

Property Outline

I. INITIAL ACQUISITION

A. Theories of property

1. Legal definition- a bundle of rights
 - a. Sticks in the bundle:
 - i. Right to possession
 - ii. Right to use and control
 - iii. Right to transfer, give away and sell
 - iv. Right to exclude
 - v. Right to destroy
 - vi. Right to bequeath or inherit
 - vii. Immunity from expropriation or damage-
 - (1) Exception, govt. may take private property for public use but only with just compensation.
 - b. If all requirements were necessary, almost nothing would qualify as property today.
 - c. Property is the conclusion of the legal system: property=whatever the law says it is.

B. Conquest and Government Distribution of Land

1. **Discovery rule:** Discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest. *Johnson v. M'Intosh*. Indians have the right to occupy only, had no right to sell their land as mere occupants.

C. Capture and Prior Appropriation Rules (gas, water and oil)

1. **Free use and capture rule:** absolute ownership of everything you capture. *Pierson v. Post*.
 - a. Exception: capture on private land by non-owner does not entitle captor to ownership.
 - b. Courts award possessor over laborer using this rule.
 - c. Policy: clear cut rule of greater certainty will reduce litigation.
2. **Capture rule w/negligence exception:** no liability for reasonable drainage of common pool BUT negligent waste is not permitted and reasonable care is required. *Eliff v. Texon Drilling*.
 - a. Policy: protects the rights of society at large.
 - b. Encourages maximum use; discourages wasteful depletion
 - c. Possessor over laborer rewarded.
 - d. Federal rule.
3. **Reasonable use test:** govt. has control over common resources; use of resources depend on varying utility of each party's uses. Each user must accommodate the interests of neighboring users.
 - a. Policy: protects society's interest by allowing the one who benefits society more to appropriate more resources.
 - b. Majority rule.
4. **Correlative rights doctrine:** rule of individual ownership; allocate in advance depending upon the % of resource which lies beneath their land.
 - a. Policy: gives incentive for conservation of resources.
5. **Prior appropriation:** privileges the first user of a resource. Ownership of present and future rights to the first user.
 - i. Generally only for water, never applied to other resources.

D. Lost, Mislaid and Abandoned Property

1. **mislaid:** owner left property somewhere and forgot where.
2. **lost:** property that is accidentally misplaced by the owner.
3. **abandoned:** owner relinquished all rights in the property.
 - a. intent to abandon must include the intent to let the first person who comes along acquire that property; intent to relinquish possession. (*Charrier v. Bell*)
4. conflicts btw original owner and finder:
 - a. original owner retains title to lost and mislaid property.
 - b. finder gains title to abandoned property.
 - c. Finder gains title over 3rd party for lost, mislaid and abandoned property.
 - d. Finder vs. owner of the premises where the property was found:
 - i. If finder was trespassing at time of find, then owner of premises gains title.

- ii. If finder is an invitee on the property:
 - (1) Object found in private home landowner gains title.
 - (2) Object found in place open to the public:
 - (a) SPLIT between awarding ownership to finder and landowner.

E. Labor and Investment

- 1. Courts reward labor and investment. One cannot reap the benefits of another's labor. *International News Service v. AP* 1918- news is not property between the public and AP, but becomes AP's property through their labor.

F. Relativity of Title: principle title is not absolute; prior possessor protected from all but prior owner.

- 1. **Imperfect title:** superior to no claim of title (*Tapscott v. Lessee of Cobbs*)

- 2. **Stolen property:**

- a. common law- thief cannot transfer any title to subsequent purchasers, even if they are bona fide. Owner retains w/respect to thief and BFP who bought from thief.
 - i. Exceptions:
 - (a) UCC 2-403(2): BFP has good title if purchases goods from a merchant who deals in that kind of goods who has been entrusted with possession by true owner.
 - (b) Policy reasons: promotes markets and protects consumers.
- b. Statute of limitations for adverse possession starts to run only when the owner discovered or should have discovered where stolen property is located. (*O'Keeffe v. Snyder*)

- 3. **Relative Hardship Rule/removal of encroaching structure**

- a. Minority rule: removal of encroaching structure, owner of land has an absolute right to an injunction ordering the removal.
 - b. Majority rule: relative hardship doctrine. Courts will refuse to grant an injunction if:
 - i. Encroachment is the result of a mistake (innocent)
 - ii. Harm is minimal
 - iii. Interference with true owner's property interest is small
 - iv. Cost of removal is substantial (*Somerville v. Jacobs*- plaintiffs mistakenly built a warehouse on Δ's land; ruled Δ's had to either compensate for cost of building or sell the land upon which it was built)
- (1) If cost is substantial, allow trespasser to pay fair market value for the property.

