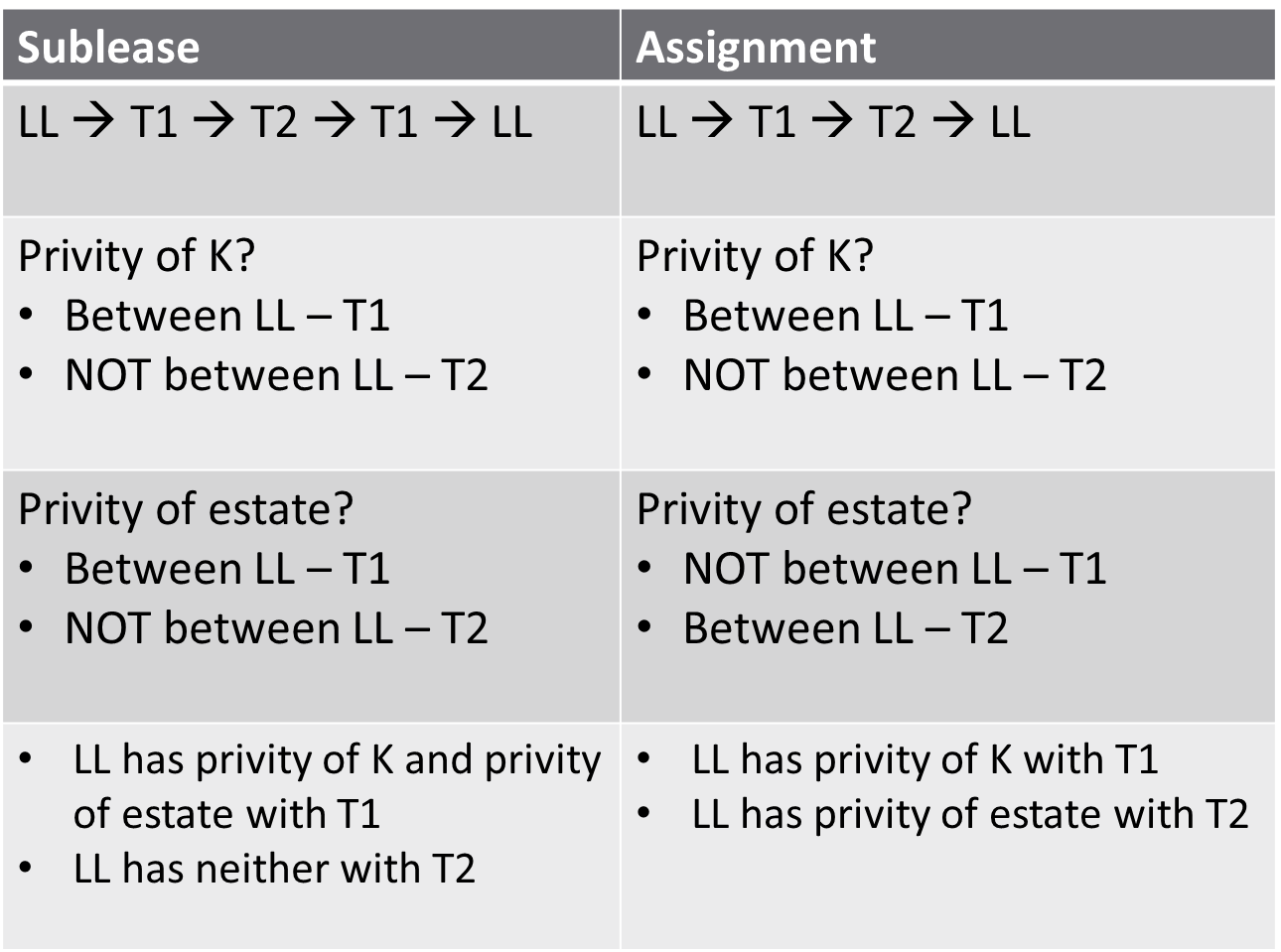
* + - 1. **American Rule**: no duty to deliver actual possession, only legal possession; no implied promise (*Hannah v. Dusch)*
         1. **New T has remedy against old T, not LL**
         2. Justifications:

Lets LL lease w/o worry

New T has more incentive to use the court to get possession

* + - * 1. *Hannan v. Dusch*: court adopts American rule in dealing with suit against LL on holdover tenant; feels LL should not be held responsible for another’s wrongdoing.
  1. Housing Discrimination
     1. **1866 Civil Rights Act**: prohibits discrimination in any kind of lease/sale/conveyance of land but only on race basis
        1. Race in 1866 might also mean national origin
        2. Broader in terms of property covered but narrow on protected classes (race only)
     2. **Fair Housing Act:** prohibits discrimination w/r/t sale, rental, advertisement of “dwellings”, applies to many protected classes.
        1. More classes than CRA 1866 but only for “dwellings”
     3. FHA exemptions
        1. 3603 Mrs. Murphy exemptions:
           1. Single family home owner that does not use broker
           2. Owner of 4-unit or smaller property where owner lives in one of the units

Justification: personal autonomy, right to make decisions about own home that not all people agree with. (Right to choose)

* + - 1. Note that these^ exemptions are from everything BUT the advertising requirement, still cannot advertise in discriminatory way
      2. Roommate cases:
         1. Advertising for female roommate does appear to violate the 3604 requirements; plain reading finds a violation
         2. BUT roommate arrangements are not for a single standalone unit and so they do not fall under “Dwellings”- not a violation.
      3. Holding units for anti-segregation reasons, like preventing white flight, does not excuse- FHA looks unit by unit
      4. “Preferred” in ad = still discriminatory!
    1. Protected classes under FHA:
       1. Race, national origin, color
       2. Religion
       3. Sex
       4. Handicap
       5. Familial status
       6. Missing classes:
          1. Age
          2. Sexual orientation
       7. States can add: lawyers, students, etc.
    2. How to show FHA violation:
       1. **Disparate treatment** (intentional)
       2. **Disparate impact** frameworks (showing of effect/burden on protected class from policies or practices, even if no intent)
  1. Subleases and Assignments
     1. **Privity**:
        1. **Of contract**: being in K, voluntary transaction
           1. Needed for obligation for K provisions/covenants
        2. **Of Estate**: voluntary transfer/conveyance from one to another
           1. Neededfor CL LL-T obligations
        3. **MUST HAVE PRIVITY TO GET RENT**! (either does for rent)
     2. Note: LL can always go after T1 for rent unless there is a **novation**
     3. **Assignment:** transfer of **entire** interest under lease
        1. **L**🡪 T1 🡪 T2 🡪 L at end of lease
        2. T1: privity of K, and NOT of E
        3. T2: NO K privity BUT there is privity of E b/c of conveyance at end
        4. *Ernst v. Conditt:* court determines that transfer of interest (entire) was assignment, and that LL can sue T2 for rent.
     4. **Sublease:** transfer of something less than entire interest
        1. **L**🡪 T1 🡪 T2 🡪 T1 🡪 L
        2. T1: both kinds of privity
        3. T2: NO privity! L CANNOT sue for rent
           1. Might try 3rd-party-beneficiary w/ LL as 3PB to T2/T1’s K
     5. **Majority: formalistic** analysis above
        1. **Minority:** intent of parties regardless of words **modern/Ernst rule**
     6. Party subletting can retain **right of entry or power of termination**
     7. Consent to assign or sublease
        1. **Majority:** LL may arbitrarily refuse (for commercial) if there is an approval clause in lease
           1. Freedom of K, right to exclude on property
        2. **In absence of approval clause**, T may sublet/assign w/o consent
        3. **Minority/Kendall:** LL may only reject for commercial if there is a commercially reasonable objection
           1. Becomes a framing issue
           2. Justifications: alienability of land, urban area land shortage
        4. Kendall v. Pesana: bixler, T, wants to lease to Kendall, and Pesana will not consent. Court decides there must be a commercially rsn objection to justify, else must consent.
        5. NOTE: this is NOT for residential
           1. Justifications:

More personal

Less sophisticated parties/more small LL who may not be able to frame reasons

* + - * 1. Some courts would apply it if there are rental shortages.
  1. Evictions
     1. **Common Law Rule:** self-help permitted if (1)entitled to possession and (2) peaceable method
     2. **Majority Modern Rule:** NO SELF HELP, must resort to courts and summary procedures instead (Berg)
        1. **Policy:**
           1. Judicial proceedings produce records tha help LL more
           2. Violence developing even though rule says peace- establish rule that prevents this opportunity for such
           3. Residential lease- LL has more power over tenant and often has more bargaining power

Court before the curb—prevents more damages from accruing and more standard damages, so court can be more efficient

* + - 1. Note that summary procedures can take over 100 days
         1. And records may prevent tenant from getting housing later
         2. No self-help for residential b/c tenants need place to sleep
    1. Berg v. Wiley: Court finds wrongful eviction in restaurant lockout case
  1. Abandonment of Possession v. Surrender
     1. **Surrender**: pairs w/ **acceptance**; if LL accepts, lease ends
        1. T owes NOTHING on rent
        2. T might be liable for breach damages of old rent-new rent, but if rent is high, no damages.
        3. **Express or implied**
           1. Express- letter and LL accepts
           2. Implied- LL lets a new T have it
     2. **Abandonment:** does NOT terminate lease! “paired with mitigation”
        1. **T remains liable for value of leasehold** b/c lease still in existence, T owes rent
        2. **LL MAY have duty to mitigate**
           1. CL/minority: no duty to mitigate damages by defaulting T

Comes from CL property conveyance; “T bought an interest and LL can’t interfere”

* + - * 1. Majority/modern rule (Sommer): LL has duty to mitigate damages by defaulting T by reasonable efforts

Comes from K law

Justifications: fairness to T, preventing waste, carrying over mitigation duty from K law generally

LL’s mitigation could be taken as unwilling acceptance by implied accept, limiting damages if new rent is high.

