

I. FIRST POSSESSION

A. Acquisition by Discovery

1. **Johnson v. M'Intosh**, p. 3, 1823, Marshall
 - a. Chain of title:
 - i. P → Indians: conveyance of 1773, 1775
 - ii. D → U.S. → Great Britain → Discovery
 - b. Occupancy theory: Indians became occupants at time that Europeans discovered land. The occupancy right could be extinguished by purchase or sword. Based on Locke's theory of labor.
 - c. Law of accession – if you provide materials and somebody else uses them you have a lessor property claim.

B. Acquisition by Capture

1. **Ratione Soli (by reason of the soil)** – Establishes constructive possession while the *feare naturae* is on the land.
 - a. English courts claim that constructive possession amounts to title American system claim that constructive possession does not amount to title, but can exclude other claims, and can get title to game by virtue of land ownership.
 - b. Policy – Rule discourages trespassers. If game is unowned, and landowner has no claim, then other hunters have incentive to chase game wherever they go.
2. **Custom** – What is the role of custom in reaching the proper decision?
 - a. Custom functions as an expression of practical experience. Source of wisdom akin to legal precedent. Lesly thinks that custom can be problematic, because it might not be founded on legal principle(?). If you impose legal rule contrary to local practice you might end up with implementation problems.
 - b. **Ghen v. Rich** p. 26, 1881:
 - i. **Facts:** Action to recover the value of a whale. Whalers would shoot the whale with a waif to mark it. Custom was for the person who found the whale to send word to the town and the owner would pick it up, finder would receive a small sum. POLICY: Custom promotes whaling.
 - ii. **Custom recognized as giving possession to owner of waif.**
 - c. **Pierson v. Post** p. 19, 1805, NY –
 - i. **Facts:**
 - (a) Post was foxhunting on an abandoned wasteland.
 - (b) Pierson knew this, saw the fox Post was hunting and carried it off.
 - ii. HELD: Pierson gets the fox, because he captured it.
 - iii. **Rule:** If wild animals are captured, they belong to the captor, but capture is *required*.
 - d. Barry Bonds case – modern example
3. **Ad Coleum** – to whomever the soil belongs, he owns also to the sky and to the depths.
 - a. Capture rule – surface owner would have title. Resulted in the “race to the wellhouse.”
 - b. Tragedy of the commons – everybody's incentive is to pump as much as possible. There is no restraint. Can take as much as possible.
 - c. Early decisions were made in ignorance. Courts have since tried to create a means of pumping most efficiently.

C. Acquisition by Creation

1. **INS v. AP**, p. 60, 1918 – INS was benefiting from AP’s work (Locke). AP does not have a property right in the news or facts, or from other people disseminating the information. However, AP wins on an unfair competition theory.
 - a. Court wants to encourage news gathering but, “punish INS for reaping what they did not sow.”
 - b. Relational property right. Constitutional protection carries strong protection.
 - c. HELD: AP has a quasi property right in the news it has gathered and may prevent other competitors from using it.
2. **Cheney Bros. v. Doris Silk Corp.**, p. 64 – Imitation is not forbidden in common law. Encouraging imitation = consumer benefit.
 - a. LESHY – theoretical idea of creating a federal IP protection. Hand feels that if Congress hasn’t protected these things, then the property rights don’t exist.
 - b. Policy – tension between encouraging creation and consumer benefit.
3. **Virtual Works, Inc. v. Volkswagen of America, Inc.**, p. 69 – expansion of property right. Big companies have protection for trademarks. ACPA case.
4. Property in Personam – right of privacy has evolved into right publicity (grow out of right to exclude).
5. Property in One’s Person
 - a. **Moore v. Regents of the University of CA**, p. 79– court does not recognize property right but Moore wins on lack of informed consent.
 - i. Conversion – a tort action that protects against interference with possessory and ownership interest in personal property. The court says that Moore has not property interest in his blood cells.
 - ii. Look at notes
6. **Right to Exclude** – the strongest property interest. There is a necessity exception to the right to exclude. Economic argument to protect property (to avoid a tragedy of the commons), privacy issue.
 - a. **Jacque v. Steenberg Homes, Inc.**, p. 100: D wanted to transport a mobile home across the property of P because it was the easiest route. P protested but D did it anyways. P sued for intentional trespass.
 - i. **HELD:** The right to exclude is one of the most essential property rights and should be protected by the State. Society has a strong interest in punishing and deterring intentional trespassers.
 - b. **State v. Shack**, p. 101– reinterpreting the common law according to Federal legislation.
 - i. Ds entered onto private property to provide health and legal services to migrant farmworkers under governmental auspices.
 - ii. HELD: Necessity justifies entering the lands of another. One should not use his property to injure others. Property rights do not include the right to bar access to governmental services available to migrant workers.

II. SUMMARY

- A. Property right is a mental construct (cultural legal phenomon imposed on the world).
- B. It is relational, and imposed on things (including abstract).
- C. Creates rights in relation to other people. Legal relationship is between you and others who own book.
- D. Bundle of sticks idea. Only need one or two to apply to property, and might be expansive or limited.
- E. Creation of property law is mostly court common law. Sometimes there is state and federal legislative decisions.

- F. Courts are using result oriented theories, but are also trying to make the most reasonable decisions. Courts are bound by tradition (how judges should behave/ stare decisis/
- G. Majesty of the law.

III. SUBSEQUENT POSSESSION

A. Acquisition by Find

1. **General rule:** A finder has rights superior of everyone but the true owner. Between finder 1 and finder 2, the prior possessor has the superior right.
2. **Armory v. Delamirie**, p. 108
 - a. Chimney sweep found valuable jewel and took it to a goldsmith for appraisal. Goldsmith took the stone and wouldn't give it back.
 - b. HELD: Bailee's right is stronger than everyone else's except for the original owner (involuntary bailor).
3. What if true owner shows up 50 years later? At common law, there is no time limit, but statutes may impose a time limit.
4. Why would you incentivize lost property? Not really a social problem.
 - a. LESHY's reasons – stuff happens, carelessness is a loose term. Policy argument of giving people incentive to take care has almost nothing to do with the Law of Finds.
5. Doctrine of abandonment – law implies that the true owner has implied any right to the property. Abandonment is the intentional relinquishing of a possession without intent to return.
6. **Hannah v. Peel**, p. 111 – D had title but not possession.
 - a. **Facts:** House was owned by D, an army major who had never lived there. House was requisitioned by the army. P was in the house and discovered a necklace. D did not know the necklace had been there.
 - b. Embedded chattels – objects found in the soil are awarded to the owner of the premises, not the finder. Rationale: owners of land expect that objects found in the soil belong to them, they think that these objects as part of the land.
 - c. **Rule:** If the owner has not made the home his personal space, he is not in constructive possession of the articles, therefore possession goes to the finder. Requisition by the army was not properly considered by the court.

B. Lost v. Mislaid – Lost property goes to the finder, and mislaid property goes to the owner of the premises.

1. **McAvoy v. Medina**, p. 118
 - a. **Facts:** P was a customer in D's barber shop. P picked up a pocketbook that had been lying on the counter and asked D to keep and advertise it. Pocketbook had been accidentally left by earlier customer. P later demanded the money but D refused.
 - b. **HELD:** For D. P did not acquire the right to take the property from the shop.
2. Distinction is based on the losing person's mentality – impossible to determine. Only able to infer from external facts.
3. Law aims to maximize the chances of returning the property to the true owner.
 - a. Then by leaving property in shop, at least the true owner can go back to the shop. Most logical place for true owner to find. And it doesn't make any difference if it is lost or mislaid. (modern trend)
 - b. However, doesn't ultimately answer question, who should be awarded title? Distinguishing between possession and title. As true owner's title diminishes → the shopkeepers interest also diminishes. Maybe the shopkeeper should be given title as a reward

4. Legislatures can solve by statute – through police custody.
 - a. CA statute achieves policy argument, by subsuming landowner’s right to the police department.
 - b. What policy is served by this – (1) rewarding honesty – incentive to get it later, (2) maximizing that true owner can get it back, (3) keep things in circulation and property is utilized (economic productivity/finder gets property if true owner does not appear).
 - c. Reversed McAvoy through statute. (modern law is defined by statute).
- C. **Acquisition by Adverse Possession** requires:
1. Elements:
 - a. Actual entry giving exclusive possession.
 - b. Open and notorious
 - c. Adverse and under a claim of right
 - d. Continuous for the statutory period
 2. Theories for encouraging Adverse Possession: p. 128.
 - a. Economic – max utility
 - b. Psychological – over time, if you don’t use the land then you lose connection to land.
 - c. Moral – (a) Owner is sleeping on land, and not using it productively, (b) Adverse Possessor is *earning* the land by using it productively
 3. **Mannillo v. Gorski**, p. 147
 - a. 2 doctrines:
 - i. Maine – predesigned hostility required
 - ii. Majority RULE: Connecticut – does not require predesigned hostility
 - b. Burden to prove notice is on adverse possessor.
 - c. Court rules that state of mind doesn’t matter, only that you actually adversely possessed the land. (modern trend)
 4. **Claim of title** – state of mind issue.
 - i. Objective standard – state of mind is irrelevant
 - ii. Good-faith claim – people who are actually possessing with by accident tend to win more often than those with a bad faith state of mind.
 - iii. Aggressive trespasser – Maine doctrine.
 5. **Adverse** – building owner allows homeless person to sleep in doorway, is landowner at risk? If landowner says that they don’t mind having the person there does it not make it adverse? Landowner is consenting, cures that adverse possession problem.
 - a. Drawbacks of consent – liability issues. May create liability to homeless person.
 6. **Continuous occupation** – often requires paying of taxes. Stems from RR legislation during expansion of West, when RR companies did not want to guard against squatters.
 7. **Color of title** – means that you are occupying as an adverse possessor because of something (piece of paper) that states that you have title. P. 145-6.
 - a. Some states require an actual piece of paper. Most states hold that piece of paper helps you case, and makes proof of other elements of adverse possession easier.
 - b. Color of title can enlarge your claim of adverse possession. Gives you a credible reason and allows to move beyond the acreage that you are actually occupying.
 8. Boundary Disputes:
 - a. Agreed boundaries – in a dispute, an oral agreement can be enforceable as a way to locate the boundary, *but not as a conveyance*.
 - b. Acquiescence – provides that a long acquiescence (can be shorter the SOL required for adverse possession) is evidence of an agreement between the parties fixing the line.

- c. Estoppel – can be used to estop a neighbor from changing position after making representations or conduct re: boundary line.

9. Tacking (Howard v. Kunto, p. 153)

- a. Kunto's have only lived there for one year, and SOL is 10 years.
- b. Tacking is based on chain of title. Kunto's were in privity of estate with the prior possessor.
- c. Privity – title transferred in a consensual transaction.
- d. Problem is that property that was being transferred was incorrect. Privity but on wrong property
 - i. Howard's argument: that you cannot tack because you are not in privity because you are on the wrong property
- e. Privity requirement prevents trespassers and people stealing.
- f. Court found that they were in the spirit of the privity doctrine.
 - i. Kunto's lawyer overcomes technical problem by looking at purpose of doctrine, and actions prove satisfaction of spirit of doctrine.
- g. Transfers must be consensual. If forceful, then SOL starts over.

10. Problems with Tacking p. 160

- a. Tacking can work both ways. You can tack onto previous adverse owners.

11. Adverse possession against the government – general principle that you cannot adversely possess federally owned land.

- a. Individuals shouldn't be allowed to take advantage of government's negligence. Practical element – gov't can't patrol all of its lands.
- b. Public access – allowing the public to use gov't land. Gov't might close off land to public if land could be adversely possessed.
- c. Sovereign immunity.

12. Adverse possession of chattels

- a. Open, notorious, claim of title, continuous
- b. Open and notorious requirement is problematic. It is easily satisfied. From standpoint of true owner, it might not be that easy to find location of chattels. Much harder than with land – can check up on it. Chattels (mobile property) is concealable, hideable.
- c. **O'Keefe v. Snyder**, p. 163
 - i. Court weighed adverse possession against discovery rule, focuses on O'Keefe's actions. Conduct of owner, not possessor is controlling. Cause of action accrues when true owner knows or reasonably should know through the exercise of due diligence where the stolen goods are.
 - ii. Court holds that a registration system would help to eliminate number of adverse possession cases. Why doesn't court create that system? Was outside of the court's realm. By shifting the burden, they've already created impetus for owner. Not within the power to levy taxes.
 - iii. NY rule – SOL only runs once the true owner knows that the painting is being adversely possessed, and then true owner asks for it. (P. 174 n 3). This makes adverse possession almost impossible. Strongly favors true owner.
 - iv. Probably leads to huge conflicts re: choice of law. Courts don't always apply home state's body of law.

13. Native American Graves Protection and Repatriation act of 1990

- a. Artifacts were held open and notoriously – museums cannot claim adverse possession. They must give artifacts back, unless they can prove right of possession (with consent of the tribe).