- 4. policy reasons for relativity of title:

- a. social utility- to discourage disorderly possession through trespass.
- b. Fairness- he who has possession has more of a right to property.

G. Adverse Possession: if all elements met, title passes to trespasser.

- 1. **Elements** (from *Nome 2000 v. Fagerstrom*):

- a. **Actual possession-** ordinary use of the land as the owner would.
 - i. Actual depends on nature and location of property and uses which can be applied, to be determined by reference to the neighborhood and normal use in it.
 - ii. If only actual use and not actual possession, court may grant a prescriptive easement instead.
- b. **Open and notorious-** possessory acts must be visible to put reasonable owner on notice that her property is being occupied by a non-owner w/intent to claim possessory rights. Actual notice not required.
 - i. Enclosure of fence
 - ii. Build structure on land
 - iii. Clear land, lay driveway, mow lawn, etc.
 - iv. Plant crops on land
- c. **Exclusive possession-** adverse possessor used land as the true owner would and possession of land was not shared with true owner.
 - i. **Objective:** whether owner acted toward the land as if he owned it.
- d. **Continuous-** must exercise control over the property in ways customarily pursued by owners of that type of property.
 - i. **Tacking:** adding up succeeding periods of possession by different persons. Privity is required (original adverse possessor transferred title to successor). *Brown v. Gobble*.

- e. **Adverse/hostility**
 - i. **Objective test/majority rule:** possession w/o true owner's permission; state of mind of possessor is irrelevant. Acting like an owner. Doesn't mean malice- means you don't recognize anyone else's claim to the land.
 - ii. **Subjective test/minority rule:** adverse possessor must intend to dispossess true owner.
 - f. **For the statutory period.**
2. **Policy reasons**
- a. Provides certainty by eliminating stale claims.
 - b. Encourages maximum utilization of land; promotes productive use of land. Use it or lose it.
 - c. Holmes- protects possessor's established expectations and reliance; dispossession would greatly harm adverse possessor and would create an unexpected windfall for the owner.
 - d. Posner- adverse possessor has much to lose while the true owner gains little; combined utility greater if adverse possessor keeps the property.
 - e. Expectation/reliance/promissory estoppel.
 - f. Encourages redistribution of wealth.
3. **Exception: GOVT. OWNED LAND CAN NOT BE ADVERSELY POSSESSED.**
- H. **Body Parts and Genetic Material** (guide to answering policy question)

1. **What is property?**

- a. Bundle of rights
 - i. Right to use, transfer, exclude, destroy, alter, and will.
 - ii. You don't need to have all the sticks to constitute property.
 - (1) Can't exclude everyone (Shack)
 - (2) Can't use property negligently (Elliff)
 - (3) Can't destroy cells even if he possessed them (Moore v. UC Regents)
 - iii. Property rights are not absolute, but rather relative of title.

2. **Are body parts property?**

- a. **Pros**
 - i. People have a right to do what they want with their bodies.
 - ii. People have a right to make their own K's.
 - iii. Promotes capitalism.
 - iv. Improves quality of life of poor, they make money.
 - v. If regulated, would protect the health of buyers and sellers.
- b. **Cons**
 - i. Exploitation of the poor
 - ii. Degradation of the human body
 - iii. Favors the wealthy
 - iv. State should protect people from themselves
 - v. Would restrict research (Moore v. UC Regents)
 - vi. May not solve a poor person's problems in the long run
 - vii. Slippery slope

3. **Analysis-** apply policy to the fact pattern.

4. **Conclusion-** either body parts are property and shouldn't be regulated, or body parts are not property and should be heavily regulated.

II. **RIGHT TO EXCLUDE (limitations on)**

A. **Rule:** the right to exclude is not absolute. The more an owner has opened their property to the public, the more likely courts will find public right of access.

B. **Trespass**

1. **elements:**

- a. intentional (satisfied by any voluntary act)
- b. intrusion (occurs the moment non-owner enters the property)
- c. on property of another
 - i. *Desnick v. ABC-* undercover TV crew filmed eye surgeon. Not a trespass as no interference with the ownership or possession of land.

2. defenses:

- a. consent of the owner is provided
- b. justified by necessity to prevent more serious harms to persons or property
- c. the entry is otherwise encouraged by public policy
 - i. *State v. Shack*- owner of farm couldn't bar migrant workers from receiving govt. services; can't interfere with the opportunity to receive aid available.