LL must advertise, treat as vacant, but rsn effort only- no need to push unit

BoP usually on LL, but TX and other states on T.

* + - * 1. Splits on Commercial/residential here
    1. *Sommer v. Kridell:* In case here and w/ Riverside, T who never took possession/abandoned was sued; court ruled LL could not let damages pile up, had duty to mitigate.
  1. Rights and Duties of Landlord and Tenant
     1. When LL fails in duty, T has multiple options- can sue for all on facts and see what they recover on:
        1. **Breach of covenant of quiet enjoyment**, letting T

Move out after claim of actual eviction OR

Remain on premises and sue LL for damages

* + - * 1. **Breach of covenant of quiet enjoyment:** covenant is “in every lease there is an implied covenant that T gets the use of all of the premises”
        2. **Both residential and commercial**
      1. **Eviction or partial (Actual or Constructive)**
         1. **Actual: physically barred**
         2. **Constructive: LL’s** actions, even if not intended so, are so severe as to bar from using premises as intended

**Elements**

**Breach of covenant of q enjoyment**

**Substantial enough to justify leaving**

**Left w/in rsn period of time**

*MPOC Case:* Prosecutor’s office constructively evicted by repeated water leaks that barred them from using evidence room (partial actual eviction and constructive on rest). Lease saying T could not terminate was not applicable since LL terminated by wrongful eviction.

Can serve for dependency of covenants- CL held covenants **independent** and T always still owed rent; this can substitute in some cases.

* + - * 1. **Actual/Constructive in EVERY JX for residential or commercial**- **default rules**

Partial constructive only in some JX, may result in reduction of rent

Partial actual everywhere

Constructive =/= breach of quiet enjoyment; can stay and sue for latter but not former

* + - 1. **Breach of Implied Warranty of Habitability:** see below
    1. LL remedies:
       1. Distrain or distress for rent: seize property and hold until paid; some JX don’t allow for due process reasons
       2. Common law ejectment
       3. Summary eviction
  1. **Illegal Lease**: largely dead letter today; if not inhabitable, lease is illegal and it turns into tenancy at sufferance for reasonable rental value of premises; gives T leverage.
  2. **Implied Warranty of Habitability**
     1. Common law: **caveat lessee**; as-is premises; now minority (constructive eviction was an exception)
     2. **IWOH:** LL will deliver premises that are **safe, clean, and fit for human habitation**.
        1. **Majority rule:** cannot be waived; minority says can be waived but as a knowing voluntary waiver
           1. Would be against public policy to waive in most places
           2. Econ arguments against no-waiver but we don’t want people in slums so society rejects
        2. **All 50 states-majority-** have IWOH!
        3. **Violations fact-**specific, codes are a starting point but not always dispositive.
        4. **Advantage:** can stay and not pay rent/can sue and withhold!
           1. With CE, can leave and sue
           2. With Breach of Q Enjoyment can stay but pay
           3. This is unique
        5. Damages: punitive possible
           1. Value of property as warranted – value as is = BoB damages
           2. Compensatory $$ for $ spent on repairs
     3. Generally only includes essentials, not amenities
     4. Includes trash from strikes, etc.
     5. Sex offenders: courts find workarounds in forced surrender/acceptance to avoid scarlet letter problems under IWOH lens
     6. LL not IWOH breach for 3rd party criminal actions
     7. *Hilder v. St Peter****:*** terrible LL has crap apt that is nonfunctional, does not return deposit as promised when T cleans; court adopts IWOH to find for Tenant.
     8. **Implied warranty of suitability: not in all states! 50/50 (in TX** though)
        1. Commercial version of IWOH; safe, clean, fit for human use and that particular purpose by T
        2. Not everywhere b/c policy
           1. Working condition laws/different laws protect workers
           2. Residents have to LIVE in houses vs only work there
  3. **Retaliatory Eviction**: ILLEGAL; sometimes cannot evict during certain period after people exercise rights.
     1. However, no one else has to rent to you, per NYT article, they usually won’t, and that’s NOT illegal! Court records are forever/7 yrs in some JX
  4. **Tort Liability: LL to T**
     1. Common law: only for exceptions p.511-512
        1. Duty to disclose latent defects existing @ time lease entered
        2. Duty to maintain common areas
        3. Duty to T to undertake repairs LL voluntarily agreed to do
        4. Duty to public for unrsn dangerous conditions
     2. Not usually liable for 3rd parties
     3. **Perverse incentive** – if no attempt to secure, no liability, but if security measure breaks, liability.
  5. **Tenant Waste**
     1. Installed items may be considered **fixtures** and so cannot be taken with
     2. Installation and changes could be considered waste; sometimes limited in lease
     3. Fact specific determinations
     4. Permissive waste; **most JX now put duty to repair on LL but was on T at common law**
  6. Affordable Housing
     1. Rent Controls: Forbids rent hikes and helps people stay in homes, but affordable housing becomes more limited (quantity and quality down!)
        1. No incentive to maintain
        2. Segregations of low-income people to certain buildings
           1. Marginal tenants can’t get housing
        3. People won’t build in rent-control areas
           1. More units = more housing obviously
        4. Sales to big developers since small LL can’t make money
     2. Today, we have little substandard housing, just a shortage of affordable housing.

**Part V – Land Transactions**

1. Introduction to the Land Transaction
   1. The **Purchase and Sale Agreement/Contract** (PSA/K)
      1. Operative document **BEFORE** closing; usually **executory** (not immediate)
      2. Only valid during some executory/attorney review period before closing
      3. Some possible terms:
         1. Inspection of property
         2. Financing/mortage contingencies- if can’t secure $, K invalidated
         3. Closing costs- who pays broker, real estate fees, taxes, other costs
         4. Title Search- good and marketable title, no outstanding liens, etc.
   2. **Statute of frauds**
      1. must be **in writing** (book: except leases less than 3 years)
      2. Must be **signed by party to be bound** (you don’t know who this is until enforcement is needed)
      3. Must **describe the real property**
      4. Must state **price**, if agreed to.
      5. Electronic transactions- yes, you can do over email now.
      6. **Exceptions:** 
         1. **Performance/part performance**
            1. Book notes that definition of part varies by JX; may require possession in some JX, or valuable improvements.
         2. **Estoppel**- something done in reliance
         3. **Restatement Second § 129**- combines the two CL exceptions- partial performance or that both parties acknowledge K, then show reliance/estoppel
      7. *Hickey v. Green*: In case where both parties agreed was K and Hickey sold house, Green estopped and had to acknowledge K for sale of farm.
         1. Sof may be used as **defense** by party wanting out.
         2. Other side then tries to show exception or writing.
      8. *Walker v. Ireton:* case contra Hickey; part performance was not sufficient to qualify for exception; reliance not rsn (we lack facts- notes case).
      9. **Recording** a transfernot necessary as long as SoF or exception is satisfied
         1. Still a good idea
   3. **Marketable Title**
      1. **Implied covenant** in **every PSA**
      2. **Marketable 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 facts and their legal bearings, and ready and willing to perform his contract, **would be willing to accept** in exercise of **ordinary business** prudence.
         1. need not be perfect, just rsn free from uncertainty
         2. about quality of title, **NOT mkt value/phys condition of property**!
      3. Things that mean not marketable:
         1. High likelihood of claim on it by other party
         2. Liens, mortgages, other financial encumbrances
         3. Physical encumbrances- easements
         4. Private land use restrictions- covenants, HOA agreements, etc.
            1. Existence
            2. Violations
         5. Violations of Public Use land restrictions
            1. **Existence of public use land regs does not cause unmarketable title, but violation of same does.** (*Lohmeyer*)
      4. **Marketability can be drafted around-** can decide to accept HOA agreement, easement for shared driveway, etc. **default rule only!**
      5. *Lohmeyer v. Bower:* In case where man K’d to accept existence of land use restrictions, violations of public and private restrictions made title not marketable.
         1. Mere existence of public land use restrictions too broad to justify calling title unmarketable; also won’t be in recorder’s office.
         2. Agreement to accept unmarketable if title insurer will insure- **risk judgement matter** but is available option (they might issue policy if $ high and risk low!)
      6. **Easements and marketability** (notes after Lohmeyer)
         1. Some JX hold beneficial easements to be technical source of unmarketability but prohibit rescission due to beneficial nature
         2. **Split** on **visible easements**- general rule is technically unmarketable if physical easement
         3. **Split** on whether landlocked property is unmarketable
         4. **Hazardous waste** and physical cond--- NO MARKETABLE TITLE ISSUE
   4. **Equitable Conversion**- who has title between signing of PSA and closing?
      1. Seller has legal title
      2. Buyer has equitable title
      3. In case of loss during period, 3 approaches by courts:
         1. **Majority:** Buyer bears risk of loss
         2. **Minority:**Seller bears risk of loss
         3. **Minority:**UVPRA (Uniform Vendor and Purchaser Risk Act)-
            1. Neither title nor possession transferred- seller bears risk
            2. If EITHER legal title or possession has been transferred, buyer bears risk.
   5. Duty to Disclose Defects
      1. *Stambovsky:* Caveat emptor- No duty- CL standard as well [minority]
         1. Case itself illustrates exception
         2. Price may be factor- cheap for a reason!!
      2. *Johnson:* Duty to disclose **latent** defects **known** to seller that substantially affect he value or habitability of property and that are **unknown and not reasonably discoverable** by buyer. **MAJORITY.**
         1. *K –* L – M mnemonic: **KNOWN, LATENT, MATERIAL!**
      3. *Minority:* Duty to disclose all material defects; no case given; highest duty
      4. *Stambovsky:* Poltergeist case; condition was **created by and peculiarly within knowledge of seller** and **unlikely to be discovered by prudent purchaser**, so normal caveat emptor does not apply, and there is duty to disclose.
      5. *Johnson:*Affirmative misrepresentation about roof leak.
         1. **Material** has two possible standards:
            1. **Most courts use OBJECTIVE**, would rsn buyer be impacted?
            2. **Others use subjective-** this buyer
         2. **Patent-** opposite of latent
         3. **Physical inspection clauses** add possible way to get around KLM
         4. **Stigma statutes** may shield nondisclosure for bad things in house like murder (notes item)
            1. **Felons/sex offenders-** split in authority on disclosure
      6. **As-is clauses**: buyer takes premises in current condition; cannot shield liability related to fraud or exemption in *Stambovsky*
         1. **Other exceptions to caveat emptor:**
            1. **Fraudulent misrep** (must be active misrep)
            2. **Active concealment**
            3. **Confidential/fiduciary duty** between parties (trustee/trustor, special legal relationship)
            4. **Affirmative misrep** similar to fraud
            5. **Partial disclosure** or half-answers
   6. Merger
      1. At closing, PSA ceases to exist. deed becomes operative document- they “merge”
      2. Recission is NO LONGER remedy.
      3. Buyer now owns property; now grantor/grantee not buyer/seller
   7. The Deed
      1. Operative document **AFTER** closing
      2. **Deed must…**
         1. Be in writing
         2. Contain
            1. names of grantor and grantee
            2. Words of transfer
            3. Signature of grantor
            4. Description of land (often attached, long description- survey ok, in many JX address is ok. Plat # also ok)
            5. Acknowledgement (usually)
         3. Consideration statement- often $x + other valuable consideration- want to be able to prove there was consideration but don’t want amount in public record
      3. Types of deed
         1. **General Warranty:** promise that no one, grantor or predecessors, has created any title defect still in existence.
            1. **Best protection for buyer**
         2. **Special warranty:** promise that, since title acquired, this grantor has done nothing to impair title, but no guarantees about past.
         3. **Quitclaim deed:** no promises about quality of title. Grantee bears all associated risk. **NO WARRANTIES, NO PROMISES**
            1. Note that QC deeds are least valuable, general most.
            2. Why accept?