D. ACQUISITION BY GIFT requires:

1. Elements:
 - a. *Intention* – state of mind problem (in harder to prove in general)
 - b. *Delivery* – objective standard (harder when dealing with constructive delivery)
 - i. Causa mortis – gift made in contemplation of death.
 - (a) Only causa mortis gifts are revocable (revoked by fact that donor stay alive).
 - ii. Inter vivos – among the living.
 - iii. Manual delivery can be infeasible
 - (a) Constructive delivery – handing over means of obtaining possession and control (i.e. key)
 - (b) Symbolic delivery – when parties do not permit delivery; delivery is accomplished through a piece of paper)
 - c. *Acceptance by Donee* – can be presumed when it is of value to donee.
2. Newman v. Bost, p. 180
 - a. Court did not award life insurance because Van Pelt did not specifically mention, but said all of the furniture.
 - i. Delivery problem, maybe an intention problem.
 - b. LESHY – Court is biased. Should be ruled according to jury, and not according to technicality with delivery. INTENT should be recognized by Jury, not court.
 - c. Bedroom furniture was bought specifically for Julia. Dominion and control over furniture.
3. Gruen v. Gruen, p. 187
 - a. Pappa Gruen would like to donate painting/transfer title to son without transferring possessory rights until his death.
 - b. Pappa retains life estate – right to possess painting for his life.
 - c. Michael retains a vested remainder (present property interest)
 - d. Court finds that gift was effective because (1) intent was there, (2) delivery – letters were a symbolic delivery (second letter was effective to est. delivery), (3) acceptance – court found that value allowed court to presume acceptance.
 - e. Court finds that delivering right to posses would be delivering a right that he doesn't want to give up. Court tries to address why you would need to make a delivery of something where you are not giving up possessory rights.

IV. SYSTEM OF ESTATES (Topic 8)

- A. **Freehold** (normal tenures of feudal times) – fee simple, life estate
- B. **Nonfreehold** (lease). Distinction is freeholder has *seisin*, non-freeholder only has possession.
- C. **Terms:**
 1. **Fee Simple** – complete or absolute title. (usually for real, but can be used for chattel). Common used to require “**A and his heirs**” to distinguish between fee simple and life estate
 2. **Issue** (descendants – children, grandchildren (doesn't need to be genetic))
 3. **Collateral** could be siblings, parents. O's issue have no claim once O conveys property.
 4. **Escheat** – estate goes back to feudal lord (modern trend is to the State).
 5. LESHY – Good rule of thumb is that “Anytime that you carve out a part of the **fee simple**, it has to add up later. Property interests don't disappear in to the ethos.” You can divide up **remainder interest** almost anyway that you want.
- D. **Life Estate**
 1. White v. Brown, p. 221

- a. Court was trying to decide if will created a *Life Estate*, or *Fee Simple*. Court determined that the default position is usually the *Fee Simple* (larger more unencumbered interest). You only get less than that if the person dividing the property has specifically stated that the interest is less.
 - i. Why is there a presumption about the *Fee Simple*? Creates economic efficiency, simplicity, and predictability.
 - b. Limitations by Grantor on the Grantee's rights are frowned upon. The bigger the restraint, the less accepted they are. (restraint on alienability)
 - i. Jesse's intent is to not allow the house to be sold – LESHY this is a huge limitation.
2. Restraints on freehold estates:
- a. Types of restraints (restatement treats these all alike):
 - i. Disabling – prohibition. Withhold from the grantee the power to transfer interest. (White v. Brown)
 - ii. Forfeiture – attempt to transfer interest results in forfeiture to a third party.
 - iii. Promissory – provides that grantees promises not to transfers interest. If valid, enforceable by contract remedies. Rare except in Landlord/Tenant situation.
 - b. Objections to restraint on alienation: (1) less marketability – may limits use, (2) perpetuates concentration of wealth, (3) discourages improvements (owner is less likely to invest money on unsellable land), (4) prevents owner's creditors from reaching property.
 - c. Restatement:
 - i. Partial restraint is valid only if purpose, effect and duration are reasonable or as justice so requires.
 - ii. Restatement treats an absolute restraint on fee simple as void.
 - iii. Absolute restraint on life estate is void
3. **Baker v. Weedon**, p. 230
- a. WASTE: if there is some sort of threat to the remaindermen because of the Life Estate holder's waste of the property, the court may order a sale of the land. That is not the case here.
 - b. This case is a good example of why Life Estates are not much in use anymore. These built-in tensions are a big problem. Instead, most lawyers would advise John not to give a life estate, they would advise John to give the land to a **trustee** to manage. Then the trustee has legal title to sell it, lease it, develop it, whatever, but is under a legal obligation to provide Anna with an income for the property and holding it ultimately in trust for the grandchildren.
 - c. Equity may intervene in order to sell the property if the sale is necessary in best interest of all the parties.
4. **Law of Waste: *Correction from the Handout*:**
- a. Bottom of p. 9: "...where property rights are divided between present and future interests." **Anytime** you divide property into different interests, the waste idea may be applicable. It developed in the context of land, but there is no reason why it wouldn't apply to personal property either. **Life estate holder** must preserve the property for the remaindermen. There are principles for dealing with the waste issue. **Keep in mind:**
 - b. **Courts look from the standpoint of the grantholder** (In Baker, from John's perspective.) Suppose the property is being used for agriculture but all of a sudden oil is discovered under it. If the oil is discovered while the grantor is alive and owns the interest, the life estate holder can still operate the oil well and benefit from it. If the oil is all gone by the time the remaindermen get there, tough luck.
 - i. If the oil is discovered while the life estate holder has the land, the life estate holder generally cannot open the oil. From the grantor's perspective, the grantor had no intent to give the life

estate holder the advantage of oil they didn't know existed. This is the "open mines doctrine." The oil is part of the asset that gets passed on.

(a) What about trees? Can the life estate holder harvest all of the timber on the land? Maybe yes, maybe no. If the life estate holder harvests all the trees, they may not grow back and be commercially marketable again for 100 years. That deprives the remaindermen. The courts will generally say that the answer is whatever good timber management would allow.

c. **Courts will be more lenient the younger the estate holder is.** Why?

i. They younger they are, more likely the longer they are going to live and the longer they are going to enjoy the property, and the remainder men's interest is less. The remainder's interest gets larger with older life estate holders.

E. Defeasible estates p. 240

1. Transfer title, and title can change depending on some future occurrence. The notion is that if the future event which is specified happens, it goes back to the grantor. There are other instances where it goes to someone else in an **executory interest**. **Defeasible estates** on the other hand go back to the grantor. There are two kinds, FSD and FSSTCS. They are both given through wills, or gifts, or trusts. We talked Monday about the advantages of a trust.
2. Reasons for Defeasible Estates:
 - a. **Charitable purposes**. Mahrenholz is this kind of purpose.
 - b. **Economic** reasons. For example if you are a farmer you could give a railroad company a property interest for a particular interest in your land so that they can pick up your crop more easily, but only so long as they use the land for railroad purposes.
 - a. **Behavioral control**. There may be public policy considerations here – "I give this land to my son so long as he smokes dope every day."
3. **Fee Simple Determinable (FSD)**
 - a. **Defined**: A fee simple determinable is a fee simple estate so limited that it will *automatically end* when some specified event happens. When specified event occurs, fee simple reverts to **grantor**.
4. **Fee Simple Subject to a Condition Subsequent (FSSTCS) –**
 - a. **Defined**: fee simple that does not automatically terminate but may be cut short (divested) at the *grantor's election* when a stated condition happens. When condition subsequent is met right of entry is created *in the grantor*.
5. **Mahrenholz v. County Board of School Trustees, p. 242**
 - a. Issue: is this a FSD or a FSSTCS? FSD is automatic, so when the condition is breached, title automatically transfers. FSSTCS does not transfer automatically, it requires action on the part of the grantor.
 - b. In the event of ambiguity, the courts tend to construe things as covenants, and in the choice between FSD and FSSTCS (modern trend), they tend to construe things as FSSTCS. The FSD seems really hard-edged.
 - c. LESHY: The first thing the court should have done would have been to decide whether the condition was breached or not. If they decided that in favor of the school, all this stuff would have been irrelevant.
 - d. **In general**, the modern trend is to construe these things more softly and flexibly and to go with FSSTCS. CA statute virtually forbids FSD. That is a legislative judgment that restricts the power of the property owner. It is a restraint on alienation, but it is tolerated because 1) it's the

legislature, to which the court will generally defer, and 2) all of these are restraints on how the land will be used.

6. **City of Palm Springs**, p. 265

- a. With respect to defeasible estates, the law has generally said that the reversion basically tends to have **no value**. So while a remainder in a life estate is generally regarded to have a value (although its value may be hard to calculate), reversionary interests generally have none. Why?
- b. Someone with a remainder interest will definitely get the property. Generally speaking this is a very likely occurrence.
- c. On the other hand, a reversion is generally unlikely. Someone with a reversionary interest may not be any property, if the condition is never broken. How do you value the likelihood that, for example, the Hutton School would breach the condition?
- d. In the City of Palm Springs, the lawyers tried to cleverly take advantage. They said, this person gave us this land for botanical gardens. So they tried to use the governmental power of **eminent domain** to condemn the reversion, extinguish it, and then use the land for a golf course. They do have the right to bring an **eminent domain** action, but what do they have to pay for it? Under the law, reversionary interests are worthless, so the government is trying to extinguish the gift. But they were exploiting this notion of reversionary interest. The court says that no one would ever let the government use their land if this was legal.

7. The reversion interest is adversely possessible. You can gain title to it through adverse possession.

- a. If the condition is for school purposes and you breach that condition, the question is, how and when does the “adverse possession” clock start to tick?
 - i. If it’s FSD, when the condition is breached, title automatically goes back to the grantor. If the school continues to use the property, the adverse possession clock is ticking. The school may get title if the grantor sits there and does nothing, if you satisfy the adverse possession requirements (open and notorious, etc.).
 - ii. If it’s FSSTCS, title remains with the school until the grantor exercises the power of reverter. So the clock does not start running until the grantor exercises the power. So this sits there as a kind of ticking time bomb. The school may have the property but does not get anymore once they breach the condition. It’s a subtle distinction but can be important.
 - iii. The general rule is to place some kind of time limit on how long the dead hand can control. The rule against perpetuities basically is designed to create a cut-off point. However **the rule against perpetuities never applies to defeasible estates.**

8. **Defeasible life estates p. 255-256:**

- a. This is the problem of, “I leave this property to my spouse, so long as she never re-marries.” The law has a lot of problems with this kind of condition because of the freedom of choice issues. You don’t let somebody, through the tie of property conveyance, control how you live your life.
- b. Court distinction: A conveyance like that is ok if it is designed to support you when you’re single, but not if it’s designed to prevent you from marrying. So if you have a noble purpose, it’s enforceable. But if it’s a behavioral control purpose, it’s not enforceable.

V. FUTURE INTERESTS

A. General (p. 269-70):

1. Future interests:
 - a. Give legal rights to owners, is not mere expectancy.
2. Present existing interest that may become possessory, although not present possession.

B. Terms

1. Grantor's rights:
 - a. Reversion – a future interest left in the grantor after the grantor conveys a vested estate of a *lesser* quantum than he has.
 - b. Possibility of reverter – When a grantor carves out of her estate a **determinable** estate of the same quantum. In almost all cases it follows a determinable fee.
 - c. Right of entry – A right of entry is retained when the grantor creates an estate subject to condition subsequent and retains the power to cut short the estate.
2. Rights created in grantee:
 - a. Vested remainder – (1) given to an ascertained person and (2) not subject to a condition precedent.
 - i. Indefeasible vested remainder: when the remainder is certain of becoming possessory in the future and cannot be divested.
 - ii. Vested but not certain of becoming possessory: when remainder can be vested subject to being divested if an event happens.
 - b. Contingent remainder – where (1) takers are unascertained or (2) is made contingent upon some event occurring other than the natural termination of the preceding estates.
 - c. Executory Interests – A restriction imposed by the grantor on the grantee's remainder that only comes into being if the grantee fails to observe the restriction. The executory interest divests the remainder from the grantee to a third party.

C. Trust

1. Artificial legal entity (like a corporation) that is created to separate management and ownership. This allows for the trustee to accommodate and adapt for change (eliminating the need to go to court to use money; allows for more creative administrative process) in the trust and still pay out the income to the beneficiaries.
 - a. Trustee has **legal title**.
 - b. Beneficiaries have **equitable title**.
2. Law of trusts places stiff burden on trustee (safeguard). Trustee must faithfully manage property. Has a fiduciary responsibility.
 - a. Trustee becomes liable for mistakes made.
 - b. Trustee is usually compensated from the trust.
 - c. **Swanson v. Swanson (p. 288, 2/17)** Supreme Court of Georgia, 1999
 - i. **Issue:** Can a spouse inherit her deceased husband's remainder interests that were created for him by his father's will?
 - ii. **Rule:** Yes. Under the conditions subsequent, Bennie's interest remained vested after his death and passed under will to his wife. George Swanson's will conveyed the trusts to his wife Gertrude as a life estate, with the remainder going to his children subject to two conditions subsequent: (1) Gertrude disposing of it otherwise through her power of appointment, and (2) the child dying before Gertrude died. Since Bennie Swanson died before Gertrude but without children, his remainder interested remained fully vested and passed to his wife under his will.

D. Rule Against Perpetuities

1. RAP attempts to define fixed period of time that dead hand can control, through generations now alive plus 21 years. (people alive today + 21 years)
2. In 20th century, RAP became irrelevant because inheritance taxes.
3. Policy: Should society impose limits on great wealth far into future?
4. **Wait and see doctrine** – 90 years?