C. Common law public policy limits on the right to exclude

1. common law: proprietor had absolute right to exclude w/o cause
2. traditional majority rule: places of amusement can exclude w/o cause
 - a. exceptions to both rules: common carriers and innkeepers cannot exclude.
3. reasonable access to all business rule: when property owner opens their premises to general public they have the right to reasonably exclude (*Uston v. Resorts Intl.*)
 - a. reasonable exclusion:
 - i. people who are security risks
 - ii. people who disrupt activities

D. Statutory limits on the right to exclude

1. **Civil Rights Act of 1964:** prohibition of discrimination (based on race, color, religion or national origin) in places of **public accommodation** (can be privately owned).
 - a. **Rule:** where a place of public accommodation and a private club share a close and mutually beneficial and necessary relationship the private club also becomes a place of public accommodation. (*Frank v. Ivy Club*)
 - b. To find places of public accommodation:
 - i. 1st issue, was there discrimination?
 - ii. 2nd, is it a business?
 - (1) Sale of goods
 - iii. 3rd, is it public?
 - (1) Selective?
 - (2) Huge?
 - (3) Any limits placed on accommodation?
 - iv. 4th, is it a facility?
 - (1) Focus on conduct of activity- don't need a fixed place of activity
 - (a) *US Jaycees v. McClure*- admitting women wouldn't affect their message and therefore no effect on their freedom of expressive association.
 - (b) *Dale v. Boy Scouts of America 1999*- NJ SC said Boy Scouts place of public accommodation b/c they engage in activities in places to which an unselected public is given an open invitation. Overturned by SC, Scouts mentality is promoting moral values, etc, and being gay interfered with this message.
2. **Civil Rights Act of 1866:** prohibits race discrimination, blacks have the same right to contract as whites do, applied to private conduct as well as public.
3. **State statutes:** can give greater protection against discrimination but not less than Constitution.

E. Constitutional limits on the right to exclude

1. Constitutional limits

- a. **1st Amendment**- right to free speech on public property
- b. **5th Amendment**- rule against taking private property for public use w/o just compensation.
- c. **14th Amendment**- no person shall be deprived of life, liberty or property w/o due process.

2. Free speech v. Property rights

- a. US constitution protection of property is different from states. Federal defines a minimum level of protection for property rights that the states may not infringe.
- b. 3 possible approaches for states to take:
 - i. Free speech rights trump property rights.
 - (1) *Marsh v. Alabama*- private owners of a company town were prohibited from preventing distribution of literature in downtown business district. Town enjoyed benefits of federal govt.

- (2) *Logan Valley Plaza*- shopping centers the equivalent of downtown business districts so private owners cannot interfere with free speech rights.
 - (a) Limited in *Lloyd* to situations where the speech was related to shopping center activities, i.e. labor dispute involving one of the center's tenants.
- ii. Property rights outweigh freedom of speech.
 - (1) *Lloyd Corp. v. Tanner*- private property owner of large mall was allowed to exclude antiwar handbillers.
- iii. States may choose whether free speech rights outweigh property rights.
 - (1) *PruneYard*- CA SC interpreted state constitution to provide free speech access to shopping centers. US SC found no property rights violated by this.
 - (2) *NJ Coalition Against War v. JMB*- NJ SC allowed anti war picketing in mall; malls have become equivalent of downtown business districts.
 - (a) some states apply **Schmid Test** to determine the existence and extent of free speech right on privately owned property: weigh the following 3 factors-
 - (i) Normal use of the property;
 - (ii) Extent of the public's invitation to use it;
 - (iii) The compatibility of the free speech sought to be exercised with the use of the property.

III. NUISANCE

A. General nuisance law

1. **Definition of nuisance:** intentional use of your own property that both:
 - a. causes substantial harm and
 - b. unreasonably interferes with a neighbor's use or enjoyment of their own property.
 - i. Trespass distinguished: trespass physical invasion of land; nuisance indirect invasion of use.
 - ii. Negligence distinguished: nuisance doesn't take into account the "reasonableness" of the conduct, just the result of the conduct.
2. **4 ways to resolve land use conflicts btw neighbors:**
 - a. **Δ's privilege:** absolute freedom to act despite harm. Plaintiff has no legal redress.
 - b. **Plaintiff's security:** absolute right to be free from harm; power to veto Δ's harmful activity and get redress.
 - c. **Prior use:** right to commit harm granted to person who first established use.
 - d. **Reasonable use:** Δ can engage in reasonable harmful activity.
 - i. **Factors to determine "reasonableness":**
 - (1) Extent of harm to P and social utility of P's activity
 - (2) Social utility of Δ's activity, measured by what society would lose by preventing the activity.
 - (3) Overall social costs and benefits of conflicting land uses of P and Δ.
 - (4) Availability of alternative means to mitigate or avoid harm and which owner can do so at the lowest cost.
 - (5) Δ's motive- profit = good, malice = bad.
 - (6) Which use established first.
3. **Exception:** plaintiff cannot allege a nuisance claim if he devotes his own land to an unusually sensitive use- i.e. can't make a nuisance out of conduct of adjoining Δ which otherwise would be harmless. (*Page County Appliance v. Honeywell*- P sued for nuisance based on radiation interfering w/TV reception. Δ tried to argue plaintiff's use highly sensitive but court finds no.)
4. **Remedies:**
 - a. Dismissal of the complaint for failure to state a claim.
 - b. Damages:
 - i. Cost of restoration AND
 - ii. Diminution in market value.
 - c. Injunction- order to do or not to do specific acts.
 - d. Purchased injunction- conditional injunction ordering activity to stop on condition that P reimburse Δ for the opportunity lost by ceasing activity. Injured bears cost.