Minimal risk (“cowboy” approach)

Title insurance willing to insure

Few will on a QC

Often donative or family transactions so people not legally on the line for a gift.

* + 1. **Forgery and Fraud:** 
       1. Forgery- fake grantor signature
          1. Between two innocent parties, grantor wins (no way to self-protect from forger)
       2. Fraud- signature real but procured by fraud
          1. Between two innocent parties, buyer wins (true owner had better chance to protect self)
  1. **Covenants in Deeds**
     1. Only in warranty deeds
     2. 6 total- 3 present (breached only at time of deed) and 3 future
     3. **Present Covenants** – statute of limitations starts running at time of conveyance
        1. **Covenant of Seisin:** 
           1. Can only convey what you **own**
           2. Violations:

Conveying more than you own

Pretending to be someone else to convey

* + - 1. **Covenant of Right to Convey**
         1. Can only convey if you have right to do so
         2. Often breached with seisin but can be breached alone as well
         3. Violations:

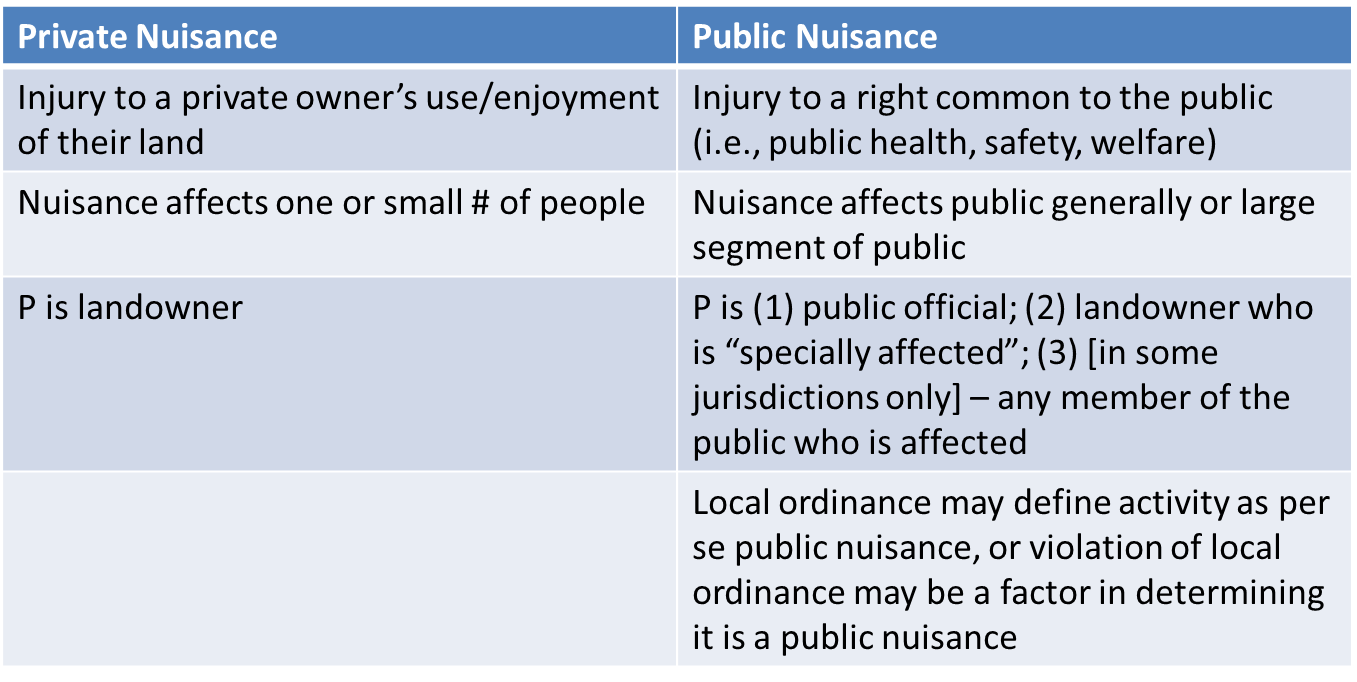
Trustee or TBE person who cannot convey unilaterally tries to do so