5. *Dynasty Trust* – offers extraordinary advantages in avoiding death taxes.

VI. CONCURRENT ESTATES – co-ownership (make compare and contrast)

A. *Unity of possession*

1. Each concurrent owner has the right to possess the whole thing.

2. Tenancy in Common

a. Each tenant has a separate but undivided interest in the property. The interest is each is descendible and may be conveyed by deed or will – no right of survivorship.

3. Joint Tenancy

a. Joint tenants are regarded as a single owner. There is a right of survivorship*. No limit on the number of people who may be included in joint tenancy. When one tenant dies *nothing passes* to the surviving joint tenants – the dying estate is simply extinguished. Joint tenancy is not devisable by will. If a joint tenant conveys their interest this breaks the joint tenancy (can be unilaterally destroyed), JT becomes tenancy in common.

b. **Four unities** – many states require that four unities of *time, title, interest* and *possession* are present before a joint tenancy can be created. Otherwise a tenancy in common is created.

c. Riddle v. Harmon (p. 345)

i. **Issue:** Can a joint tenant unilaterally sever the joint tenancy by conveying her interest to herself?

ii. **Rule:** Yes, although the common law requires *unity of title*, courts rule that her actions are equivalent to if she had passed title to a straw man, and then had title passed back to her.

iii. CA statute does not require use of strawman to create a joint tenancy (so that each joint tenant has equal title in joint tenancy). *Riddle* is the mirror image of the creation issue, which is allowed by statute.

iv. Court is implying that legislature fixed front end problem, and indicates that they might be willing to fix back end problem.

v. **Notice** – should the law require Frances to notify her husband? Law seems to favor not requiring notice (general rule). There are questions of whether or not you need to record transaction in court house.

(a) Argument for notice – if Jack knew that she had severed joint tenancy, he might have changed his position.

(b) This might lead to questions of what constitutes adequate notice.

d. Bank Accounts – contract with bank signed by parties is not legally enforceable. Bank agreement doesn't determine what kind of estate is created. This also applies to safety deposit boxes. Courts are reluctant to find that giving a key would allow joint tenancy.

4. Tenancy by the Entirety

a. **Defined:** Can only be created by husband and wife. Tenancy by the entirety is a joint tenancy with a fifth requirement (marriage), and the surviving tenant gets the right of survivorship.

b. Policy: unless specifically stated, court will find a tenancy in common instead of a joint tenancy. Courts don't want to place undue burden on land.

B. Relations between Co-owners

1. Partition

a. Land or proceeds from sale of land can be divided according to percentage of interest that each owner has. This is an equitable proceeding, not available to tenants by the entirety because neither spouse can destroy the survivorship rights of the other spouse. Partition may be granted through a voluntary proceeding.

- b. Partition in kind – division of the land.
- c. Partition by Sale – sale of the land.
- d. **Delfino v. Vealencis** (p. 359, 2/18), Supreme Court of CT, 1980
 - i. **Issue:** How should property be partitioned amongst warring tenants in common, where one tenant operates a garbage removal business and the others want to develop the property for residential use?
 - ii. **Rule:** The court considers the interests of all tenants in common, not just the economic gain of one tenant. Partition by sale is only applicable when (1) physical attributes of land would make partition in kind inequitable or impracticable, and (2) the interests of the owners would be better served by partition by sale. Today, most courts would make this transaction as market-value oriented as possible, and perhaps in the case of business property that would be correct, whereas in a dwelling situation sentimental value should play more of a role.

2. Benefits of Co-ownership

a. **Spiller v. Mackereth** (p. 369)

i. ***Ouster applies to 2 situations:***

(a) Beginning of running of SOL for adverse possession

(b) Liability of an occupying cotenant for rent to other tenants.

ii. **Issue:** what rights is a tenant in common entitled to when the other tenant in common makes use of the space without his/her consent?

iii. **Rule:** General rule is that one co-owner in full possession does not have to pay anything representing full value because as tenant in common you have right to occupy.

iv. **Issue:** Is a demand to vacate or pay rent sufficient to constitute ouster?

v. **Rule:** (Majority view) Before tenants in common can be liable for rent he must have denied his cotenants the right to enter. The demanding cotenant must assert right to occupy property. (Minority view) occupying cotenant is liable for rents on a continued occupancy after a demand to vacate or pay rent.

vi. LESHY – this case is troublesome because it places an emphasis on confrontation. AL court's reading of ouster is very narrow –almost to the point of physical denial.

vii. This also might be a good place to make a distinction between commercial and residential property.

C. Marital Interests

1. Common law

a. **Swartzbaugh v. Sampson** (p. 373, 2/23), Court of Appeal of CA, 1936

i. **Issue:** Can a spouse who owns land as a joint tenant but did not join a lease executed between her cotenant and another maintain an action to cancel the leases, where the lessee is in exclusive possession of the property?

ii. **Rule:** No. The lease is valid. As joint tenants, each cotenant has a 100% possessory interest in the property and can convey that interest to someone else.

iii. Lola could have sought **partition, accounting** (the right to recover half the rental value), or **ouster**, but this would not have helped her get the sin off her land.

iv. **Accounting:** Both co-tenants have a 100% right of possession. However if one of them leases out the land, the other has a right to recover half of the rental value (p. 380).

2. Termination of marriage by divorce

a. **In re: Marriage of Graham** (p. 401), Supreme Court of CO, 1998

i. **Issue:** Does a master's degree in business administration constitute marital property which is subject to division by the court?

- ii. **Rule:** Traditional view is that a degree is not included in marital property because it does not have the traditional concepts of property: exchange value; inheritability; cannot be assigned, sold, transferred, pledged. Advance degrees are simply “intellectual achievements.”
 - iii. LESHY – if W had sued for maintenance/alimony degree might have influenced amount awarded (W could not sue because maintenance required that she was not able to support herself).
 - iv. What is the value of the MBA? Future earning capacity is dependent upon performance. Judgment and contacts – perception by others and accessibility. If Graham had started a business (goodwill), Mrs. Graham would have been entitled to remedy because courts generally all recognize goodwill as a form of marital property.
 - (a) Why does court distinguish between goodwill and degree?
 - (b) Some of the value of the degree depends upon the experience gained through practice. You could argue that goodwill of the degree has not been fully realized. Asset can increase in value – LESHY courts should consider possible increased value.
- b. **Mahoney v. Mahoney**, Supreme Court of NJ, 1982 (p. 407)
- i. Court declined to recognize professional degree as marital property because of speculative nature.
 - ii. Dist. from Graham: In Mahoney the court ordered “reimbursement alimony” to provide a fair and effective means of compensating a supporting spouse. Reimbursement alimony covers past contributions, not future upkeep.
- c. MINORITY: **Elkus v. Elkus** (p, 408, 2/24), Supreme Court of New York, Appellate Div., 1991
- i. **Issue:** Is a career/ celebrity status marital property subject to equitable division upon divorce, even when it is not a “license” or “professional”?
 - ii. **Rule:** Yes. It is the nature and extent of the contribution by the spouse rather than the nature of the career that determines the status of the thing as “marital property.” To the extent that one spouse’s efforts contributed to an increase in value in the other spouse’s career, the appreciation was a product of the marital partnership and therefore subject to equitable distribution. Under the Domestic Relations Law, marital property is broadly defined and includes things that fall outside the scope of traditional property. **Most courts probably don’t go this far. Next time just sign a prenup.**
3. **Termination of marriage by death**
- a. Elective forced share (all common property states except GA):
 - i. A property interest created by the legislature.
 - ii. Surviving spouse may renounce will and receive an elective forced share in all property, real and personal. Share is generally 1/3 – 1/2 of the property.
 - iii. Generally does not apply to property held by decedent and another in joint tenancy, or life insurance proceeds.
 - iv. POLICY: This is a statutory recognition of marriage as a financial commitment, and spouses should not be allowed to disinherit each other at death.
4. **Community Property**
- a. Rests on the notion that husband and wife are marital partners and both contribute to the material success of the marriage.
 - b. Earning of either spouse and property acquired from the earnings are jointly owned.
 - c. Property owner before marriage or acquired by gift, descent, or devise is separate property (separate note for neela).

- d. If property has been commingled in such a manner that it is impossible to separate community property from non-community property then the co-mingled whole is considered community property.
 - e. Neither husband nor wife can convey property unilaterally, and there is no survivorship element.
 - f. **Management of community property** is subject to a fiduciary duty. Husband is deemed to be the manager. H and W must manage the money in good faith.
- 5. Rights of Domestic partners**
- a. Reasons for abolishing common law marriages:
 - i. Development of modern transportation – access to courthouse no longer bars individuals from getting marriage license.
 - ii. Certified marriage provides proof of benefits of marriage
 - iii. Common law marriage “dignified immorality among persons in lower socio-economic class.
 - b. **Baker v. State (p. 428)**
 - i. VT equal protection clause provides protection to same sex domestic partners. Has not been followed by other states.
 - ii. **Issue:** Must a recognizing state give an out of state same-sex marriage full faith and credit?
 - iii. **Rule:** No. Congress passed the Defense of Marriage Act (p. 439) to solve the conflict of laws problem.
 - c. **Marvin v. Marvin (p. 427)**
 - i. **Issue:** Is a contract required for property division or support of *unmarried couples*?
 - ii. **Rule:** No, courts can find an implied contract by looking at the parties conduct. CA Supreme Court ruled that principles of unjust enrichment required a departure from contract law theories. Court favored a presumption that parties intended to deal fairly with each other, and that intent could only be found by an inquiry into the nature of the relationship. This approach has been received cautiously. Most states do not require a written contract.
 - d. Some courts will not enforce marriage-like agreements between co-habiting couples. These (holdout – “IL”) courts hold that legislature abolished common law marriage (requirement of certificate), and that by implication feel that contract should not be to substitute for marriage in terms of making property arrangements.
 - e. **American Law Institute (p. 428)** – allows for an implied contract theory. LESHY – the gaping hole is that the couple may make different property arrangements by contract, BUT if the partnership terminates at the death of one partner, the surviving partners interests depend upon the applicable state’s law of succession.

VII. LANDLORD TENANT RELATION (p. 445)

A. Types of Leases (*non freehold estates*):

1. **The Term of Years**
 - a. **Defined:** An estate that lasts for some fixed period of time with beginning and end dates – may be less than a year. May also be terminable upon the happening of some event or condition. No notice of termination necessary.
2. **Periodic Tenancy**
 - a. **Defined:** An estate that lasts from period to period until notice of termination is given. If no notice, period is automatically extended for another period. Common law is ½ year – largely superseded by JXal statute. Periodic leases for period less than a year notice is equal to length of period.
3. **The Tenancy at Will**

a. **Defined:** No stated duration – estate continues until the tenant/landlord desires to end. Modern statutes require a period of notice.

4. ***The Tenancy at Sufferance: Holdovers***

a. When the tenant remains in possession after the period of tenancy. Landlord may evict (plus damages), or consent (express or implied) to the creation of a new tenancy.

B. Lease

1. ***License:***

a. **Defined:** Right to occupy someone else’s property for a specific purpose, usually revocable at will.

2. ***Easement:***

a. **Defined:** The right to use somebody else’s property for a particular purpose, usually more permanently. It is a non-possessory right to use land.

b. ***Leases:***

i. Somewhere between. Often the key issues are **management and revocability**. Statute of Frauds applies everywhere: Leases for more than one year must be in writing.

C. Selection of Tenants:

1. A major limit on the rights of property owners in terms of who they may exclude and on what grounds. At common law, LL could exercise complete discretion over tenants. Now changed by FHA. **An example of federal law regulating property interests.**

2. **Fair Housing Act** of 1968 (amended in 1994).

a. § 3604 (a) and (b): LL may not refuse to sell based on race, color, religion, sex, familial status, national origin.

b. § 3604 (c) cannot **advertise** discriminatory intent. This is an absolute bar to overt discrimination.

c. § 3603 (b) – exceptions: other than exceptions found in § 3604 (c), preserves the right of individual property owners who don’t own more than three houses to discriminate. Congress is targeting commercial landlords/ developers.

d. Sublease v. Assignment –

3. **Ernst v. Conditt** (p. 482, 2/25), Court of Appeals of Tennessee, 1964

a. **Issue:** When is the transfer of the lessee’s interest a sublease or an assignment?

b. **Rule:**

i. **Assignment** conveys the whole term of the remainder of the lease. Breaks privity between LL and original T.

ii. **Sublease** - a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term. Here, the instrument between Rogers and Conditt was an assignment because it was for the entire remainder of the term.

c. **Issue:** Does sublessor’s (B)’s express agreement to remain liable for performance of the lease create a reversionary interest in the sublessor from the sublessee (C) and therefore privity of estate between LL (A) and the sublessee (A→C)?

d. **Rule:** No. B’s agreement to remain liable to A does not create a reversionary interest from C → B. B is still liable for rent and removal of track because of the express agreement

i. Obligations from B → A are not affected by an assignment/ sublet to C.

e. **Modern approach** in determining the difference is to look at the **intention** of the parties. May be difficult when the intention is not clear from the words, i.e., “party subleases, transfers, and assigns.”