B. Flooding and diffuse surface water

1. diffuse surface water: drainage from the rain, melting snow, flooding streams that cause water to run over surfaces, not streams or lakes. General nuisance.
 - a. Disputes arise when property owners try to drain their land and cause harm to others, or if drainage is caused by development or other change in natural drainage system.
2. **3 possible rules to govern:**
 - a. **common enemy**- allows property owners the absolute freedom to develop their property w/o liability for any resulting damage to neighbors caused by increased runoff. No liability.
 - b. **natural flow rule**- injured property owner given absolute security against injury from flooding caused by a neighbor's development of her property and right to recover damages. Strict liability.
 - i. May inhibit development b/c most development changes drainage patterns.
 - ii. Most states adopt exceptions allowing minor increases in natural flow of surface water.
 - c. **reasonable use rule (majority)**- must balance 3 factors (*Armstrong v. Francis Corp*):
 - i. **amount of harm**
 - ii. **foreseeability of harm**
 - iii. **purpose of action**
3. **Policy considerations:**
 - a. Social benefit of developing land trumps security (common enemy).
 - b. More justice if you impose costs to the one who profits (natural flow).
 - c. Shielding liability encourages investment in socially beneficial activity (common enemy).
 - d. Protects security of investment (natural flow).
 - e. Flexible standard provides justice in individual cases, but less predictable.
 - f. Rigid rules offer predictability, but may result in unfairness.

C. Subjacent support

1. **lateral support**: loss of lateral support when you excavate a hole close to the boundary of neighbor's property, causing it to collapse.
2. **subjacent support**: loss of subjacent support when you withdraw surface materials from a well in your land, causing neighbor's water to drain to your well, resulting in the sinking of the neighbor's land.
3. **3 possible rules:**
 - a. **strict liability**: Δ liable whenever he has caused harm to plaintiff regardless of reasonableness or balancing of interests.
 - b. **negligence test**: Δ liable if his conduct created an unreasonably great risk of causing harm. Harm must be foreseeable at time Δ acted. (*Friendswood v. Smith-Southwest*)
 - c. **nuisance rule**: Δ is liable if his activity is both unreasonable AND causes substantial harm to the use and enjoyment of plaintiff's property.
4. **traditional common law rule**: liability only for malicious/reckless well-digging.

D. Light and Air

1. **majority rule**: in the absence of an agreement to the contrary, owners have an absolute right to develop their property w/o liability for any interference w/their neighbor's interests in light and air. No negative easement for light and air. *Fontainebleau Hotel*.
 - a. **Exception**: spite fences, structures erected for sole purpose of maliciously harming neighbor by interfering with access to sunlight.
2. **minority rule**: nuisance doctrine is used to see whether there is liability for blocking neighbor's light. *Prah v. Maretti*.
 - a. Relief granted if Δ 's conduct is unreasonable.

E. Law and Economics

1. School of thought among legal academics that applies economic analysis to the study of law.
 - a. Point of law & economics:
 - i. Explain existing rules or
 - ii. Prescribe changes to maximize efficiency.
 - b. **Wealth maximization is the focus of law & economics**: whether a change from one legal rule to another will increase or decrease social wealth.
 - i. Market value of a nuisance- determined by how much individuals are willing and able to pay for entitlements.