* + - 1. **Covenant Against Encumbrances:** 
         1. Conveying w/o things that affect marketability
         2. Covers only things buyer did NOT agree to.
         3. Even if the easement is actually asserted later, it must be within stat of lim.
    1. **Future Covenants**—only can be breached in future when problem arises, SoL starts running when problem arises
       1. **Covenant of Quiet Enjoyment**
          1. Grantee will not be ousted by person with superior title/claim of superior title
       2. **Covenant to warrant and defend**
          1. **Covenant of general warranty**
          2. Grantor will defend if someone comes with superior title claim
          3. Overlaps with QE
       3. **Covenant of further assurances**
          1. Grantor will sign necessary further title documents as needed.
    2. Will see suits on future covenants on present-covenant facts if SoL has run for present.
    3. *Brown v. Lober:* Improper conveyance that included mineral rights not actually owned was **not breach of covenant of quiet enjoyment** since there was **no actual disturbance in possession or use- no actual or constructive eviction.** 
       1. Note: Facts support claim for breach of covenant of seisin (present covenant) but SOL has run.
       2. **To prove breach of covenant of QE, P must show constructive eviction**, i.e., that someone holding superior title is interfereing with Pe’s right of possessession
       3. **Remedy** option: difference in price between promised and got.
       4. Courts **split** on **knowledge of encumbrances**
    4. *Frimberger v. Anzellotti:* **Existence of encumbrance** is enough to breach covenant, but **latent violations of public land-use regs are NOT encumbrances.** (Too hard to find, not on public record, uncertainty)
       1. *Bianchi*, mentioned in notes- split on authority. **If discernible from public records, successful claim is possible.**
  1. **Estoppel By Deed:** If a seller conveys without title and later acquires title, title passes automatically to buyer, seller is estopped from denying conveyance.
  2. **Delivery of Deed:** 
     1. Often in context of donative transactions
     2. **Lack of physical existence of the deed does not invalidate it** so long as it was previously valid and existence can be shown by other methods (*Sweeney*).
     3. Oral conditions on deed are void (Sweeney)
        1. Policy: fraud!
     4. **Irrevocable escrows to third parties are valid for delivery**, but **revocable escrows** to third parties are void for failure of delivery (*Rosengrant).*
     5. *Sweeney v. Sweeney:* Delivery and recording of deed to J followed by hand-delivery of deed back to grantor with intent to have it not be enforced unless J died first was valid for BOTH deeds- grantor owned land again. **No oral conditions on deeds! (**policy: fraud reasons)
     6. *Rosengrant v. Rosengrant:* Bank’s writing grantor and grantee’s name on envelope held to create **revocable** escrow, and thus deed was void for failure to deliver. (Note both cases against intent of parties.)
     7. What SHOULD you do if you want conditions on deed? Trust, convey with life estate reserved, devise by will, revocable trust, give to 3rd party with written conditions
  3. **The Recording System**
     1. **Recording Acts:** 3 types- resolve disputes on title, promote certainty and efficiency.
        1. Limited- can only resolve disputes between claims when there is a grantor in common.
           1. Competing grantees with same grantor in common
           2. Competing grantees with common grantor in chain of title (additional special rules may apply)
        2. Does NOT solve different grantor issues- fraud problem.
        3. Do not deal with validity of conveyance
        4. Recording is NOT required to transfer title.
     2. **Title search:** can pay to have done, looking in public records
     3. **RECORD YOUR DEEDS AFTER CLOSING**
  4. **Recording Acts**
     1. **Common Law: First in time to record wins.** 
        1. Still applies in JX with statutes when no one satisfies the recording act, or if the JX has no recording act.
     2. **Race:** First to record wins, regardless of notice. LA and NC only.
     3. **Notice:** Subsequent purchaser w/o notice has priority **even if** subsequent purchaser fails to record.
        1. **Notice** is key
        2. **Purchaser-** why we require “consideration” statement in deed
        3. **Remember to record if you are the BFP**- grantor might convey yet again, you want to record to put subsequents on constructive notice.
     4. **Race-Notice:** Subsequent interest has priority only if (1) purchaser, (2) w/o notice, **and (3) records first**.
     5. Purchaser for value must have no **notice** to qualify in ^^JX
        1. **Actual notice:** actual knowledge, whether from title search, public records, neighbor tells you, whatever. (evidentiary issue if someone tells you)
        2. **Constructive Notice:** in public record= you should have known, deemed to be on notice
     6. **ALL STATES BUT LA- MUST BE PURCHASER TO WIN**
        1. Less protection for donors b/c fraud concerns and no monetary loss to donors. Donees should record
     7. **Shelter Rule:** If A 🡪 C, C would not win, C may “shelter” and **assume chronology of grantor** A.
        1. Note that in notice JX where O🡪 A, O🡪 B, A🡪 C, recording in A, B, C, order, A records at conveyance: in a notice JX, C still wins. C is a BFP in **chain of title with common grantor**, so still “counts” as BFP with no subsequent notice (basically as if O granted to C)
     8. *Messersmith v. Smith:* Mesne/intermediate deed in title was not eligible to be recorded, so later conveyance held to be invalid (earlier deed treated as not recorded due to invalidity) and no recording act protections apply.
        1. Some states retain this law, but not state this case was in.

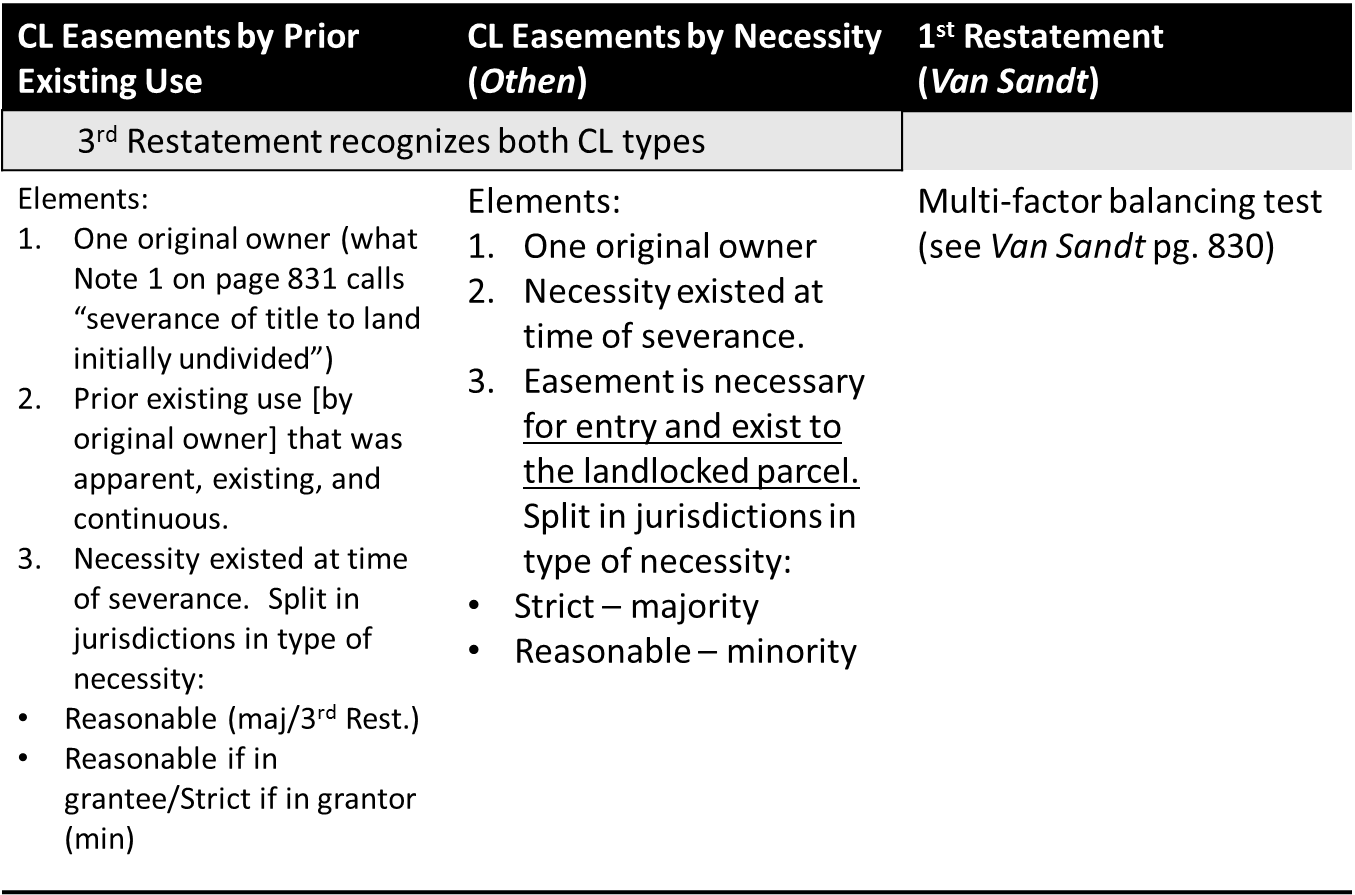
**Part VI – Land Use Controls**

1. Land Use Controls
   1. Judicial Land Use Controls: Nuisance Law
      1. **Nuisance** is separate from trespass- involves **interference with use and enjoyment of property**
      2. **Intentional** – intentionally invades land w/ **unreasonable conduct**
      3. **Unintentional-** unintentional invasion of conduct that is reckless, negligent, or **ultrahazardous**
      4. **Can be per se or in fact:**
         1. **Per se:** at all times, is nuisance
         2. **In Fact:** nuisance due to location
      5. *Morgan v. High Penn:* Oil refinery near house, restaurant, trailer camp is a nuisance in fact, injunction granted.
      6. **Intentional Nuisance** does **NOT require that person intends to cause harm-**- simply must intend to engage in the conduct that they know or should know is substantially likely to interfere with use/enjoyment of other property
      7. **Three tests for intentional nuisance “unreasonable” conduct:**
         1. Restatement Test 826(a) – balancing test
            1. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct,
         2. Restatement Test 826(b)
            1. An intentional invasion of another's interest in the use and enjoyment of land is **unreasonable if** (b) the harm caused by the **conduct is serious** and the **financial burden** of **compensating** for this and similar harm to others would **not make the continuation** of the conduct **not feasible**.
            2. Basically if you could afford to pay, you should
         3. *Jost*/threshhold Test
            1. **Once conduct crosses some threshold,** it is nuisance- no balancing. (Jost, Morgan v. High Penn)
            2. Popular b/c gives court large discretion
      8. Restatment § 827. **Gravity Of Harm—Factors** Involved
         1. (a) The **extent** of the harm involved;
         2. (b) the **character** of the harm involved;
         3. (c) the **social value** that the law attaches to the type of use or **enjoyment invaded**;
         4. (d) the **suitability** of the particular use or enjoyment invaded to the **character of the locality**; and [encompasses things like whether the resident was there first, or if the resident “came to the nuisance”]
         5. (e) the **burden** **on the person harmed of avoiding** the harm.
      9. § 828. **Utility Of Conduct—Factors** Involved
         1. (a) the social value that the law attaches to the primary purpose of the conduct; [value of the goods the factory produces to general public, importance of having factory to have other essential things (like electricity), jobs produced by factory]
         2. (b) the suitability of the conduct to the character of the locality; and [encompasses things like whether the factory was there first, whether it’s primarily industrial area]
         3. (c) the impracticability of preventing or avoiding the invasion. [how much it would cost for the factory to install things/fix the building to make the nuisance stop]
      10. **Two-Part Nuisance Test:**
          1. Nuisance? (tests above)
          2. Remedy?
             1. **Balancing equities Test**