- f. Under a **sublease** Conditt would not be liable to Ernst because there is no privity of contract/ estate.
 - g. Under an **assignment** there would be a legal connection between Ernst and Conditt and Ernst would be able to sue Conditt.
4. **Kendall v. Pestana (p. 490)**, 3/3, Supreme Court of CA, 1985
- a. **Issue:** Can a lessor unreasonably and arbitrarily withhold consent, if there is no clause stating that consent will not be unreasonably withheld?
 - b. **Rule: No.**
 - i. Common law: LL could arbitrarily refuse transfer of lease.
 - ii. **Modern view: (adopted here):** Where a lease provides for assignment only with prior consent of lessor, such consent may be withheld **only where lessor has commercially reasonable objection to the assignment.**
 - c. Court cites two policy reasons for abandoning common law approach:
 - i. *Property* - Restraints on alienation apply to lease. Cal. Civ Code – repugnant restrictions on alienation are void. Reasonableness – justification v. quantum of restraint – greater quantum, greater justification required. If the law will protect the landlord’s arbitrary interest, why isn’t asking for more money OK?
 - ii. *Contract* – increased emphasis on good faith and fair dealing. Discretion should be exercised in accordance with commercial standards. Denying based on personal taste is not commercially reasonable. Court found that purpose of clause was to protect lessor’s interest in performance of K and preservation of property. Denying to increase rent does not fall within this gambit
 - iii. **Restatement, 2d** – restraint on alienation is valid, but cannot be unreasonable. Personal choice of tenant is reasonable (character of lessee).
 - d. Should this apply to residential property? LESHY – this probably won’t be extended to residential because it is too complicated.

D. Defaulting Tenants

- 1. Tenant in possession
 - a. **Berg v. Wiley** (p. 500, 3/4), Supreme Court of Minnesota, 1978
 - i. **Issue:** When does a tenant **abandon or surrender** the premises,
 - ii. **Rule:** There is no abandonment if the tenant intends to retain possession.
 - iii. **Issue:** When is reentry **forcible and wrongful** as a matter of law?
 - iv. **Rule:** At common law, the landlord may retake the premises where (1) he is legally entitled to do so, and (2) where he uses peaceable means. The tenant may recover damages for wrongful evictions.
 - (a) **The court abandons the common law rule:** NO self help for LLs. They must resort to judicial process. Here, LL’s lockout of the tenant was wrongful as a matter of law.
 - v. **POLICY:** Avoid mayhem and violence of self-help. This might be even more applicable in residential than commercial settings. A result of the “judicial process only” approach may be that the landlord will internalize costs of possible litigation by charging higher rent.
- 2. Tenant who abandoned possession
 - a. **Sommer v. Kridel**, p. 509, 3/4, Supreme Court of New Jersey, 1977
 - i. **Issue:** Does a duty to mitigate exist when T abandons the property?
 - ii. **Rule:** Yes. Court borrows from contract principles.
 - (a) Common law: If a tenant abandons, LL has no duty to mitigate/ find another tenant.
 - POLICY: This is based on principles of property law.

- (b) **Rule adopted:** Looks more to contract principles as well. Landlord has duty to mitigate and must treat the vacant apartment as one of his vacant stock.
- iii. **POLICY:** Economic efficiency and productivity. Policy supports land to be used, avoid waste. T is still on the hook until LL can find a new tenant. T also has to pay for LL's advertising costs.
 - (a) Hoboken is a hot place to live these days.
- iv. Why is the burden on the landlord? Landlord is in a better situation to rent out the land – access to resources, in the business...
- v. Economic efficiency argument applies to residential and commercial situations equally.
- vi. R2d holds that landlord does not have a duty to mitigate.
 - (a) If landlord has to mitigate, tenant will move out which will lead to vacancies, which will lead to increased vandalism. LESHY – this is a backward position.
- b. **Surrender:** A term of art effected when T offers to end tenancy and LL accepts. Extinguishes T's liability for future rent.
 - i. Explicit: T expressly offers, LL expressly accepts (subject to Statute of Frauds). Lease is unambiguously terminated.
 - ii. Implied: Based on the intent of LL in retaking possession. If LL's actions inconsistent with the continuation of the original lease, this implies acceptance of surrender.

E. Landlord's Duties: Tenants Rights, and Remedies

1. Covenant of Quiet Enjoyment (CQE):

- a. **Reste Realty Corp. v. Cooper** (p. 522, 3/4 – 3/8), Supreme Court of New Jersey, 1969
 - i. **Issue:** When are premises so defective that the tenant can claim constructive eviction through a breach of the CQE?
 - ii. **Rule:** A tenant may claim a breach of the CQE and constructive eviction when and act or omission by the landlord or an agent of the landlord renders the premises substantially unsuitable for the purpose for which they are leased, or seriously interferes with the enjoyment of the premises. The right of the tenant to claim CE will be lost if they do not exercise it within a reasonable time.
 - iii. **Issue:** Does T's knowledge of a defect at the time she signs a lease prevent her from using CQE/constructive eviction as a defense.?
 - iv. **Rule:** Generally yes. Here, agent of the LL promises to fix the defect, and agent's promise binds the LL. D signed the second lease relying on the agent's promise to fix the problem, so she is not barred from CQE.
 - v. This is less important in residential settings because of the implied warranty of habitability.
 - vi. The court in Reste reads the CQE broadly. Under the common law, only express CQE's were enforceable. Now they are enforceable if they are express or implied.
 - vii. Under the CQE the LL must affirmatively take steps to maintain the premises so that they are suitable for the purposes for which they were leased.

2. Implied Warranty of Habitability

- a. **Defined:** LL must maintain minimum standard of decency. IWH is written into all residential leases and cannot be contracted around. LESHY – this is a bedrock of inhabitability.
- b. **Does not apply to commercial settings.**
- c. Tenant must give the landlord notice. Cannot seek remedy without giving landlord to correct the defect.
- d. **Issue:** How IWH this different from CQE?

- e. **POLICY:** LESHY – broad view of CQE as envisioned in Reste – any omission that interferes with inhabitability – is probably pretty close to IWH. But, the doctrines are not the same. IWH is viewed as a more tenant friendly doctrine because of the broad number of remedies available. CQE has medieval quirks to worry about, whereas IWH is modern and supplies clear *remedies*.
 - i. Generally thought that neither of them can be contracted around.
- f. **Hilder v. St. Peter**, p.533, 3/9, Supreme Court of VT, 1984
 - i. **Issue:** what is the effect of a tenant agreeing to rent premises “as is”?
 - ii. **Rule:** Even though “as is” if conditions are uninhabitable, and it was a voluntary act, had knowledge of conditions, Hilder (T) wins. Policy: we don’t let people living in conditions that violate public health standards. LESHY – basic standard of human decency.
 - iii. **POLICY:** Court is shifting balance of power from landlord to tenant. Commercial nature of leases – Landlords are in a better position to make repairs. When landlords rent property it should meet a minimum standard of decency.
 - iv. Vermont Supreme Court is saying that there is a societal floor that the courts are going to create and enforce – IWH. The supply of rental housing, because some places might not be rented but, “the poor can move to Canada..”
 - v. **Issue:** What is the relationship between legislative codes and common law IWH?
 - vi. **POLICY:** Codes are the baseline and the IWH is a more flexible standard. Court can adopt new standards along the way.

3. Remedies:

- a. **IWH: defense/ affirmative cause of action.** Provides options for tenant (contrasted to CQE which requires you to move out). IWH allows tenant to withhold rent (might have to pay to bank until liability is assessed), can fix and deduct rent, move out and terminate lease, punitive damages are also available.
- b. Retaliatory eviction:
 - i. Common law: LL could terminate periodic tenancies and tenancies at will upon proper notice, and to refuse to renew expired terms of years.
 - ii. Modern view: Most JX forbid retaliatory evictions either by statute or judicial decree.
 - (a) Common approach: An eviction coming within a certain time period after a good-faith complaint or other action by tenant based on the premises is presumed to be retaliatory. Beyond that time period, tenant may bear the burden of proof.
 - (b) Evictions also constrained by anti-discriminations statutes/ rent control laws.

F. Tenants’ Duties; Landlord’s Rights and Remedies

1. Law of Waste

- a. Tenant has a duty not to make “such a change as to affect a vital and substantial portion of the premises; as would change its characteristic appearance; the fundamental purpose of the erection; or the uses contemplated, or a change of such a nature, as would affect the very realty itself.”
- b. **Voluntary waste:** affirmative actions amounting to waste defined above.
- c. **Involuntary/ permissive waste:** Waste arising from a failure to act.
- d. Relevant factors:
 - i. The degree of the effect on the use and value of the leased premises
 - ii. Permanence
 - iii. Length of term remaining at the time the tenant makes the change in question.

VIII. LAND USE CONTROLS

A. Nuisance

1. **Estancias Dallas v. Schultz (p. 755)**, 3/10, Ct of Civil Appeals, TX, 1973
 - a. **Issue:** May the noise of a neighboring apartment complex's air conditioner be considered a nuisance?
 - b. **Rule:** Yes. The noise unreasonably interfered with P's ability to use her property (couldn't carry on a normal conversation and the value of property was diminished.)
 - c. **Issue:** Did the trial court abuse its discretion in using the "balancing the equities" test in favor of the plaintiffs, even though monetarily the loss would be huge for D and not as huge for P?
 - d. **Rule:** Yes. Balancing the equities is a standard test for issuing injunctions with the efficiency objective of avoiding the greater harm/ social cost. Balancing the equities involves considering what the harm will be to P if the injunction is not granted, what the harm will be to D if the injunction is granted, and where the public interest lies. Here there is no public interest concern (no shortage of housing) and Ps had a good case of the injunction so the trial court did not abuse its discretion by balancing the equities in favor of the P.
2. **Boomer v. Atlantic Cement**, 3/10, (p. 759)
 - a. **Issue:** If a court finds that a nuisance exists, is the court required to grant a remedy (injunction or damages)?
 - b. **Rule:** Before this case was decided, NY law was that if a court finds that a private nuisance is present, and where there has been any substantial damage shown by the party complaining an injunction will be granted. However, the court in this case decided to **balance the interests**. Plant is worth \$40 million, and 300 employees, v. decrease in land value to P. Court is assuming that you cannot operate the plant without created dust and noise.
 - i. In the end the cement company has to pay permanent damages and then continue to operate forever. In property terms – court is giving defendant right to condemn (eminent domain) an interest in plaintiff's property. Buying without the consent of Ps, the plant can buy a noxious easement (right to buy right to pollute).
 - ii. LESHY – this permanently reduces the value of Ps' homes.
 - c. **Boomer dissent:** majority is licensing a continuing wrong. There is also no incentive for the company use cleaner technology.
 - d. **Other possibilities:**
 - i. Court could have issued injunction until new technology to reduce noise and dust.
 - ii. Temporary/periodic damages – would allow for Ps to continually receive damages. This also protects D from giving P a windfall in case the D later adopts a cleaner way of making cement.
 - iii. EPA (Environmental Protection Act) – authorized gov't regulatory agencies to require companies to adopt more environmentally friendly technologies, even if they don't exist at the time.
 - e. **Boomer** is a path breaking case because it was the first to say that when you have a nuisance with substantial injury to P, it is not an automatic injunction. **Boomer** says that if there is a strong enough injustice to D and strong enough public interest, then you can deny injunction to P.
3. **Spur Industries v. Del Webb (p. 766)**, 3/10, Supreme Ct. AZ, 1972
 - a. **Issue:** Is a cattle feedlot a public nuisance when the residential developer moved into the area after the feedlot?
 - b. **Rule:** Yes. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood. To bring a private action, you need not be the

land owner nor have an interest in the land, but generally need to show a “special injury.” Del Webb’s special injury was their loss in sales.

- i. To bolster the public nuisance claim the plaintiffs claimed it was a public nuisance under TX statute defining public nuisances dangerous to public health.
- c. **Issue:** Where a cattle feedlot was lawful and only became a public nuisance when a developer began enlarging his residential development, can the cattle feedlot be enjoined from operation?
- d. **Rule:** Yes. Were Webb the only party injured, “coming to the nuisance” doctrine would have barred the injunction. However the injunction may be granted because of the public health risk.
- e. **Issue:** Where the injunction is granted, may the residential developer be required to indemnify the cattle feedlot operator?
- f. **Rule:** Yes. Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. This relief is limited to cases where the developer brought people into the previously industrial/agricultural area and it was foreseeable that the injunction would become necessary against a lawful business, and that business has no adequate relief.