- (1) Entitlement for factory polluting example: right to pollute v. right to be free from pollution.
- ii. Total benefits outweigh losses; winners could compensate losers and still be better off.
- c. Market transactions give law & economics theorists a way to measure costs and benefits. Transactions include 3 elements:
 - i. Initial distribution of property rights;
 - ii. An offer price by non-owner (costs);
 - (1) factory ex.- amount homeowners are willing and able to pay to stop the pollution.
 - iii. Asking price by owner (benefits).
 - (1) factory ex.- amount factory would need to be offered before giving up the right to engage in the polluting.
- d. **Efficiency definitions:**
 - i. **Pareto superiority**- a change from one situation to another is p.s. if someone gains by the exchange and no one is injured or made worse off by it.
 - ii. **Pareto optimality**- a situation is p.o. if no further exchanges can be made without harming others or making them worse off than before.
 - iii. **Wealth maximization**- a change in allocation of resources or change from one legal rule to another where the benefits outweigh the costs.
 - (1) Losses to individuals who are worse off are less than the gains to those who are better off.
- e. **Externalities:** costs imposed on 3rd parties by legal actors that are not taken into account in the actor's own revenue-cost determinations.
 - i. Internalizing external costs- the actor causing harm must pay for the external costs caused by it.
 - (1) Factory ex.- internalizing external costs would force the factory to pay for the external harms that its operation causes.
 - ii. Positive externalities- benefits generated by Δ 's activity; must be taken into account when calculating the utility of Δ 's actions.
- f. **Coase Theorem** (joint cost analysis; criticism of argument that property owners should internalize their external costs)
 - i. **Joint cost analysis:** the internalization of external costs by the party causing harm is a false analysis.
 - (1) Avoiding the harm to plaintiff would inflict harm on Δ and vice versa (costs are reciprocal).
 - (a) Factory ex: granting homeowners right to be free from pollution will inflict harm on the factory owner; to avoid harm to the factory owner would inflict harm on the homeowners.
 - (2) **Better analysis is to consider joint costs that each activity imposes on the other, and to avoid the more serious harm.**
 - ii. **Subsequent bargains:** parties are free to bargain around any allocation of entitlements made by the courts. Parties may bargain to achieve the efficient result notwithstanding the legal rule chosen by the court.
 - (1) Factory ex: if court rules factory is a nuisance, owner may attempt to bribe the homeowners to induce them to sell the property right to prevent the nuisance; factory will have purchased the entitlement to commit a nuisance.
 - iii. **Efficiency:** is achieved by giving the entitlement to the party who values it the most, with value measured by willingness and ability to pay.
 - iv. **Assumes there are no transaction costs.**
 - v. **Criticisms of the Coase Theorem:**
 - (1) Offer/asking price problem- asking price is always higher.
 - (a) Asking price is not limited by wealth the way that offer price is- factory ex., homeowners who own the entitlement to prevent pollution may ask for 10 times as much as they could offer if they were purchasing the entitlement.
 - (2) Efficiency is a function of initial distribution of wealth, thus favors the rich.
 - (a) Those who have more wealth have greater "votes"; their preferences count more in the analysis since their ability to pay is greater than those with less wealth.

- (3) Difficult to define “voluntary” exchange.
 - (a) ex, you fall into a pit of snakes and someone sells you a ladder for 100K. Is the exchange voluntary?
- (4) Assumption of no transaction costs is false in the real world.
 - (a) Difficult even to identify all transaction costs.
- (5) Efficiency has a conservative bias b/c it gives greater weight to the interests of the wealthy and the large corporations that currently wield substantial economic power.
 - (a) Value defined by reference to willingness and ability to pay. Privileges interests of property owners over interests of non-owners.
 - (b) Favors the rich b/c they have more bargaining power.
- (6) Commodification: certain types of resources should not be traded in the market or otherwise treated as if they were commodities for sale:
 - (a) Workplace safety protects individual dignity.
 - (b) Adoptions.

IV. EASEMENTS (privilege to use the land of another)

A. Licenses

1. **Definition:** a revocable permission to enter the real property possessed by another.
2. **Characteristics:**
 - a. not transferable
 - b. can't be inherited or willed
 - c. revocable but with some exceptions
3. Rule for licensees: irrevocable if-
 - a. license coupled with interest- can recover personal property from owner's land.
 - b. easement by estoppel- owner gives permission and licensee acts in reliance (*Holbrook*)
 - c. Constructive trusts- a trust found to exist by law regardless of party's intent.

B. Prescriptive Easements

1. **Rule:**
 - a. Actual use
 - b. Open and notorious
 - c. Continuous (tacking allowed; privity required)
 - d. Hostile (lacking permission)
 - i. Majority: hostility implied if other elements are met
 - ii. Minority: hostility must be intended.
 - e. For the statutory period.
2. **Different from adverse possession:**
 - a. No exclusivity requirement;
 - b. Actual use rather than actual possession.
3. Dominant estate is benefited by the easement; servient estate is burdened.
4. Only need a general outline of consistent pattern of use to establish a prescriptive easement, not absolute precision. (*Community Feed Store v. Northeastern*- gravel lot used by neighbor to make deliveries to store, owner put up a chain to restrict his use. PE found for the lot.)
5. **2 kinds:**
 - a. **Affirmative**- trying to use part of another's land.
 - b. **Negative**- right to restrict the use of another's land. Functionally equivalent to restrictive covenant.
 - i. Courts have recognized the following:
 - (1) Light and air
 - (2) Alternation of the flow of an artificial stream
 - (3) Easement for lateral support.
 - ii. Courts don't like b/c of problems with notice (buyer might not be aware b/c they're not visible) and they hinder development of land.