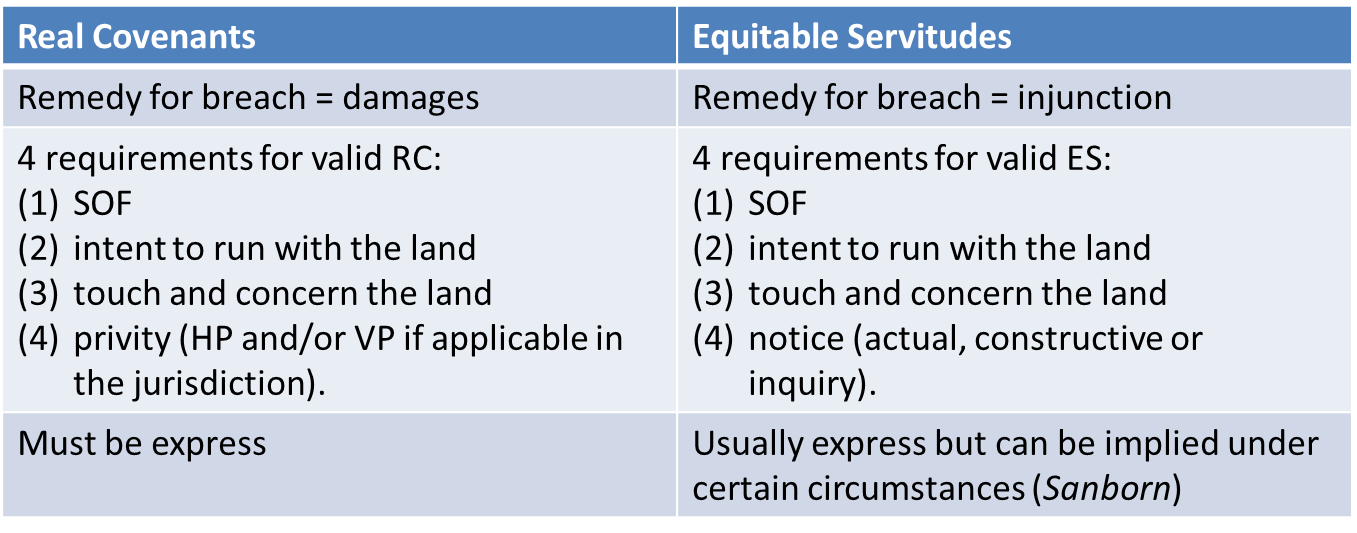
**Public’s issues matter in addition to parties-** is there harm to public from granting injunction? Is there harm to public if not enjoined?

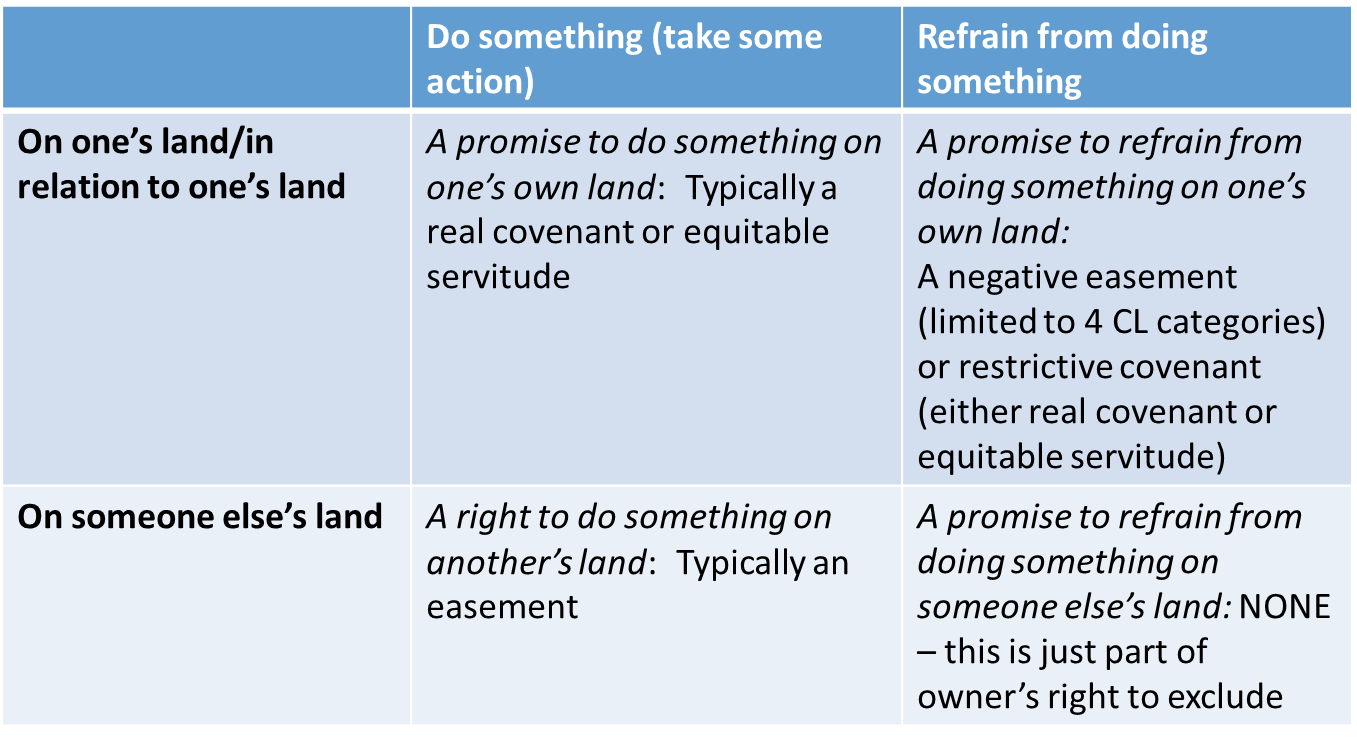
* + - * 1. Or one of the step 1 tests?- may say “nuisance under threshold, so injunction proper”
    1. **Remedies** for nuisance:
       1. **Injunction**
          1. *Dallas v. Schultz:* Court applies **balancing of equities test** comparing harm to homeowner-neighbors with harm to apartment building owner of stopping loud air conditioners and grants injunction.
       2. **Buy the injunction-** P can agree to take $ and let D continue later.
       3. **Buy land from P and do what you want**
       4. **Temporary damages (**but do people have to bring suit for later pollution/nuisance again?)
       5. **Permanent Damages**
          1. *Boomer v. Atlantic Cement****:*** Cement company’s pollution passes threshold test, but multiple suits would be a pain, so permanent damages awarded.
    2. **Coming to nuisance-** damage reductions/servitudes barring suit once property wins judgement so that people who move in cannot re-sue.
       1. Price of property will reflect this
    3. **Public and Private Nuisance**
       1. *Spur v. Del Webb:* Sun city case-nuisance despite city coming to because elderly in community at risk; developer **forced to indemnify** due to coming to nuisance. (statute ruled flies a per se nuisance)
       2. **Public nuisance** often draws on ordinances (see left)
       3. **Nuisance can be both public and private.**

(b) Private Land Use Controls (Split off for space!)

* 1. Note: Restatement groups all of these under “servitudes”, but not all states adopt that approach
  2. **Easements**
     1. **Affirmative –** right to enter/do something on land
     2. **Negative—**right to prevent someone from doing something
     3. Dominant Estate- benefits from easement
     4. Servient Estate- burdened by/subject to easement
     5. **Appurtenant**- attaches to /runs with land; **default rule**
     6. **In Gross-** belongs to holders regardless of land ownership, often used for utilities.
     7. Easements can be term-limited, have conditions.
     8. *Willard v. First Church of Christ, Scientist:* **As at common law, cannot reserve interest for third party in a sale/conveyance document,** but under **Cali rule**, church parking easement valid.
        1. **Reservation-** provision creating new easement that did not exist before
        2. **Exception-** provision excluding a preexisting servitude from grant.
        3. Solutions- write a separate document, or give to church to sell to buyer, and do as reservation
     9. **Creation of Easements**
        1. **Traditional:** Easements cannot be reserved for benefit of stranger; no reservations, no exceptions!
        2. **Willard/Restatement:** Reservations are allowed (for benefit of 3rd party); still no exceptions for grantor under Willard.
  3. **Licenses**:
     1. **License**: revocable permission to do something; NOT an interest
     2. **Fully revocable**\*
        1. But under certain circumstances, might become irrevocable - i.e., the grantor is estopped from revoking it. If so = easement by estoppel.
           1. Estoppel generally = if A takes some action in reliance of B, and B knows it, then B may be estopped
     3. **Written or oral**
  4. **Implied Easements- Easement by Estoppel**: \*all 50 states
     1. *Holbrook v. Taylor:* In case where Taylor relied on Holbrook, spent own money to improve road to T’s house, easement found.
     2. Benefits and Concerns:
        1. *Dalton*-because not written, concerns on fraud
           1. Some courts may not grant easement by estoppel but most do recognize it in some circumstances
           2. Hard to find notice and can complicate title
        2. *Shepard*- fairness reasons, equitable remedy
     3. **Easement by estoppel is created** through irrevocable license if:
        1. a license is granted;
        2. the licensee expends money or labor in good faith reliance; and
        3. the licensor has knowledge or reasonable expectation that reliance will occur
     4. Boundaries/Scope:
        1. **Restatement defines scope** as “reasonable expectations of rsn people in the position of the landowner and the person who relied on grant.”
           1. **Rebuilding** something on same site- usually rsn.
        2. **Duration**: Original restatement had different rule, R3 returns to rule for all easements (same as express ones)
        3. **Level of reliance** may vary the damages
        4. Can agree for payment to use in express**, cannot demand money for use in implied!**
  5. **Easements by Judicial Implication**
     1. *Van Sandt v. Royster:* In case of old sewer line across three lots previously with common owner, court applies test to determine whether there was easement, finds one. (Notes but does not follow **quasi easement** doctrine- against self, using one part of land for another part). Buyer knew home had modern appliances and so was on constructive notice as to presence of sewer easement.   
          