B. Easements

1. Property interests that are not possessory interests – are more concerned with right to use (not exclusive). Historically used to allow use. Modern trend is to easements are negative easements, or restrictions on us (conservatory easements).
2. Easements are generally considered property interests that pass on to next owner.
 - a. Non-contract like – they do not expire after death of owner.
3. **Implied Easements** (See flow chart on p. 300 Gilbert’s)
 - a. Two kinds:
 - i. *implied from prior existing use*: Implied on the basis of an apparent and continuous (or permanent) use of a portion of the tract existing when the tract is divided. Implied to protect the probably expectations of the grantor and grantee that the existing use will continue after the transfer.
 - ii. *Easement by necessity*: Court finds the claimed easement is necessary to the enjoyment of the land and the necessity arose when the dominant parcel was severed from the servient parcel.
4. **Private Land Use Controls**
 - a. **Willard v. First Church of Christ, Scientist (p. 785)**, 3/11, Supreme Ct. CA, 1972
 - i. **Issue:** In deeding real property, may a grantor reserve an easement in a third party?
 - ii. **Rule:** Yes. The common law rule was that you could not reserve an interest in a third party. This conflicts with modern rules and frustrates the grantor’s intentions, and creates an unfair result because the grantee has paid a reduced price for title based on the fact that the use of land is subject to the reservation in the deed.
 - iii. **Issue:** How is the easement to be construed?
 - iv. **Rule:** If it is ambiguous, courts will construe as easement in appurtenance. Here the church would only get the easement if the church remains in the same location. If it is an **easement in gross**, it would attach to the church wherever the church goes.
 - b. **Holbrook v. Taylor (p. 791)**, Supreme Ct. KY, 1976
 - i. **Facts:** 2 adjacent pieces of property. Holbrook is the owner of the servient estate, and Taylor uses the pathway through Holbrook’s land. This easement is implied – there is nothing in writing. Taylor argues easement by prescription and by estoppel.
 - ii. **Issue:** what is required for an easement by prescription?

- iii. **Rule:** An easement by prescription requires adverse, continuous or uninterrupted use of land during a period of time.
 - iv. **Issue:** when does a license become an implied easement, when can the license no longer be revoked?
 - v. **Rule:** An easement may be implied where a license exists when the license includes the right to build structures and improvements on the land in the nature of an easement.
 - vi. How does court find easement, what is the magic?
 - (a) Taylor relied on Holbrook's non-interference.
 - (b) Watching Holbrook put \$25k into the house, in reliance on Holbrook's good will in allowing Taylor to use land. This creates an *investment backed expectation* in Taylor.
 - (c) Resembles contract law doctrine of promissory estoppel.
 - vii. **Issue:** Do implied easements run with conveyances of the land?
 - viii. **Rule:** Yes.
 - ix. **Issue:** If Taylor burns down his house, can Holbrook stop him from using the road to build a new house? The destruction of the house and the compensation (through insurance), means that Holbrook has a fee simple, and the easement disappears.
 - x. **Rule:** when easement is created by reliance, destruction of the property may destroy the easement.
 - xi. Should Taylor have to pay Holbrook for using the land? Holbrook initially consented and let Taylor rely on the land, therefore it is not unjust to not compensate Holbrook. **Problem:** Do you want to make it easy to allow one neighbor to take advantage of another neighbor's friendliness.
 - xii. The implied easement is not always followed. Writing is required. Don't we want to encourage people to be explicit about their demands. If you're going to invest \$25k, shouldn't you ask for a writing?
- c. **Van Sandt v. Royster (p.796)**, 3/11, Supreme Ct. KS, 1938
- i. **Issue:** May an easement to continue using a private sewer be implied across A's land?
 - ii. **Rule:** Yes. The easement existed at the time the parcel of land was divided and conveyed. The easement is created by implication as an inference of the intentions of the parties in conveying the land.
 - iii. LESHY: The modern American rule is to imply the easement if it is absolutely necessary.
 - iv. **Issue:** Even if there was an implied easement when Van Sandt bought the land, was he a bona fide purchaser without notice and not bound by the easement, since it was not in writing and he had neither actual nor constructive notice of the sewer?
 - v. **Rule:** Appearance and visibility are not synonymous. The fact that the sewer was underground does not negate its existence as an "apparent condition." Van Sandt had notice because he knew he had modern plumbing and that his sewer had to drain somewhere.
 - vi. LESHY: The law ought to apply easements pretty easily on an economic utility theory. The CA solution is that everyone benefiting from the easement should share the costs of maintenance and repair.
- d. **Easement by Necessity**
- i. **Othen v. Rosier (p. 802)**, Supreme Ct. TX, 1950
 - (a) Othen argues that easement should be found through **necessity** and **prescription**.
 - i. **Issue:** May an easement of necessity be found between two unrelated lots of land?
 - ii. **Rule:** Doctrine of Necessity requires that the necessity existed at the time that the two estates were severed (this implies that land was unified at one point). At the time that

the owner conveyed part of land away, there must have been a necessity to get out via the land. If there is a strict necessity at the time of conveyance the law will find an easement. But, if there is a way out, then law will not find an easement.

- a. If there is a way out on the day of the conveyance, and the next day the way out is wiped out, there is no easement of necessity.
- iii. **Issue:** Doesn't *public policy* favor finding an easement of necessity when the deed is silent as to the *intent* of the parties; so that landlocked estates are used and do not go to waste (more economically efficient)?
- iv. **Rule:** the law is hesitant to imply easement of necessity because it is protecting the right to exclude. The law is saying that we will protect you, only if at the time you had an absolutely had a easement of necessity at the time of creation.
 - a. **Intent:** The law assumes that if the easement was actually necessary it would be included in the deed and there would be no need for the court to imply and easement.
 - b. **Public Policy:** Land should be productive.
 - c. LESHY – these rationales are somewhat in tension with each other. In different cases, each can be predominant. If intent is really rationale then there would be no land that is landlocked. However this is not the law, “You don't just do it because you have to.”
- v. **Issue:** How does one establish the right of necessity and who bears the burden? Is it possible to say that in the age of helicopters, there is never a need for easement by land?
- vi. **Rule:** Easement by necessity is generally through road access. However, some JX's say that alternative access by boat is sufficient. “We are only talking about access across the surface of the Earth.”
- vii. Othen claims that he has been using the road for 50 years and claims to have an easement by prescription. Othen initially has a license – this can be revoked. Othen would like to convert the license into an easement, preventing Rosier from revoking the license.
- viii. Why didn't the irrevocable license theory – **Holbrook v. Taylor** – work here? TX requires an express written easement. TX did not recognize that licenses can be made irrevocable by use.
- ix. **Issue:** What type of use is required for an easement by prescription?
- x. **Rule:** the adverse use required to find an easement by prescription must be of the sufficiently hostile and adverse character required for adverse possession. Othen loses because his use was permissive; he was given a license to use the path.
- xi. Prescription is very close to adverse possession, works in all sorts of circumstances. Utilities, airport landing lines. Difference is that adverse possession gives you title – fee simple which allows you to exclude everybody else.
- xii. Prescription gives you the right to use somebody else's property but not exclusively occupy. Both parties are using the road which means that it is hard to establish the element. LESHY – when court talks about exclusivity this is wrong because exclusive use is not required to establish an easement to begin with.
- xiii. **Issue:** Does a claim of easement by prescription require a specific route?

xiv. **Rule:** Yes, LESHY – you don't want to have a legal interest that allows someone to wander around the other person's property. Provides a stable predictable property interest.

5. Public Trust Doctrine, Scope and Termination of Easements

a. Matthews v. Bay Head Improvement Assoc'n, (p. 816), 3/24,

- i. **Issue: (Right of easement)** Under the public trust doctrine, does the public have the right to gain access to the beach through the dry sand area owned by a quasi-public body?
- ii. **Rule:** The public has a right of **reasonable access** to the foreshore as well as a suitable area for recreation on the dry sand. Where the use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the PTD warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.
- iii. **Issue: (Right to use private land as incidental to rights under the PTD)** Under the public trust doctrine does a quasi-public body have to open up its dry sand beaches to the public to satisfy the public's rights?
- iv. **Rule:** Membership of the Association must be opened up to the public at large from 10-5 between mid-June and September. This will reasonably satisfy the public's need.
- v. LESHY: This is an ad-hoc ruling in a local situation attempting to balance the rights of the public against the private rights of the association. It provides very little stability or predictability for property owners, since it is judicially created and administered.

b. Miller v. Lutheran Conference (p. 824) Supreme Ct. PA, 1938

i. **Facts:**

- (a) Frank Miller and Rufus Miller create a company. Company grants Frank an easement to fish and boat. Frank gives ¼ Rufus easement to fish, boat, and bathe.
- (b) Company has right to create lake, and therefore has right to bathe, but Frank does not because it was not granted in the easement from the Company to Frank.
- (c) Ultimately Rufus has right to fish and boat (express grant), and right to bathe (prescription).

(d) **Easement bathe by prescription**

- i. Rufus exercised the right to bathe by allowing the groups to come to the lake and bathe – open and notoriously – AND the company did not interfere. LESHY – this is classic adverse possession-like prescription.
- ii. Company did not exercise legal rights over the use of the lake.

(e) What kind of easement is this? This is an easement *in gross*.

- i. *Appurtenant* – this would be easement appurtenant if Frank had an easement that pertained to a specific piece of land, and the rights coming from the easement were attached to the piece of land. You would not be able to exercise the easement unless you were attached to the land.
- ii. *In gross* – Frank and Rufus can use easement wherever they are. The easement is floating – a generalized right. Transferability creates much more potential that the easement will be expanded.

ii. **Issue:** May the owner of an easement in gross transfer his/her easement?

iii. **Rule:** The general rule is that easements in gross were not transferable. The more modern view is that you can transfer the easement in gross but there are limits: you must manage the easement as one entity. The interest in the easement in gross can be subdivided but there needs to be consensus between all the parties involved – each individual owners retains a veto power. “One stock.”

- iv. **POLICY:** This protects the original (servient) estate. This restricts the possibility that different interest holders will grant different individuals. In this case, it protects the company.
- v. **Issue:** How is this different from a tenancy in common? Could one tenant use the property irrespective of the other?
- vi. **Rule:** Yes, one tenant could use the property irrespective of the other's objection because of the *unity of possession*. Tenants in common could partition, but in this case there is no remedy available – parties must manage as one stock.
- c. **Brown v. Voss (p. 833)**, 3/25, Supreme Ct. WA, 1986
 - i. **Issue:** May a holder of a private road easement use that road not only to reach the dominant estate, but also a subsequently acquired parcel?
 - ii. **Rule:** Easements appurtenant may not be extended by the owner of the dominant estate to other parcels. HERE: While the easement may not be extended, 1) the owner of the servient estate could prove no damage, there was no increased traffic, and no increased burden on the servient estate; 2) The defendant sat by for a year before bringing an action, and 3) there would be great harm to the plaintiffs were the injunction granted to the defendants, with no appreciable harm flowing from the defendants if the injunction were denied.
 - iii. **LESHY:** Court kind of abandons the longstanding notion recognized everywhere that when an easement appurtenant is granted, it cannot be extended without the servient owner's consent. The court is going to have to constantly monitor these neighbors.
- d. **Presault v. United States (p. 843)**, DC Circuit, 1996
 - i. **Facts:**
 - (a) Case involves State law, Federal law, and Federal regulatory Agency (Interstate Commerce Commission).
 - (b) Rail to Trails program allows for conversion of RR rights of ways to trails.
 - (c) What kind of interest did the RR originally have? VT RR company got permission to cross 3 of P's predecessors.
 - (d) What exactly is the RR getting through eminent domain? RR got an easement for all of them. Question of Scope.
 - (e) Parcels A and B were obtained through eminent domain "Commissioner's Award." Commissioner's award was silent on issue of fee simple or eminent domain because RR was seeking right to build a RR, not title to the land.
 - (f) Parcel C: Even though warranty deed states fee simple, court holds that it is an easement. Fee simple was only for the use of the RR.(?) **LESHY**, court is bending over backwards to protect P. This is terrible to disregard the deed. Doggone it the legal instrument says that we are conveying the title.
 - ii. **Issue:** What type of interest is created when a RR acquires an estate in land for laying track and operating RR equipment?
 - iii. **Rule:** When a RR obtains an estate in land for laying track and operating RR equipment, the estate acquired is no more than that needed for the purpose, and that typically means an easement, not a fee simple.
 - iv. **Issue:** What is the scope of the easement acquired by a RR for RR purposes?
 - v. **Rule:** A RR that acquires a right-of-way for its road acquires, typically an easement, necessary for its limited purposes needed, an easement for its roadway.
 - vi. **Issue:** Does the scope of the easement granted to the RR include public recreational use?

- vii. **Rule:** Common law principles allows for the scope of the original terms of the easement to be adjusted to include reasonably foreseeable changes in society. This is allowed in the hope that the easement may continue to serve the original intent of the parties. However, while expansion is often allowed, *change in use* is not reasonably foreseeable.
- viii. **Issue:** What is the standard for extinguishing an easement?
- ix. **Rule:** The general rule is that the easement is extinguished when abandonment has occurred. Non-use, or irregular use is not sufficient to constitute abandonment.
- x. **Issue:** What is sufficient for abandonment?
- xi. **Rule:** In order to establish an abandonment there must be in addition to nonuse, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.

C. Covenants

1. Equitable Servitudes

- a. **Defined:** Equitable servitudes are covenants respecting the use of land, enforceable against successor owners or possessors in equity regardless of enforceability at law. They require:
 - i. **Intent:** that parties intended the promise to run,
 - ii. **Actual/ constructive notice:** Parties must have actual or constructive notice
 - iii. **Touch and concern the land.**
- b. **Tulk v. Moxhay (p. 864)**, England, 1848
 - i. **Issue:** May a party be permitted to use the land in a manner inconsistent with the equitable servitude when he entered into the contract with notice?
 - ii. **Rule:** No. Where the party had notice, even if not written in the contract, he may be enjoined from using the land for a different purpose.
 - iii. **LESHY:** Tulk illustrates how English courts of equity began to enforce promises made by landowners to limit the use of their land, and to enforce these promises against successor owners or possessors, subject to the intent/notice/t&c requirements.