C. Easements by Estoppel

1. Rule:

- a. Permission by owner
 - b. Reliance on permission
 - c. Investment based on reliance (*Holbrook*)
2. When licensees have permission to improve land they are using, once they improve it, original owner cannot revoke the license. *Holbrook v. Taylor*- private road used to access highway, originally used with permission so no PE; but they built a house which they wouldn't have done w/o access.

D. Constructive Trust (not permanent, unlike express easements)

1. Rule: a trust found to exist by law regardless of the party's intent. *Rase v. Castle Mt. Ranch*

- a. Trustee holds legal title to the property; beneficiary holds equitable title. Trustee to manage property for the benefit of the beneficiary.
2. Conduct of previous owners that induces reliance and improvements may give rise to a constructive trust. *Rase*- families had lived in summer homes and improved them; constructive trust found.
- ### 3. Purposes:
- a. Prevents unjust enrichment of legal holder of property by turning him into a trustee for the beneficial use of the deprived person.

E. Implied Easements

1. Easements implied by prior use

a. Rule:

- i. Prior common ownership of claimed dominant and servient parcels.
- ii. Prior use during the common ownership- owner used part of the united parcel for the benefit of another part, and use was continuous and visible.
- iii. Reasonable necessity for enjoyment of dominant estate.
 - (1) Claimant must show something more than simple convenience.
 - (2) Showing of absolute necessity not required.
 - (a) *Granite Properties v. Mann*- driveway used to make deliveries, although there was another driveway available, it wasn't convenient. Reasonable necessity adequate.
 - (3) If previous use is continuous and apparent, the degree of necessity required to create is reduced.
 - (4) Recreational use can amount to reasonable necessity.

2. Easement by Necessity

a. Rule:

- i. Prior common ownership of claimed dominant and servient parcels AND
 - ii. Strict necessity.
- b. Where the owner of a land conveys a landlocked parcel, a way by necessity exists over the remaining land of the grantor. *Finn v. Williams*.
- c. Policy:
- i. To effectuate intent of the parties
 - ii. To promote the efficient utilization of property
 - iii. When these 2 policies in conflict:
 - (1) Some courts say goal is to effectuate party's intent;
 - (2) Others say the goal is to promote development of property.

F. Express Easements

1. Appurtenant easements: runs with the land, benefits its holder in the use of a certain piece of land.

a. Rule for burden to run with the land:

- i. **Writing**- required writing is the original writing creating the easement.
 - (1) Easement need not be included in subsequent deeds.
- ii. **Intent**- of the original grantor for easement to run with the land.
- iii. **Notice**- subsequent owners had notice of easement.
 - (1) Actual notice or
 - (2) Inquiry notice- reasonable owner would discover through investigation.
 - (3) Constructive notice- owners should have known b/c easement is recorded in the deed in chain of title.