        TEST FACTORS:
        1. **Grantor or Grantee**
        2. **Terms** of conveyance
        3. **Consideration** for conveyance
        4. Whether claim made against **simultaneous conveyee**
        5. **Extent of necessity** of easement/profit to claimant
        6. Whether **reciprocal benefits** result to both
        7. **Manner in which used** prior to conveyance
        8. **Extent to which manner** of prior use was or might have been **known** to parties
     2. **Changes in easements over time-** general rule is yes, but only for **closely related and ancillary uses.** (tech, etc. may change)
  6. **Easement by Necessity/Judicial Implication part 2**
     1. Elements in chart
     2. *Othen v. Rosier:* in case of multiple conveyances from single grantor over period of years, no evidence in record to show necessity of right of way at time of severance (smaller parcel probably provided right of way)
        1. **Very chronology dependent**
        2. Solution: negotiate for paid right of way/express easement.
     3. **Easements by necessity reflect need for efficiency as regards landlocked parcels**- but should not be too easy, only last as long as necessity!
     4. Necessity considered is that of party with otherwise landlocked parcel
     5. Generally, easement will take shortest route, court cannot redraw property lines. Equity and common law guides.
     6. **Condemnation of right of way-** some states have available when necessity is not, but must pay neighbor and there must be hardship.
        1. **Useful when no common owner in past**
  7. **Easements by Prescription (Implied)**
     1. **Results in right to use property** (Contrast AP for ownership of property)
     2. Elements:
        1. **Actual Entry**
        2. **Exclusive\***
           1. Unlike AP, for PR, this element can be satisfied even if another person is using the property. Question is **whether anyone else interferes with your right to use prop.**
           2. Ex: Shared staircase- PE. Road with chain over- no PE
        3. **Open and Notorious**
        4. **Adverse** (w/o permission)
        5. **Claim of Right/Title**
        6. **Continuous for statutory period**
     3. To prevent one on own property, either block off with fences or give permission.
     4. **Public Prescriptive Easements:** possible in theory for public to acquire prescriptive easement across property accessed by public
        1. **Open and notorious** is biggest issue (public v group of people)
        2. Walking across something alone is not enough
        3. Putting up a sign “by permission” prevents creation
  8. **Public Trust Doctrine** 
     1. For things “incapable of being privately owned”/no one should own; gov’t holds it for public and all citizens have right to use
     2. **Scope**- for “navigable waters” and ocean”
        1. Originally only **navigation and commerce,** but **majority** now recognize **reasonable expected uses of society**
           1. **Many** jx include recreational uses
           2. **Maine and MA-** more narrow [minority]
        2. Book adds: “All and covered by ebb and flow of tide and all navigable waters to ordinary high water mark”
           1. Some states repudiate public trust as threat to private property, others think it has good socializing function
     3. **Access issue**: how to get people to “wet sand” public trust area? *3 views*
        1. **Expansive view of public trust doctrine**- **Majority-** beach includes more than wet sand and ocean
           1. *Bay Head (Matthews v. Bay Head):* NJ beach case notes that public trust is useless without some dry sand to rest on and access, requires Bay Head Assoc. to let people use the roads to beach, charge reasonable fee, open membership outside of residents.
        2. **Customary Rights-** TX, OR, HI **minority**- people have used dry sand so long that it is not a right;
           1. TX SC has limited these public rights
        3. **Public prescriptive Easements**: NC **minority-** public acquires easement over dry sand area
     4. **Right to roam**- not in US but in Scotland, right to go on private property of certain types as long as you follow certain rules.
  9. **Scope of Easements**
     1. **Assignability:** 
        1. Easements pass with conveyance of land, treated like an interest
        2. **In Gross** easements may not always be assignable! Might be.
           1. **Utility** easements in gross do pass with land.
     2. **Common Law Rule:** dominant tenement cannot extend easement to another part of property. **Servient owner protected from any expansion, regardless of lack of additional burden.**
     3. **Restatement:** easement can be used in manner “reasonably necessary for the convenient enjoyment of the servitude for its intended purpose.”
        1. **Manner, frequency, intensity of use may change over time** to accommodate normal development/changes in tech
        2. Holder of dominant estate not entitled to cause unrsn damage or interfere unrsn with enjoyment of servient estate.
     4. ***Voss* Rule: Multi-factor balancing Test:** to decide whether injunction:
        1. **Proceeding is equitable** & **addressed to** sound **discretion** of court
        2. Trial court is vested w/**broad discretionary power** to shape and **fashion injunctive relief to for the particular facts circumstances, and equities** of the case before it
        3. **Actual and substantial** injury sustained by person seeking injunction
     5. *Brown v. Voss:* Couple who own two lots, one dominant for easement, could build house over both lots that used easement road, as easement for only one lot, in violation of traditional rule, because harm of granting injunction > harm denying injunction.
     6. Wording matters- “general use” v. “right of way” give different rights
     7. **Common law says easement cannot be moved from location of express grant.**
     8. Difficult to expand prescriptive easements.
     9. If a deed grants a strip of land, could be found to be EITHER fee simple or easement. (right of way = magic words for easement)
     10. **Termination of Easements**
         1. **Express expiration**: express statement- “this goes as long as O farms” or “5 years”
         2. **Release:** Acan say, by written doc, I release this burden, doc recorded.
         3. **Merger:** D and S tenements in one ownership- auto termination of easement
         4. **Estoppel:** relying on termination
         5. **Abandonment:** must have conduct AND intent- stopping use alone or intent alone NOT ENOUGH
            1. But **conduct can have intent**- if you are a RR and you rip up lines over easement, you are possibly signally intent to not use it for railway use, which it was granted for
         6. **Condemnation:** can end if gov’t condemns land
         7. **Prescription**: if, for stat period, servient owner puts other on notice, o&n actions, and prevents them using easements, easement can be terminated by prescription
         8. **Necessity easement** ends when necessity ends
         9. Book adds frustration/changed conditions
         10. **VERY SMALL MINORITY** allows changed conditions doctrine
  10. **Negative Easements**
      1. **4 traditional negative easements:**
         1. No blocking light
         2. No interfering with air movement
         3. No removing support of building
            1. Lateral support
            2. Subsidence
         4. No interfering with artificial stream (natural ones already protected elsewhere)
      2. Very limited otherwise, do by restrictive covenants.
  11. **Conservation Easements**
      1. May be held in gross. Enacted by stat in almost all states
      2. Prescribe use of land for certain purposes, generally forever
      3. Developed to protect environment and family farming
      4. HUGE TAX BREAKS (possible overvaluing too)– makes them controversial

1. **Covenants and Equitable Servitudes** 
   1. Real Covenants
      1. **Negative covenants** – promise not to do something
      2. **Affirmative covenants** – promise to do something
      3. RC **run with the land ONLY** if it satisfies very specific requirements
      4. Remedy for **breach of RC = damages** only (injunction not available)
   2. **Real Covenant- Four Requirements**:
      1. **SOF**- F; can be within another writing or document as in a deed. **ALWAYS EXPRESS/WRITTEN, NEVER IMPLIED**
      2. **Intent to run with the land**
      3. **Touch and concern the land-** almost always met for negative covenants- you basically can only promise not to do something on your land…
         1. ***Affirmative*** *ones might have a problem*- like “I promise to pay condo association fees”- some courts did not think it touched/concerned land, but some justify it by land value conn., touches value of land
         2. **In US,** both types can touch and concern land
   3. **Privity\*** of estate
      1. **Two types of Privity:**
         1. **Horizontal:** requires that there be a relationship between parties that does not involve covenant- there must be transfer of land.
            1. Easement, conveyance, etc. with covenant
            2. Separate docs ok as long as the interest transfer was AT SAME TIME as covenant!
         2. **Vertical:** exists when there is **voluntary transfer of entire property interest** from prior to successive property holder
            1. VP looks at conditions of transfer of the estate - did the original party pass down her entire estate to a successor?
      2. **Horizontal Privity:** 
         1. **Majority** rule/Restatement = HP is **not required** at all
         2. **Minority** rule = HP is required for burden to run to successors, but HP not required for benefit to run to successors.
      3. **Vertical Privity**:
         1. **Majority** rule = VP required for **burden** to run to successors, but VP not required for benefit to run to successors
         2. **Minority** rule/Restatement = VP is not required at all
      4. For burden of RC to run to successor, need at least VP, and may need HP (depending on jurisdiction)
      5. For benefit of RC to run to successor, neither VP or HP required
   4. **Equitable Servitudes**
      1. May be implied; REAL COVENANTS MUST BE EXPRESS
      2. **Allows injunction**- which is more desirable in a residential setting