2. Creation of Covenants

- a. **Sanborn v. McLean (p. 870)**, 3/30, Supreme Ct. MI, 1925
 - i. **Issue:** Can a landowner who bought a lot without any explicit restrictions in his deed or anywhere in the chain of title be enjoined from building a gas station on her lot by her neighbors, who maintain a reciprocal negative easement is attached to all the lots in the neighborhood?
 - ii. **Rule:** Yes. Her lot is subject to an implied reciprocal negative easement. Even though not all the subdivisions from the common owner had explicit restrictions, the court infers the intent of a common plan.
 - iii. **Issue:** Does the easement attach even though the landowner had no notice in the deed or in the chain of title?
 - iv. **Rule:** Yes. The owner was put on notice because of the uniformly residential character of the neighborhood.
 - v. **POLICY:** People may pay more for the land because they will all benefit from the peace and quiet of the residential neighborhood. On the other hand, perhaps Sanborn rewards sloppy transactions, because the original grantor should have just put the restriction in writing in every deed, if he truly had a common plan. This ruling skirts the Statute of Frauds.
- b. **Neponsit v. Emigrant Bank (p. 875)**, 3/31, Ct. of Appeals, NY, 1938
 - i. **Issue:** When is a covenant enforceable against successive owners?

- ii. **Rule:** A covenant is enforceable when (1) there is intent of the parties, (2) the covenant touches and concerns the land, (3) there is privity between the parties.
 - iii. **Issue:** when does a covenant touch and concern the land?
 - iv. **Rule:** Generally, an affirmative covenant to pay money does not touch and concern the land. Exception: when the affirmative covenant substantially affects the rights of the parties. A lien paid in exchange for maintenance of public places can be said to substantially alter the rights.
 - v. **ISSUE:** What is the policy not enforcing affirmative covenants?
 - vi. **RULE:** Court wants to keep personal promises separate from property use. Court does not want to create judicial supervision over promises to pay. Idea of binding a successive owner, other than someone who makes the promise, makes the courts uneasy.
 - vii. **PRIVITY ISSUE** – check with NEELA
- c. **Covenant not to compete**
- i. A owns a property, subdivides and sells to B. A opens a convenience store and gets a promise from B not to open a convenience store. A can enforce this promise through contract theory. What if B sells to C and C opens a store (deeds says that they cannot open store)? Does the covenant not to operate a business, touch and concern the land? (unenforceable) If B's promise is economically concerned it probably does not touch and concern land, and should not be enforced. (enforceable) Restatement only requires a promise between parties. As long as there is no public policy argument objection to enforcing the covenant.
 - ii. Issue might change if Dell Webb owns large tract of land, and does not allow other types of convenience stores within tract of land. Public policy might have a problem with allowing Dell Webb to use land interests to choke economic interests of land owners.

3. Scope of Covenants

- a. **Hill v. Community of Damien (p 893)**, 3/31, Supreme Ct. NM, 1996
 - i. **Issue:** Does a restrictive covenant confining property use to “single family residence purposes” prohibit the construction of a group home for individuals with AIDS?
 - ii. **Rule:** No. This group home does not violate the restrictive covenant. The court says that “single family residence” is an ambiguous term, and where language is unclear or ambiguous it will be construed in favor of the free enjoyment of property and against restrictive covenants. The home is designed to give the four individuals living there a traditional family environment. The word “family” is not defined in the restrictive covenant as only people related by law or by blood, and the Albuquerque zoning ordinance includes in its definition of “family” any group of not more than five [unrelated] persons living together in a dwelling.
 - iii. **Issue:** If the covenant did prohibit a group home for individuals with AIDS, would it be void under the FHA?
 - iv. **Rule:** Yes. Congress has articulated a rule of law, the FHA, expressing a clear policy in favor of allowing people with physical and mental disabilities to live in small group homes. People living with AIDS are included in the definition of people with disabilities under the FHA.
 - (a) The FHA ruling may be **dicta** or it may be an **alternative holding**.

4. Termination of Covenants

- a. **Western Land Co. (p. 911)**
 - i. **Facts:** When developer created lots he placed a restrictive covenant in master deed on all of the lots. Now he claims that the nature of the neighborhood has changed and wants to

- remove restrictions and build commercial buildings. Developer brought this upon himself. Marketed the lots as residential. Probably profited from marketing the lots as such. In this way, the developer is trying to rip off the people who have already bought lots.
- ii. **Changed circumstances doctrine:** if the covenant is included in the original deed, courts are very unlikely to disturb the covenants. “Even though nearby avenues may become heavily traveled thoroughfares, restrictive covenants are still enforceable if the single-family residential character of the neighborhood has not been adversely affected and the purpose of the restrictions has not been thwarted.”
 - iii. **Issue:** Is a landowner entitled to terminate a covenant that he creates due to a changed circumstances that make the land more valuable for a different use? **Is this an anti-market decision?** Will society suffer as a result of enforcing the covenant?
 - iv. **Rule:** Overall value might not be maximized. However, the neighbors who are the next row in will suffer. Court finds that as long as the original intent of the covenant can be satisfied without undue burden the covenant should be upheld.
 - v. **Issue:** What is the relationship between covenants and zoning?
 - vi. **Rule:** Council was considering changing the zoning. Court goes on the state that even if the government had changed the zoning for the area, it would not be able to defeat the covenant.
 - (a) Covenants are private agreements that may be enforceable by law
 - (b) Zoning is governmental and can restrict property
 - (c) How do they fit together? They are parallel universes. If you have both, the most restrictive one applies.
 - vii. **Policy:** Is it a catch 22 to require the entire neighborhood to change? Covenants prevent neighborhood from changing. It overlaps with other ways in which you can change a covenant.
 - viii. **Issue:** What can the developer do if one of the front lots cannot be rented as a single family unit?
 - ix. **Rule:** Look at the terms and conditions of the restriction. ***This is a scope issue.*** Developer might be able to put in apartment building, or motel-like structure.
- b. **Rick v. West (p. 916)**, 4/7, NY Supreme Ct, 1962
- i. **Issue:** A grantor with a common residential plan subdivides and conveys his land with restrictive covenants, but the plan fails. He then decides he wants to build a hospital, and the town board is willing to change the zoning in the area. May a lone holdout enforce the original restrictive covenant?
 - ii. **Rule:** Yes. The holdout relied upon the restrictive covenants when she bought the land and has a right to continue to rely on them. The restriction is not outmoded by changed conditions and it provides real benefit to the person seeking its enforcement.
 - iii. **Issue:** Does the governmental willingness to change the zoning indicate recognition of changed conditions?
 - iv. **Rule:** Under R3d, the test for changed conditions is a stringent one. Zoning regulations do not modify or terminate a covenant unless they make compliance with the servitude illegal.
- D. Common interest Community “Little Fascist States”**
1. **Nahrstedt v. Lakeside Village Condo**, p. 927, Kennard, CA Supreme Ct., 1994
 - a. **Facts:**
 - i. P bought a condo. The development has covenants, conditions and restrictions (CC&Rs) that were included in the developer’s declaration at the inception of the development project. One is a restriction contained in the project’s declaration (operative document for a common

interest development) prohibiting keeping dogs, cats, livestock, reptiles or poultry in any unit.

- ii. P moved in with 3 cats.
- iii. Homeowner's association learned of the cats, demanded their removal and assessed fines against P for each month she remained in violation of the pet restriction.
- iv. P brought action to declare the restriction unreasonable as applied to her indoor cats, and alleged she did not know of the restriction when she bought the condo.
- b. **Procedural:** Appellate court held that the Association had the burden of proving the restriction was reasonable, rather than the P having the burden of proving the restriction was unreasonable.
- c. **Holding:** The recorded pet restriction was not arbitrary but was rationally related to health, sanitation and noise concerns held by residents of the condo. P's complaint alleged no facts supporting a finding that the burden of the restriction was so disproportionate to its benefit that the restriction was unreasonable and should not have been enforced.
- d. **Issue:** By what standard should restrictive covenants be judged?
- e. **Rule: Standard:** Legislature provides by statute § 1354 that such restrictions are provided a presumption of validity. Challengers must demonstrate restriction's *unreasonableness* by the deferential standard applicable to equitable servitudes:
 - (a) Restriction must be uniformly applied unless P owner can show the burdens it imposes on affected properties so substantially outweighs the benefits of the restriction that it should not be enforced against any owner.
 - ii. Restrictions should be enforced unless wholly arbitrary, violate a fundamental public policy, or impose a burden on the affected land that far outweighs any benefit.
- f. **Issue:** What is the focus when determining whether a restriction is unreasonable under § 1354?
- g. **Rule:** The project as a whole, not the individual homeowner.
- h. **Issue:** What is the rationale for upholding such restrictive covenants in condominium cases?
- i. **Rule:** Because owners live in such close proximity and use common facilities, each owner must give up a little freedom of choice in order to promote health, happiness, and peace of mind.
- j. **Issue:** What is the policy behind enforcing restrictions?
- k. **Rule:** The policy considerations favoring enforcing recorded restrictions are:
 - i. Discourages lawsuits by owners seeking personal exemptions from the restrictions
 - ii. Promotes stability and predictability by
 - (a) Providing substantial assurance to prospective buyers that they may rely on CC&Rs
 - (b) Protects all owners from unanticipated increases in association fees due to lawsuits.
- l. **What if** the CC&R was silent on the pet issue, and the no-pet rule was adopted 6 mos. Ater?
 - i. **Different case.** Homeowner Assoc's have the authority to adopt new rules, but their ability to enforce them against existing owners may be restricted.
 - (a) Some courts hold that if only one person is being singled out in an after-imposed regulation, the restriction will not be enforced.

E. ZONING: Legislative Land Use Controls

1. General

- a. Zoning is a governmental land control accomplished by dividing a city into zone from which harmful uses are excluded.
- b. Distinguished from *Nuisance*, and *covenants*
 - i. Nuisance law could not prevent nuisances from arising, it could only *react* (enforce injunction). *Proof, timing, technical, procedural problems.*

- (a) Plaintiffs – you need either the gov’t to bring a public nuisance, or private individuals who will pay the lawyers.
 - (b) Nuisance cases are also hard to win. Courts balancing interests.
 - ii. Covenants and servitudes (private agreements)
 - (a) Transaction costs – if you want to enforce through private agreement, you need everybody to sign up.
 - (b) Technical problems – early 1920’s was the era of real covenants where you needed a common owner to enforce a covenant. The safest way would be for everybody to convey to the strawman and then re-convey to individual owners with restrictions.
 - iii. Zoning – provided a simpler, easier option. Go to the city council ask them to create an ordinance and will solve the problems.
 - (a) It is proactive
 - (b) You don’t need to worry about holdouts. Solves the transaction problems
 - i. Issue: Did the landowners consent?
 - ii. Rule: they elected the representatives.
 - c. How zoning works
 - i. Most cities apply a plan. Usually a delegation to a board. Can bring an appeal. Elaborate provisions for variances through legislative and executive boards. Does not regulate just uses. It can also regulate height, density, what kind of foot print your building can have on the property (setback requirements).
2. **Village of Euclid v. Ambler (p. 960)**
- a. Euclidian Zoning: (1) Regulated land by height, use, and density; uses were cumulative (lowest zoning classification allows for all other types of uses).
 - i. Modern trend is that industrial/commercial/residential zones are exclusive.
 - b. **Facts:** City passed zoning ordinance that resulted in Amber’s land decreasing in value by 75%.
 - c. **Issue:** Is this a “facial challenge,” or “as applied?”
 - d. **Rule:** Ambler challenged on its face – that ordinance was beyond gov’t police power because it was not rationally related to any state objective.
 - i. As applied zoning ordinances have been struck down – **Nectow v. City of Cambridge** (p. 970).
 - ii. Today most attacks on zoning, are almost exclusively takings questions.
 - e. **Issue:** is the gov’t power to police based on the nuisance principles? Is it using legislation to anticipate and prevent nuisances?
 - f. **Rule:** The gov’t has a broad power to legislate a sweeping comprehensive legislation of thousands of property owners in order to carry out its vision of a rational nice American supper. *As long as they are not arbitrary or unreasonable* they get deference.
 - g. **Policy:** We want people to have nice places to live in. Small town social values in the big city. Thomas Jefferson’s vision of the city. Jefferson believed that the US would prosper with small landowner/farmer types.
 - i. There is little constitutional obstacle to the city planners doing this because the courts should defer to the other branches of gov’t.
 - ii. **EUCLID** is a judicial approval of the idea and the substantive goals of zoning. It is also an example judicial deference to the other branches of the gov’t to carry it out.
3. **The Structure of Authority Underlying Zoning**