- b. **Rule for benefit to run with the land:**
 - i. **Intent of the grantor for benefit to run with the land** (if runs w/land, it is appurtenant; if not, it is in gross).
- c. When instrument granting easement is ambiguous, courts look at the following factors to see if intent was for burden to run w/land:
 - i. Situation of the property and parties.
 - ii. Surrounding circumstances at time instrument was executed.
 - iii. Practical construction of the document.
 - iv. Parties' conduct and verbal admissions. (*Lupo*)
- d. **Strong presumption of appurtenant easement (if ambiguous → appurtenant).** (*Lupo*)
 - i. Owners of easements in gross have little use for them once they move.
 - ii. Protects buyers as it limits the number of easements that can exist on a particular parcel.
- e. A servient owner may impose reasonable restraints on a right of way to avoid a greater burden on the servient estate than that originally contemplated in the easement grant unless restraints unreasonably interfere w/dominant owner's use. *Green v. Lupo*- motorcycles on easement.
- 2. **Easements in gross: runs with a person**, easement whose benefit is not tied to any particular parcel so no dominant estate.
 - a. Belongs personally to the grantee.
 - b. Not connected to the ownership or use of any specific parcels of land.
 - c. There are 2 types: commercial and personal.
 - d. May be owned and sold separately from a parcel of land.
 - e. Most common- right of way for utility lines b/c owned by utility companies that own no property in the vicinity of the easement.
 - f. Generally not assignable except for commercial easements in gross (telephone lines).
- 3. **Test for distinguishing Appurtenant Easements from Easements in gross:**
 - a. **Intent of the grantor**
 - i. Language in the deed
 - ii. Surrounding circumstances and policy considerations
 - b. Ask:
 - i. Would the easement be useful separate from ownership of land?
 - ii. Does easement have little or no utility separate from ownership of land? If yes → appurtenant.
- 4. **Determining scope of the easement:**
 - a. Whether the use is of a kind contemplated by the grantor;
- 5. Whether the use is so heavy that it constitutes an unreasonable burden on the servient estate not contemplated by the grantor AND
 - a. Whether the easement can be subdivided.
 - b. In gross easement is exclusive (thus transferable) if the owner of the servient estate is excluded from participation in the rights granted. Where the servient owner does not retain the privilege of sharing the benefit conferred by the easement, the easement is apportionable and divided utilization of the land is permitted. *Henley v. Continental Cablevision*.
 - c. The owner of an in gross easement may license or authorize 3rd persons to use its right of way for purposes non inconsistent w/the principle use granted.
- 6. **Terminating easements:**
 - a. By agreement in writing (release of easement by holder)
 - b. By their own express terms (e.g., time limit)
 - c. By merger- servient owner buys dominant estate.
 - d. By abandonment.
 - e. By adverse possession (by owner of the servient estate or 3rd party)
 - f. By prescription (by owner of servient estate or 3rd party)

V. COVENANTS & SERVITUDES

A. Differences btw easements, covenants and servitudes:

1. **Easements: affirmative** except for the 4 easements of light, air, lateral support & flow of artificial stream.
2. **Covenants:** create both affirmative duties to do on one's land and negative restrictions.
 - a. **servitudes:** enforced by equity courts, remedy is injunctions.
 - b. **covenants:** enforced by law courts, remedy is damages.

B. Rule for Covenants (damages)

1. **Does BURDEN run with the land?** Need burden AND benefit to run.
 - a. **Writing**
 - i. Common scheme and notice OR
 - ii. Estoppel = representations + reliance + notice
 - b. **Intent**
 - i. Express OR
 - ii. Implied- from the circumstances, usually implied if servitude touches and concerns land.
 - c. **Notice**
 - i. Actual notice OR
 - ii. Constructive Notice (could have checked deeds) OR
 - iii. Inquiry notice (if you can look around and know there's a restrictive covenant or servitude)
 - d. **Touch and concern land**
 - i. Affects land use OR
 - ii. Affects market value of the land (*Whitinsville v. Kotseas*)
 - e. **Privity of estate** (only need to determine if damages are sought)
 - i. **Horizontal privity** (two types below) **AND**
 - (1) Instantaneous privity (parties share an interest at same time in an instant, when they are selling)
 - (a) Grantor/grantee
 - (b) Landlord/tenant
 - (c) Easement promisor/promisee OR
 - (2) Mutual privity (parties share an interest in property at same time)
 - (a) Mutual easements
 - ii. **Vertical privity-** parties in the covenant give all rights and property interests to the next person; they cannot have some of the interest held back.
 - (1) Doesn't exist if leasehold or life estate b/c grantor retains future interests.
 - (2) There's vertical privity if it's an assigned lease b/c they are giving all their interests away.
 - (3) No vertical privity for sublets b/c they regain lease at end of term.
2. **Does BENEFIT run with land?**
 - a. **Ownership of land**
 - b. **Intent**
 - c. **Vertical privity**

C. Rule for Servitudes (injunctions)

1. **Does BURDEN run with the land?** Need burden AND benefit to run.
 - a. **Writing**
 - i. Common scheme and notice OR
 - ii. Estoppel = representations + reliance + notice
 - b. **Intent**
 - i. Express OR
 - ii. Implied- from the circumstances, usually implied if servitude touches and concerns land.
 - c. **Notice**
 - i. Actual notice OR
 - ii. Constructive Notice (could have checked deeds) OR
 - iii. Inquiry notice (if you can look around and know there's a restrictive covenant or servitude)
 - d. **Touch and concern land**
 - i. Affects land use OR