* + 1. *Tulk v. Moxhay:* later purchaser who knew of restrictions on original deed even if not in his deed, due to notice. “Purchaser in equity cannot stand in a different situation from the party from whom he purchased.”
    2. **NOTE: If given a problem of this sort, look to both covenants and ES!**
    3. **Reciprocal covenant/IMPLIED ES:** If an initial common owner intended to apply a **"general plan" or "common scheme**" of development to all of the land, then an equitable servitude will be implied for the grantor’s remaining land. i.e., **the covenant is reciprocal** (Sanborn)
    4. For ES to be enforceable, subsequent purchaser **must have had notice**; ie, **BFP are free from implied equitable servitudes** (Sanborn)
    5. **Notice** can be **actual, constructive, or inquiry**
       1. **Inquiry notice**= **bigger burden to search record** to see what is in **other common plan deeds**- something might affect you
       2. *Sanborn:* should have noticed how people only built houses and wondered if common plan = inquiry notice.
    6. **Not every JX recognizes** **implied reciprocal equitable servitudes;** those that do not say restriction should be in all deeds if to apply to all deeds.
       1. In this situation, may be able to argue that owner and purchaser’s restriction has everyone else in development as **third party beneficiary,** allowing enforcement. Must have common plan or intent for purchasers of land to have benefit of covenant.
    7. *Sanborn v. McLean:* Owner of residential plot w/o express ES in deed not able to build gas station since general plan imposed reciprocal covenant and owner was on inquiry notice.
  1. **Validity and enforcement of covenants**
     1. Must meet the requirements in chart
     2. *Neposit Property Owner’s Association v. Emigrant Industrial Savings Bank:* Covenant to pay assessments for HOA is VALID, even if bank foreclosed property and is now owner.
        1. Can also be done under 3rd party beneficiary
        2. Efficiency reasons- difficult for neighbors to simply collect
        3. HOA’s covenants- benefits can be considered **appurtenant** because the HOA is made up of people who could hold benefits that way. (Doesn’t have to be in gross, despite HOA not directly owning land)
     3. **Defeasible fee can do much of the same stuff**, but the remedy is forfeiture; that is too harsh, so use another route instead.
  2. Discriminatory Covenants
     1. *Shelley v. Kramer:* Judicial enforcement of discriminatory racial covenants is state action that violates the 14A.
        1. Alternative ground of enforcement: **unlawful restraints against alienation**, since covenants like this limit seller and buyer pool
           1. OR not valid real covenant due to touch/concern.
     2. Now most discriminatory covenants banned by FHA.
     3. Group Homes- “single family residence only” covenants may ban;
        1. Some courts say it is residence, so it is not banned
        2. May also raise “handicap” FHA issue
  3. Termination of Covenants
     1. Same as easements above, PLUS:
     2. **Changed Conditions:** if circumstances have so changed so much as to nullify the original purpose of covenants (such as radical changes in character of the neighborhood), then RC/ES may be terminated.
     3. **Changed Conditions doctrine is stringent, most courts narrowly apply it (i.e., rarely grant termination of RC/ES on grounds of changed conditions.)**
        1. *Rick v. West:* Single holdout in residence relying on covenant was enough to prevent “changed conditions” rezoning land for hospital’s use. (Town did approve zoning change, court nopes out)
        2. *Western Land Co.* *v. Truskolaski:* Changed conditions outside of development did not justify rezoning a corner lot as commercial, as residents still benefitted from residential covenant.
     4. **NY’s doctrine:** “no actual substantial benefit” = changed conditions
        1. Leeway to find reasons it’s not serving purpose- zoning board decisions, etc.
        2. Note that Eminent Domain is not a restrictive covenant. But still not for private parties, only government.
  4. Book p.920 for lessees and life tenants, not discussed in class
  5. **Duration of covenants- as long as intent of parties**

1. Common interest and zoning
   1. Common Interest Communities
      1. Based on requirements: SOF, intent to run, touch and concern, privity (RC) or notice (ES). CL requirements for Restrictive Covenant or ES usually met
      2. But **most states do not rely on CL for validity of CIC** and instead have **statutory laws** modeled on Uniform Common Interest Ownership Act.
      3. CIC generally residential; developer files declaration to authorize
      4. **Declaration** is key document under statues, must be **recorded.** 
         1. Recorded against **whole community,** comes up in **title search,** and **constitutes constructive notice**
      5. Owners in community bound by declaration covenants and whatever future covenants adopted by association
         1. In theory, mechanism for adopting new ones, residents will “buy in” to lifestyle they agree with.
         2. Tension from rights of individuals/the community as whole
   2. Common Interest Community Types:
      1. **Condos:** unit and interior walls individually owned, common areas and exterior walls in TIC. Financing as if for standalone house.
      2. **Coop:** big cities only; NY/Chicago; corporation owns entire property and each resident owns shares of corp, NOT UNIT and pays rent to corp. Notoriously picky and discriminatory, as each rent goes to mortgage; entitled to be picky.
   3. Validity of Restricions in CIC
      1. *Nahrstedt:* **Restrictions presumed valid unless unreasonable in general**
         1. **Unrsn in general:** burdens the restrictions impose on affected properties must **substantially outweigh the benefits** it provides such that it **should** **not be enforced against ANY owner**.
            1. **Makes it difficult to strike down restrictions** but people have non-HOA places to live, market will self-correct!
         2. Note that more deference is given to restrictions that are in original declaration and recorded vs. ones adopted later.
            1. Equity considerations as applied to latter
         3. *Nahrstedt v. Lakeside Village condominium Assoc.:* Restriction against keeping cats/pets in development is valid in general, over dissent about policy reasons.
            1. (Cali changes law to overrule later)
            2. Public health arg possible- but unlikely b/c no protected class and there are other places to live.
      2. **Restatement: servitude is presumed valid unless illegal, unconstitutional, or violates public policy.**
         1. Violates public policy if it **unreasonably burdens a fundamental constitutional right** or imposes **unreasonable restraint on alienation** (not quite unconst. but BURDENS CONST RIGHT)
            1. Unreasonable restraint on alienation:

**Direct restraints =** invalid in unrsn- apply nahrstedt test of burden/benefits

“no renting clauses” = example

**Indirect Restraints =** invalid if **no rational basis**, NO BALANCING TEST!

**Limits who you can sell to-** like no pet restriction. (allergies justify that)

* + - 1. Restatement examples: See Day 32 Notes
         1. Keep in mind free expression, religion, etc.
         2. **Can limit but not ban American Flags**
         3. **Many states forbid banning solar panels**
    1. **HOA’s may act like local gov’t to some communities,** hence the restrictiveness and rules.
  1. **Legislative Land Use Controls** - **Zoning**
     1. **Euclidean Zoning:** municipality divided into rigid use zones that are cumulative- “higher” uses (but not necessarily higher value) are allowed in lower areas, but not vice versa
        1. **Highest= single family residential**
        2. **Lowest= industrial**
        3. **In between = stores, commercial retail, multifamily housing**
     2. **Euclidean Zoning Justifications:** protect property values + prevent lower-use pollution, noise, and traffic from hurting quality of life.
     3. *Euclid v. Ambler:* Zoning ordinance found to be valid in general by deferential court using rational-basis test. **Zoning as general concept is within police power.** 
        1. **Applied challenges/as-applied challenges still open!**
        2. Today, claim would be brought under 5A takings, not 14A.
     4. **Multi-use Zoning:** reduce traffic- light commercial and retail near mixed single-and-multi family residential areas. (more efficient)
     5. **Houston:** We use **other legislative controls- lot size, height etc.** 
        1. **Private covenants and deed restrictions**
        2. If 60% of people in neighborhood agree, can get a mini legislative enactment to have a regulation