- a. **Enabling Legislation** - Zoning law is local/state law. Federal gov't was the cheerleader, but cannot actively pass legislation. State government adopted enabling laws that allowed local gov't to adopt zoning schemes.
 - i. Typical regulations:
 - (a) Height, number of stories, and size of buildings, percentage of lot that may be occupied, size of yards and other open spaces, density of population, and location and use of buildings.
 - ii. To enact a zoning, a city must create:
 - (a) a planning commission – makes recommendations to the city council.
 - (b) a board of adjustment (board of appeals) – grants variances when required.
 - iii. **Limitation on Zoning legislation** – Zoning ordinances are required to be within the power given by state legislature (**standard state enabling act**). If it exceeds this power, it is *ultra vires*.
 - b. **Comprehensive Plan** – is a statement of the local gov't's objectives and standards for development. The plan is based on the city's present and future needs.
 - i. Regulation must be made in accordance with the comprehensive plan.
 - ii. Reflects the view that zoning is a means of giving effect to a larger planning enterprise that has led to formulation of the comprehensive plan.
 - iii. This is only required in 50% of states. This is a loose requirement.
 - (a) **Policy:** Future is too unpredictable, better approach is to focus on short-term and mid-term and be flexible.
4. **Nonconforming Use**
- a. **PA Northwestern Distributors, Inc., (p.974)** Supreme Ct. PA, Larsen
 - b. **Facts:**
 - i. Adult bookstore opened after obtaining legal permits, etc. Four days later the twp board of supervisors published a notice to amend the zoning ordinance to regulate “adult commercial enterprises” and giving non-complying enterprises 90 days to amortize. P argues this constitutes a regulatory taking and should be compensated.
 - c. **Issue:** When is property regulation reasonable?
 - d. **Rule:** When it is clearly necessary to preserve the health, safety, morals, or general welfare of the people.
 - e. **Issue:** When may lawful nonconforming uses be divested of their property rights?
 - f. **Rule:** The right may not be abrogated or destroyed unless it is a nuisance, is abandoned, or is extinguished by eminent domain.
 - g. **Issue:** What other Constitutional concern may be seen in this case?
 - h. **Rule:** First Amendment right to free speech (unless you can argue this is peddling pure pornography, which is not protected under the 1st Amendment.)
 - i. **Holding:** The amortization and discontinuance of a lawful pre-existing nonconforming use is *per se* confiscatory and violative of the PA Constitution.
 - i. **MAJORITY VIEW: Concurrence:** The amortization and discontinuance should not be *per se* confiscatory; instead the one at issue should be unconstitutional because it was not **reasonable** (only 90 days).
 - j. **Issue:** Is the majority holding here consistent with Sutherland's opinion in Euclid?
 - k. **Rule:** LESHY: Sutherland would uphold the idea of an amortization principle as a useful thing in this situation. This court seems to be saying, “if it's not a nuisance, and there is some sort of vested right, the only way to eliminate it is to do so immediately with compensation.

5. Amortization

- a. **Defined:** Allows local governments to phase out non-conforming uses to zoning ordinances. More often non-conforming uses are grandfathered in. Time of amortization may differ depending on investment in the use and building. (Ex: Billboards).
 - i. Amortization gets around the duty of compensation.
 - ii. Allowed by most jurisdictions but must be reasonable as applied. Factors often considered: nature of use in question, amount invested, number of improvements made, public detriment caused by the use, character of the surrounding neighborhood, amount of time given. p. 982
- b. **Grandfathered non-conforming uses** run with the land, but are strictly construed. They may continue after ownership changes hands, but may be restricted from developing or expanding.

6. Vested Rights:

- a. A label that denotes that you deserve “more fairness” than you would otherwise. A concept with narrow application.
 - i. You had a vacant lot in an area zoned for residential use. You plan to build an apt. bldg and have made some steps. Then the zoning is changed.
 - (a) If you have a plan but not all the permits, you may not have a right.
 - (b) If you have the permits but have not broken the ground, it’s a grey zone.
 - (c) If you have dug the foundation, you may have a vested right.

F. Eminent Domain and Takings

1. Eminent Domain – Power of gov’t to force transfers of property from owners to itself. Power is confirmed by the 5th Amendment.
 - a. Gov’t has power of eminent domain – the power to take private property for **public use** with **just compensation**.
 - b. Private property does not have to be land. It can be IP, or personal property.
 - c. Where does this power come from?
 - i. Constitution? Not, really. 5th Amendment states that “nor shall private property be taken except for public use upon just compensation.”
 - (a) It assumes that power exists, and places restraints upon the power.
 - ii. Carryover from England? Stems from monarchy? Like part of the social contract. One of the powers is to take private power.
 - iii. LESHY – this is part of the inherent power of the gov’t in our social contract. The gov’t has power to regulate and that includes power to take private property.
 - d. **Public Use**
 - i. **Hawaii Housing Authority v. Midkiff (p. 1098)**, 4/15, US Supreme Ct., 1984
 - (a) **Issue:** May the Hawaii legislature take title in real property from one party and transfer it to lessees in order to reduce the concentration of ownership of fees simple in the state?
 - (b) **Rule:** Home ownership is a good thing.
 - (c) **Issue:** What is the standard of review that a court must use when determining the public use of a taking?
 - (d) **Rule:** A court must defer to the legislature’s judgment of public use, unless the public use is without reasonable foundation. When assessing reasonable foundation, the court should determine if the legislature could rationally have believed that the act would accomplish its intended goals. This includes both Congress’ and state legislatures’ determination of public use.
 - (e) **Issue:** In a taking is the government required to actually possess and use the property at some point during the taking?

- (f) **Rule:** A gov't does not itself have to use the property to legitimate a taking. Under the Public Use Clause, takings should be evaluated by their purpose, not their mechanics.
 - (g) **Issue:** Is this a private taking because title is being passed to private individuals?
 - (h) **Rule:** No, this would not be considered a private taking because the Act is intended attack evils of concentrated ownership in Hawaii – a legitimate public purpose. Issue is whether there is a public value from the action. Value can derive from something other than the gov't's possession of property. If you believe that widespread property ownership is beneficial to the public then the gov't possession is not relevant. Therefore the technical requirement that the gov't actually use or possess the land is not needed.
 - (i) **Issue:** Why didn't the market take care of this problem?
 - (j) **Rule:** If the landowners don't want to sell then the private market will never get it from them.
- e. **Just Compensation:**
- i. **Standard:** The willing buyer-willing seller fair market value. When the gov't condemns property the value is determined by the price that the willing seller would sell to a willing buyer.
 - ii. The value is an objective standard – personal idiosyncratic value is not considered.
 - iii. **Issue:** Can gov't claims that takings cost \$500, but the remaining land has been improved \$200, so they will only give you \$300. There is a lot of disagreement in regards to this.
 - iv. Argument against allowing gov't to offset. Is there is a similarly situated property owner with a piece of land that is consumed by the taking, you end up treating property owners differently based on the fact that one person has more adjacent land.
 - v. **Question:** What if you own a piece of undeveloped property that is zoned industrial. Gov't decides to down zone and claim that you can only place residential property. This reduces the value of land (\$100k to \$50k). Next year the gov't condemns and places a highway. What does the gov't have to pay?
 - vi. **Rule:** Can the gov't take advantage of the downzoning. Gov't will only have to pay \$50k if the downzoning was made in goodfaith without regards to highway plan.
 - (a) The interaction between gov't regulatory powers of zoning and public use takings can work the other way (when there is an increase in value).
- f. **Poletown Neighborhood Council v. City of Detroit** (p. 1108), 4/15, MI 1981
- i. [Overruled by the MI Supreme Court last year]
 - ii. **Facts:**
 - (a) Detroit planned to condemn a residential neighborhood, clear the land, and convey it to General Motors for construction of an assembly plant under **eminent domain**.
 - (b) Residents sued, arguing this constituted a taking for a private, not public purpose.
 - (c) D argued the public purpose is to create jobs and prevent unemployment – the fact that the use is by a private manufacturer does not defeat the predominant public purpose.
 - iii. **Held:** For the city. The state **demonstrated** that the power of eminent domain was being used to accomplish an essential public purpose of alleviating unemployment and revitalizing the economic base of the community. Benefit to a private interest is incidental.
 - (a) The Legislature determined that governmental action of this type meets a public need and serves an essential purpose.
- g. **City of Oakland v. Oakland Raiders** (p. 1112), 4/15, 1982
- i. **Facts:**

- (a) In 1980 the Oakland Raiders owners wanted to move the team to LA. Oakland sought to acquire the team through eminent domain.
 - i. Government argument:
 - a. Promotes recreation for the public
 - b. Has economic spillover
 - c. Sentimental attachment.
 - (b) LESHY: An easy case to make for the city: it's a rational decision made by city government.
 - i. Government may build a stadium and lease it to the private team to play there, maybe below market rates. That would not be subject to constitutional limits. This is analogous.
 - ii. **HELD:** There is a valid public interest in providing access to recreation to its residents in the form of spectator sports. Respondent owners failed to show there was a legally substantial basis for differentiating between managing and owning the facility in which the game is played and owning the team. Remanded for further hearings (dismissed on other grounds).
2. **Physical Occupations and Regulatory Takings “Classic Mud”**
- a. **Loretto v. Teleprompter Manhattan CATV Corp.**, (p. 1117), US Supreme Ct., 1982
 - i. **Facts:**
 - (a) Prior property owner granted cable company permission to install cable boxes and wires in an apartment building, compensating the owners at 5% of the gross revenues from the property.
 - (b) 1973: NY state enacted legislation prohibiting LLs from interfering with the installation of cable TV upon the premises or property and awarded LLs a one-time \$1 compensation.
 - (c) P brought suit after buying the property, claiming the law effected a taking without just compensation, requesting damages and injunctive relief. Summary judgment granted for cable company and the city, affirmed.
 - (d) Ct. of Appeals upheld the law because it serves the legitimate purpose of elimination the inhibition of the development of CATV, which has important educational and community benefits.
 - ii. **Issue:** When does an otherwise valid regulation frustrate property rights to the point that compensation must be paid?
 - iii. **Rule:** A permanent physical occupation authorized by the government is a taking without regard to the public interests it may serve.
 - (a) A physical intrusion by the government is a property restriction of an unusually serious character.
 - (b) A permanent physical occupation destroys the rights to possess, use and dispose of the property. It denies the owner the right to control the use of the property. More severe than a regulation because the owner cannot control the timing, extent, or nature of the invasion.
 - iv. **Issue:** How should the court determine the compensation due?
 - v. **Rule:** “Just compensation” - Court should take into consideration the extent of the occupation.

- vi. **Dissent:** (Blackmun, Brennan, and White) – takings claims should be evaluated under a multi-factor balancing test. The extent of the interference with the owner’s use should be evaluated.
- vii. **Issue:** How could the gov’t have achieved its ends constitutionally?
- viii. **Rule:** Through regulation requiring the LL’s to have cable. That would be evaluated under Penn Central balancing. Or they could have condemned it via eminent domain for the public use.

b. Hadacheck v. Sebastian

- i. **Facts:** Facts: Hadachek bought a brickyard and legally made bricks. Gradually LA sprawled out and city decides to close brickyard through a zoning restriction. This is fairly rare because it does not have a grandfather clause/amortization.
- ii. Physical occupation of the land? No, they are only stopping the making of bricks. Hadacek can still mine clay, or build a building. Hadachek still maintains the right to exclude, but gov’t has sharply restricted the use of the property.
- iii. **Rule:** “nuisance exception” – gov’t has ability to police nuisances therefore a gov’t regulation preventing a nuisance is not a taking.
 - (a) Hadachek’s use and enjoyment of the property was a substantial interference with the neighbors’ use and enjoyment of their property. City thinks that it is a nuisance and therefore decides to stop the nuisance through regulation.
 - i. Issue: How is this different than the City’s filing a common law nuisance action?
 - ii. Rule: In a common law nuisance suit the City might have to compensate (Spur).
- iv. The court calls this another per se rule, but nuisances are not per se takings. They are enforcing a limitation that is built into your property right to begin with.
 - i. Your property right in fee simple is subject to some inherent limitations built into title itself. Fee simple includes obligation to not use property in a manner that is a nuisance.
- v. **Issue:** What is the difference between an *Eminent domain* action, and a *Regulatory Taking*?
- vi. **Rule:**
 - (a) Eminent domain (simple) – legal proceeding that provides compensation. The gov’t ends up with title.
 - (b) Regulation (complicated) - courts must determine that the gov’t has effectively taken your property and you must be compensated. The gov’t does not end up with title.
 - i. Ex. Loretto – in 50 years when the cable has deteriorated the gov’t does not have an easement to the cable.

3. Rules Based on Measuring and Balancing

a. Pennsylvania Coal Co. v. Mahon, (p. 1140), US Supreme Ct., 1922

- i. **Facts:** PA coal gave deed to Mahon. Mahon gets deed to surface, retaining right to mine for PA Coal. PA kept the right to mine the coal over the surface owner’s objection.
 - (a) Kohler Act: Other Mahon-types asked legislature to create act that prevents mining because it is a nuisance.
- ii. Arguably this was bargained for: Mahon gets the property cheaper b/c of the coal reservation than it would without the reservation.
 - (a) LESHY: Holmes’ view – property owners are trying to get something for nothing through the legislature.