**Part VII – Eminent Domain and Takings**

1. Eminent Domain
   1. Note: The decisions here are NOT CONSISTENT. Just deal.
   2. **5th amendment: nor shall private property be taken for public use, without just compensation**
      1. Presumption that gov’t can take property, but 2 limitations:
         1. Public use
         2. Just compensation
   3. Reasons to allow gov’t to take land:
      1. Utilitarian- benefit for society
      2. Prevent holdouts
      3. Constraints are there to prevent dumb takings
      4. Efficiency and transactional costs
      5. Compensation to keep people feeling secure- **loss of autonomy when gov’t can take is a problem**
   4. **Government can try to delegate to private parties but that is controversial.** 
      1. Ex: TX to railways
   5. **Government attempts to negotiate before using ED-** b/c it has bad rep.
   6. Public Use
      1. **Public use not always literal use by public/means public purpose! (Kelo)**
         1. Use by public
         2. Public purpose
            1. Hawaii Case: land oligopoly break-up to private parties
            2. DC Case: super blighted area renovation justified taking of non-blighted store
            3. Economic development- Kelo (not always- fact specific)
         3. NOT PUBLIC USE- TAKING FOR PRIVATE PARTIES
            1. But parties may benefit from public, all public use benefits some private parties
      2. *Kelo v. City of New London:* City may E.D. house for economic development plan as public purpose public use, since unemployment rate high and blight spreading.
         1. 43 states altered law to make it more difficult after this.
         2. Dissent- this is taking for private, specter of ED over homes. Can only go private – private for econ development when former owner’s use is harmful to society.   
            3 proper categories for taking:
            1. Transfer private 🡪 public ownership, as for roads
            2. Private 🡪 common carriers, who make property available for public use
            3. 🡪 Private parties as part of program to serve public purpose (Midkiff, Berman – Hawaii and DC cases)
      3. Means and Ends Tests:
         1. **Ends Test- Kelo- deferential determination of public purpose**
         2. **Means Test- is eminent domain the only way to do this?**
   7. Just compensation
      1. “**Fair market value”** objective standard is current one- what willing buyer would pay to willing seller.
      2. Court will look to laws on what can be built- if commercially zoned but there is house, and commercial value greater, you get that.
      3. Subjective elements- should they be added?
         1. Advantage- sentimental value compensated, owners get more fairly compensated
         2. Disadvantage- overvaluing houses, long litigation
2. Takings
   1. Includes ED and Inverse Condemnation aka Regulatory Takings
      1. **Eminent Domain**: govt directly exercising authority under 5th amendment to condemn private property for public use.
         1. **Gov’t is P, files petition**
         2. **Central Q: IS taking public use?**
      2. **Inverse Condemnation (aka Regulatory Takings)**: govt not physically condemning land but regulation effectively amounts to exercise of the gov’ts 5th amendment power.
         1. **Owner is P**- lawsuit challenging regulation as taking
         2. **Q**: **is there a taking?**
            1. If not, gov’t does not have to compensate
            2. Ex: zoning-police power- no payment
   2. Police power- NOT TAKING- can be positive (adding benefit) or negative (preventing harm); clever framing for both at same time.
   3. Challenges to takings usually for land use regs
   4. *Loretto v. Teleprompter Manhattan TV Corp:* Wire and cable boxes from cable company must be allowed on building by statute; since it is a physical invasion, it was taking, just compensation eventually set at $1.
      1. **Permanent physical occupations are takings** b/c interfere with owner’s right to \*exclude\*, destroy, fully possess property.
      2. **Distinguished from temporary physical occupations**- flooding, etc. is not taking if temporary.
         1. **Easements** are permanent/taking
         2. **1st amendment protestors on land-** temporary
      3. Dissent feels this is arbitrary brightline; but majority can **respond to minor nature of taking by low compensation**
      4. LL/T- since no third party placing something in apt, can still have regs.
         1. Regs that tell LL to buy/do something still valid. No interloper involved.
   5. *Hadachek:* not assigned- **harm preventing legislation is not taking.**
   6. *PA Coal v.* *Mahon*: Struck down Penn. Kohler Act that prevented removal of coal from under homes as it “**goes too far**” in the test of **weighing diminution in value of property against character of gov’t action.** Because coal interest was separate interest, 100% diminution since could not remove coal vs. protecting one house.
      1. Dissent applies similar rule to *Hadachek*
      2. Cost of compensation if found taking may also be a factor
      3. **Diminution of property** framing may change #s (100% of 1 estate v. if you consider all 5 estates owned by a party…)
      4. **Character of gov’t action:** does this equally benefit P and public? How many people protected?
   7. **Conceptual Severance:** “What is P’s property” if we have no categorical rule?
      1. Interests can be framed/divided- not so clear!
   8. *Penn Central*: modified balancing test;
      1. Owners of Penn station bought it in 1965, 1967 law prohibiting development stymies 1968 deal to build a tower
      2. **Penn Central Balancing Test: Econ impact + Character of action**
      3. Economic impact
         1. **Diminution of value:** 
            1. Property is as whole **– NO CONCEPTUAL SEVERANCE**
            2. Must be VERY HIGH diminution in value to be deciding factor
         2. **Extent regulation has interfered with property owner’s reasonable investment-backed expectations**
            1. Effects on **current value of property**
            2. Effect of regs on **owner’s ability to continue to use property in its current state** or in a way that is **rsn based on regulatory environment for that type of property**

Waste dump- expect regs

Single family home- expect more freedom

* + - * 1. Effect of regulation on owner’s **ability to recoup investment**
    1. **Character of Gov’t Action**
       - 1. **Where on continuum of public benefit does it fall?**

Broad or narrow?

* + - * 1. **Reciprocity of advantage?**

If owner benefits as member of public that helps

* + - * 1. **What stick/right? \*EXCLUSION\* leans toward taking**

Courts less suspicious if it just affects right to use

* + - * 1. **Benefit promoting or harm preventing?**

Can always frame as harm preventing though-see Lucas

* + - * 1. **Physical invasion? (Non permanent**)
        2. Broader laws tend against takings
        3. TDRS? (**Transferable development rights,** allow development in other land parcels in area/held by owner of land taken that would normally be violation)

Some JX allow sale, transfer, etc. There are no-

TDR land use regs that are not takings, they are not required

Book notes gov’t can game this by restricting and granting TDRs.

* + 1. **Actual Penn Station Holding:** Can’t expect to use a historic building as a tower footstool. They do benefit from regs. **Also they could have challenged via judicial review at time of land passage!** There is still use in building, can still develop in some airspace- only this one proposal rejected.
  1. ***Lucas v. SC coastal Council:*** 
     1. Lucas bought a lot of land, now has two lots affected by Beachfront Management Act and Coastal zone erosion rules
        1. TC found 100% diminution in value and SC of South Carolina disagrees, reverses under Hadachek rule.
     2. **Two important holdings:**
        1. **Narrows CR#2 from Hadachek to only harm-preventing regulations that do what background CL property or nuisance principles does are not per se takings.** 
           1. **Other harm-preventing legislation could possibly be taking**
        2. **New CR#3: When regulation denies owner all economically beneficial/productive use of land, per se taking.**
           1. Dissent criticizes this b/c of uses like camping and selling land, or sell to someone for view
     3. Holding: this court does not reach the severance problem because Lucas owns in fee simple. Court finds that it is taking b/c 100% of **development uses** are prohibited.
        1. Scalia dislikes Penn
        2. Why this rule on CR#2? B/c traditional nuisance/CL regs mean that you never had that stick in your bundle in the first place- you’re not losing b/c you never had it
        3. Kennedy Concurrence- circular about property being what gov’t says it is, and that Scalia froze the common law in time, we should consider broader legal tradition for this.
        4. Dissent- Blackmun- **missile to kill a mouse**; small category of cases- we should stick with Penn Central instead.
        5. Dissent-Stevens- This is too arbitrary (95% is no per se taking, 100% is?)- economic uses too narrow and do not constitute all the 100% of available uses.
     4. **Today most courts still reject conceptual severance**
     5. **Regulatory taking is not for personal property, only real** (scalia)
     6. 4 additional CRs- this, **fire, navigation, forfeiture**.
     7. Possible chilling effect of these regs- expensive for local officials to guess wrong and have to pay!

1. Takings Regulatory framework:
   1. **FIRST: Categorical Rules (aka “per se rules”): If we have X, then definitively do or do not have a taking.**
      1. ***Central Q: Do we have X?***
         1. **CR #1: permanent physical invasion of property = taking (*Loretto*)**
            1. (If no, keep going down the list…)
            2. (remember, could be physical but only temporary and then it’s not an auto taking under this test!)
      2. **CR #2: regulation equivilant to background CL property law and nuisance = NOT a taking (*Lucas,* modifying Hadacheck)**
      3. **CR #3: when regulation denies owner all economically beneficial/productive use of land = per se taking (Lucas)**
   2. ***SECOND: If no CR applies, then apply balancing test***
      1. **Balancing Test**
         1. **(Initial version: *PA Coal* – weigh diminution in value of the property against the character of the government’s action)**
         2. **Current version: *Penn Central***
            1. **Economic impact of the regulation**

**Diminution in value**

No conceptual severance (Penn)

Must be very high to be decisive factor

**Extent regulation has interfered with property owner’s reasonable investment-backed expectations**

Effect of reg. on current value of property

Effect of regulation on owner’s ability to continue to continue to use property in its current state or in a way that is reasonable based on the regulatory environment for that type of property

Effect of regulation on owner’s ability to recoup investment

* + - * 1. **Character of the gov’t action**

Where on continuum of public benefit does regulation fall (applying to many or only a few?)

Does regulation provide reciprocity of advantage?

What stick in the owner’s bundle does reg affect?

Benefit-promoting or harm-preventing?

Physical invasion (non-permanent)?

* 1. Applying tests- Palazzolo v. Rhode Island
     1. Palazzolo is shareholder of corp buying property in Rhode island, 3 attempts to develop, then new law. **He has 6% developable and 94% not.** He wants to split…
     2. Case clarifies 2 issues:
     3. **Issue #1: How to determine when CR #3 applies vs. when balancing test applies?**
        1. **No conceptual severance!**
        2. Yes, LOTS of reduction, but cannot break up parcel to get Lucas
        3. **CR #3 (Lucas) will only apply if regulation deprives owner of 100% of economic value of land**; if reg deprives owner of anything less than 100%, then apply PC balancing test to determine if regulation is a taking.
     4. Issue #2: What is the impact of regulations were in effect before the owner bought property?
        1. These **regs are NOT automatically considered a background principle of CL property/nuisance under** CR **#**2 (ie, reg in effect at time of purchase does NOT trigger CR2 and say no taking.)
        2. **These regulations can be factored into the PC balancing test factor of what the owner’s reasonable investment backed expectations are, but they are not determinative** of that factor
           1. (b/c even if the law was in existence, if it’s an unconstitutional law, shouldn’t be considered to be binding on owner’s reasonable investment backed expectations)
     5. Policy reasons:
        1. Future owners lose right to sue otherwise
        2. Catch-22 timeline: if someone does not want to develop they do not challenge. If someone buys it later, no one can ever challenge it- so you must challenge at enactment before sale or never at all.
        3. “State may not put so potent a hobbsian stick into lockean bundle”- we are not going to say any rule unchallenged by current owner is a background CL principle
     6. Relevance- **bg regs weight on investment back expectations determinations**
        1. **May not be fatal but do affect expectations**
     7. Courts are flexible with these rules- many regs get “not per se takings” rules because of background/CL principles