- (b) Holmes claims that it is not a nuisance and that there is no public interest. Holmes is skeptical, thinks that the PA legislature is working only for the surface owners.
- (c) Brandeis is ready to defer to PA legislature.
- iii. **Plymouth Coal Co. v. PA** – precedent case where Coal Co's was prevented from mining coal for miner safety – public interest. Court did not find a taking.
 - (a) Holmes distinguishes because miner safety is different than blowing up houses.
- iv. **General rule:** if a regulation goes too far it will be recognized as a taking.
- v. **Question:** what is the property interest that you are claiming is being taken?
- vi. Holmes claims that you must focus on coal that cannot be mined. Therefore Holmes finds that there is a severe diminution in value because coal value is gone (100% taking of the coal). Brandeis argues that values are relative and should be considered in light of the entire property.
- b. **Penn Central Transportation Company v. City of New York**, (p. 1151), US Supreme Ct., 1978
 - i. **Facts:**
 - (a) In accordance with a state Enabling Act, NYC passed a city Landmarks Preservation Law in 1965. Under the law, owners of properties deemed to be historic landmarks had their use of their property restricted to preserve the landmark. The landowner could apply for administrative approval of any sought change to the landmark, and they also received transferable development rights (TDR's).
 - (b) Penn Central Co. wanted to develop Grand Central Terminal to include a 50-story office-building tower. Their plans were rejected by the Commission for not providing adequate protection for the historical façade of the GCT.
 - (c) Penn Central argued that (1) the restrictions on their development right of the airspace over the GCT effected a taking of their property.
 - ii. **Holding:** Supreme Court affirmed, holding that NYC had not taken the P's property without just compensation and did not arbitrarily deprive the plaintiffs of their property without due process of law.
 - (a) P may not establish a taking simply by showing they had been denied a property interest that they had believed was available for development.
 - iii. **Issue:** Were the restrictions imposed substantially related to the promotion of the general welfare?
 - iv. **Rule:** Yes. They not only permitted reasonable beneficial use, but they also provided the plaintiffs with the right to further develop other properties.
 - (a) **Important factors:** There are more factors involved than this, but these three are particularly relevant:
 - i. **Diminution in value** (econ'c impact on claimant): Important, but not determinative.
 - a. Evaluate the parcel as a WHOLE (probably just the single lot, not all property holdings of the landowner)
 - b. Distinguished from Loretto: In Loretto, the government was physically occupying the property. Here the government is regulating the property.
 - c. Distinguished from PA Coal: In PA Coal, the PA law said that support was a separate property interest. Brandeis said that while it was legally classified as separate, really it was part of the whole parcel.
 - ii. Extent of interference with DIBE (Direct investment-backed expectations)

- a. What did the landowners (objectively, reasonably) expect, and what did they (reasonably) invest in, relying on their expectations?
 - b. Related to the idea of “fairness”
 - iii. Character of the government action
 - a. HERE: Purpose of gov’t action is economic advantage (tourism) and quality of life (preserving culture, history). From Penn Central’s perspective, they are getting in return the same thing all of New York is getting, but they are being singled out to pay the cost.
- 4. Third Categorical Rule – Complete Wipeout**
- a. **Lucas v. South Carolina Coastal Council**, (p.1171), U.S. Supreme Ct., 1992
 - i. **RULE:** Gov’t regulation that takes all economic value is a taking. Court analogizes it to a physical occupation.
 - ii. Value – Trial court found that there was no value to land. Is this correct?
 - (a) LESHY – of course it has value.
 - (b) Is Scalia speaking in terms of productivity in economic value or economic productivity?
 - (c) **In practice:** Developers will often look at a property regardless of the zoning, and then seek a variance.
 - iii. Scalia attempts to reopen the *parcel as a whole* issue.
 - iv. **Burden of regulation:** Is Lucas being singled out by the gov’t?
 - (a) LESHY – it looks like it. Lucas owns the only two lots in a gated community that are not developed.
 - v. **Issue:** how does this rule and the rule in **Hadachek** relate?
 - vi. **Rule:** A gov’t may deprive a LO of “all economically beneficial use,” without compensation “only if the proscribed use interests were not part of his title to begin with.” (this gets back to the idea that a LO’s title has inherent limitations)
 - (a) **Note:** this does not apply to personal property. The gov’t can pass regulations that deprive you of all the economic value, especially when it is sale value (i.e. eagle feathers)
 - vii. **Issue:** What is the scope of the gov’t’s authority to regulate nuisances?
 - viii. **Rule:** Scalia claims that it is *background principles from property and nuisance*. Scalia means judge-made law that prohibits certain activities as nuisance, but does not include legislative determinations of what is a nuisance.
 - (a) LESHY – this is clearly wrong. Common law, and nuisance must be free to change to times. This shows Scalia’s distrust of the legislature.
 - ix. **Issue:** Is a nuisance defined as *preventing harm*, or *preserving a good*?
 - x. **Rule:** In most situations, the gov’t can argue one or the other. South Carolina is saying that it is a public harm to disturb the erosion.
 - xi. Dissent: believe that courts AND legislatures can make determinations on law. You cannot freeze the process of common law. Law must change and adapt.
 - b. **Palazzolo v. Rhode Island**, p. 1193, 2001, Kennedy
 - i. **Facts:**
 - (a) 1959: Owner invests in three shore-line properties under a corporation, SGI Inc. Corporation attempted to develop property but was rejected for adverse environmental impact.
 - (b) 1971: RI law created an agency charged with the duty of protecting the RI coastline. This is encouraged by the federal gov’t Clean Water Act, which encouraged preservation. SGI’s corporate charter revoked and property title passes to current owner (P).

- (c) 1983: Owner again tries to develop and is rejected. The pre-regulation value of the land was \$3 million, post-regulation value \$200k (because he was only allowed to build one house). P brings suit.
 - ii. **Issue:** Can you challenge a pre-purchase regulation?
 - (a) **RI argument:** P became the owner after a regulatory scheme was in place telling him he could not develop. This should act as an absolute bar to his claim.
 - i. **Focus on expectations:** Landowner's expectations when he acquired the property in 1978 was that he would only be able to build one house. He probably didn't pay \$3 million for the property, he paid \$200K because of the regulations. RI argues P is looking for a windfall.
 - ii. **Court holds that** the court on remand must consider P's claim under **Penn Central**. There, his DIBE would play an important factor in considering the diminution of value of his land (expressed in Justice O'Connor's concurrence).
 - iii. **Rule:** P is not barred from bringing the claim simply by virtue of having bought the property after the regulation.
 - (a) A flat rule barring challenges to pre-purchase regulations would be unconstitutional. The government would have too much power if they could downzone and then have no constitutional restriction on applying their prohibitions to future property owners.
 - iv. **Issue: Lucas argument:** Do the government restrictions have effected a total taking of the value of P's land, governed by Lucas?
 - v. **Rule:** No. The property has not been rendered valueless because he can still develop it to be worth \$200k.
 - (a) **Token interest:** Court says that a state may not leave an owner with a mere token interest, but that here he is left with economically valuable land, so it is not a token interest.
- c. **Sierra Tahoe (temporary v. permanent)**
- i. **Facts:** Commission declare a blanket moratorium on development. Owners of undeveloped lots file a takings lawsuit. Argue that it is a per se taking under **Lucas**.
 - (a) LESHY – it has a superficial interest. Regulation says no buildings – a wipeout. One problem – moratorium is only temporary,
 - ii. Stevens – breaks temporal argument down into parcel as a whole framework. This means that takings should be judged *in terms of time as a whole*. It doesn't fit into the per se rule. This is an example of judicial jockeying.
 - iii. **Tahoe Sierra** is all about the scope of the **Lucas** rule, and do you look at conceptual severance (temporal units, or over time)?
 - (a) Confines **Lucas** to a narrow set of facts.
 - iv. **Penn Central Analysis** – can it be applied? On the facts of this case – no. Plaintiff's lost on Penn Central analysis and did not appeal.
 - (a) How does penn central apply to a temporary moratorium?
 - (b) ***Diminution in value*** – depends on how long? Length of moratorium will affect the value because moratorium is not permanent.
 - (c) ***Strength of government interest*** – There is a strong gov't interest in regulating. Moratorium is justified because you need to have time to figure out planning.
 - (d) Distinguished from **Lucas**: Lucas was the only lot in the gated community that was not allowed to develop. In Tahoe there are 20k lots and gov't is preventing 12k from developing – it would not be seen as singling out individual owners. Equal distribution.

- d. Compare **Tahoe Sierra**, and **Lucas** in terms of views on government
 - i. Lucas/Scalia – shows distrust of government. They might engage in base interests and look for cheap way out.
 - ii. Tahoe/Stevens – talk about land use planners require deference to do their jobs. There is a consensus in the planning community that moratoria are essential tools for development.
- e. **Dolan v. City of Tigard** [EXACTIONS] p. 1207, 1994, Rehnquist
 - i. **Facts: Oregon case:**
 - (a) P wants to enlarge her hardware store, consistent with the city’s zoning scheme.
 - (b) City grants permit with conditions that she dedicate (deed) roughly 10% of the land to the city for a greenway and a bicycle path, to help prevent flooding and ease traffic congestion.
 - (c) P requested variances on the grounds that the conditions would cause undue hardship, which were denied.
 - (d) P appealed to the Land Use Board of Appeals, which found there was a reasonable relationship between the impacts of the proposed development and the requirements by the city commission, and between alleviating the impact of increased traffic and the bicycle path. OR Ct. of Appeals, OR Supreme Ct. affirms.
 - ii. **Framework of evaluation**
 - (a) Is there an “essential nexus” between the legitimate state interest and the permit condition?
 - i. HERE: there is a legitimate public purpose in preventing flooding and alleviating traffic.
 - (b) If yes, what is the required degree of connection between the exactions and the projected impact of the proposed development?
 - i. “rough proportionality” – no mathematical calculation required, but the city must make some sort of individualized determination that the required dedication be related both in nature and extent to the impact of the proposed development.
 - a. HERE: Not clear why a public greenway is necessary – deprives P of her **right to exclude**. City did not show a reasonable relationship between the floodplain easement and the P’s proposed building.
 - b. Also no clear showing of reasonable relationship between bike path and impact on traffic. (they showed that it *could* help but made no effort to quantify their findings).
 - (c) This is an aggressive stance by the court exuding hostility towards local government.

G. Summary of takings:

- 1. It is very fact dependent.
- 2. Doctrine reflects the messiness of the inquiry. Court tends to decide cases on the gut reaction.
- 3. A few (only a few) seemingly clear rules:
 - a. Per se rule on **physical occupation** – (**Loretto**)
 - i. Ambiguities: (1) gov’t can achieve the same result through regulation without occupying the property. This is a narrow rule and fairly easy for gov’t to avoid. (2) Court claims that taking must be permanent. What is a permanent occupation? “as long as it is endangered?” or expectation of long term?
 - b. Per se rule of **total wipeout**:
 - i. **Lucas** – if gov’t destroys all economic value than taking.
 - ii. **Palazzolo** – can’t be token value.

- iii. **Tahoe** – must be permanent deprivation of all economically viable use.
 - c. **Nuisance defense** – gov’t can prevent nuisances without compensating.
 - i. Limitations: gov’t can’t arbitrarily declare nuisances.
 - (a) **Issue:** Is the nuisance defense frozen in time at some magic moment in the past when the court developed common law principles. Scalia – claims that it must be some traditional idea, and cannot be continually re-invented. However, common law must adapt and does this enhance the power of the gov’t to regulate. Is nuisance only within the power of the court or is it within the power of the legislature too?
 - d. **Risk of nuisance defense:** It is very hard to say whether the court is saying that the a nuisance is bad, OR if they are preserving a public good. You can argue both ways. We cannot let the nuisance defense become all powerful.
 - i. Holmes was right, in PA Coal, not giving gov’t free hand, and judiciary can “ride herd” on the legislature. The general notion of takings doctrine is part of the institutional fabric. Issue: how aggressive should the court be?
 - e. Most cases are Penn Central cases – grope with all the considerations. Not all the predictable.
 - i. **Penn Central analysis:**
 - ii. What is the character of the gov’t action?
 - (a) Aesthetic and historic preservation – not as much deference. This is a less core concern.
 - (b) Environmental protection – is in between.
 - (c) Public health and safety – translates closely to nuisance.
 - iii. Impact on property owner? Is property owner being singled out? Does regulation have effect of singling out?
 - (a) The more it singles out, the more it is probably a taking. **Tahoe** was a broad application.
 - iv. Diminution in value?
 - (a) It is important, but not predictable. A big question is how do you define the property? Parcel as a whole issue. Majority in **Sierra** seemed to comfortable with the parcel as a whole analysis.
 - f. **Takings concern all forms of property:**
 - i. By and large takings cases involve real property, mostly undeveloped land. (There are a few involving IP or trademark stuff).
 - ii. Environmental regulations a very contentious area.
 - iii. Most property measured by value is now intangible. Land, where most of our property concepts evolved from, is a diminishing area of our value, but most cases in takings are involved in this area.
 - iv. LESHY: Court should be doing something close to what Fishell writes about on p. 1237. The courts have an important role to play, but the political process works pretty well without the courts. The courts shouldn’t get out of the arena entirely, but executive branch regulators, are sympathetic to property owners.
 - (a) **Penn Central:** Singled out by NYC. NYC cuts a deal with Penn Central to allow them to sell TDRs and they can operate GCT at a profit. So the government does not usually arbitrarily/ vindictively take people’s property.
 - g. There are all sorts of political checks on this process, and non-judicial checks on compensation happen all the time.