- ii. Affects market value of the land
- e. **No privity required- can get an injunction if above met; must have privity to get damages-** unless covenant is in a lease, in which case vertical privity is required.
- 2. **Does BENEFIT run with land?**
 - a. **Ownership of land**
 - b. **Intent**
- D. **Running with the land- supplemental rules**
 - 1. reasonable covenants against competition may run w/land when they serve a purpose of facilitating orderly and harmonious development for commercial use (*Whitinsville v. Kotseas*)
 - 2. covenant touches and concerns land when it makes occupation or use more convenient or when it enhances the market value of promisee's land (*Whitinsville v. Kotseas*)
- E. **Interpretation of ambiguous covenants**
 - 1. when there is ambiguity to the meaning, restrictive covenants will be read narrowly in favor of free use of property b/c law disfavors restrictive covenants. *Blevins v. Assoc. for Retarded Citizens*.
 - 2. single family dwelling restrictions are restrictions on architectural style rather than on relationship of people occupying the structure. *Blevins*
 - a. definition of single family dwelling is descriptive of structure, and not residence therein.
 - 3. restrictive covenants preventing group homes are unenforceable b/c they violate public policy against discriminating against people with disabilities. *Blevins*
- F. **Terminating Covenants and Equitable Servitudes**
 - 1. **Changed conditions rule:** restrictive covenants won't be enforced if:
 - a. There is a drastic change in conditions in the neighborhood AND
 - b. Due to the changes, restrictions no longer benefit the dominant estate.
 - i. Lots located on the fringe of the restricted area may not invoke the changed conditions doctrine if it is still possible for the restrictions to create benefit within the subdivision.
 - ii. The changed conditions doctrine applies to changes outside the restricted subdivision only when those changes have so adversely affected every lot in the subdivision that enforcement is pointless.
 - iii. Restrictive covenants are not enforceable where the fundamental changes in the intended character of the neighborhood render the benefits underlying restrictions incapable of enjoyment. *El Di v. Town of Bethany Beach*.
 - 2. **Relative hardship doctrine:** restrictive covenants won't be enforced if:
 - a. The hardship to the owner of the servient estate will be much greater than the benefit to the owner of the dominant estate.
 - i. Exception: if the benefit to the dominant estate is substantial the covenant will be enforced despite the substantial hardship to the servient estate.
 - ii. The mere change in economic conditions rendering it unprofitable to continue the restrictive use is not sufficient alone.
 - 3. Covenant restrictions on building may be denied when they would:
 - a. Unreasonably impede the most feasible use of land AND
 - b. Money damages would adequately compensate party asserting the restriction. *Blakeley v. Gorin-* covenant requiring passageway outdated.
 - 4. **Acquiescence:** plaintiff has tolerated previous violations by owner of the servient estate.
 - 5. **Abandonment:** plaintiff has tolerated violations by other restricted parcels in the neighborhood covered by the covenant.
 - 6. **Unclean hands:** plaintiff has violated the covenant himself.
 - 7. **Estoppel:** if plaintiff orally represented that he would not enforce the covenant and Δ changed his position in reliance on that.
 - 8. **Laches:** if covenant ignored or breached for substantial period of time, but less than time necessary to establish prescriptive rights, court may find unexcused delay in enforcement prompted investment in reliance on the failure of plaintiff to object.
 - 9. **Marketable Title Acts:** statutes that terminate restrictive covenants if they are not recorded after a specified period of time.
 - 10. **Language of Instrument:** termination within a specific number of years unless renewed.

11. **Merger:** if the burdened and benefited estate comes under common ownership, covenants will terminate (applies to easements too).
12. **Release:** parties may agree in writing to terminate covenant.
13. **Prescription:** open and notorious violation of covenant without permission for statutory period.

VI. ESTATES SYSTEM AND FUTURE INTERESTS

Future Interest

<i>Present Interest</i>	<i>Words often used to create the interest</i>	<i>In grantor</i>	<i>In 3rd Person</i>
Fee simple absolute	“to A” “and her heirs”	None.	None.
Fee simple determinable	“so long as” “while” “during” “until” “unless”	Possibility of reverter.	None.
Fee simple subject to condition subsequent	“provided that” “on condition” “but if”	Right of entry for condition broken, or power of termination.	None.
Fee simple subject to executory limitation	“so long as...then to” “until/unless..., then to...” “but if..., then to...”	None.	Executory interest.
Life estate	“for life”	Reversion.	Remainder.

A. Fee Simple Absolute:

1. an estate of indefinite or potentially infinite duration. No future interest in grantor or 3rd party.
 - a. Ex: “to A and his heirs.”

B. Fee Simple Determinable:

1. an estate that will automatically end and revert to the grantor if some specified event ever occurs.
 - a. Ex: “to A and his heirs while the property is used for charitable purposes.”

2. Future interest:

- a. **In grantor:** possibility of reverter.
- b. **In 3rd party:** none.

C. Fee Simple Subject to Condition Subsequent (FSSCS):

1. an estate subject to the grantor’s power to end the estate if some specified event happens.
 - a. Ex: “to A and his heirs, on condition that no alcohol is sold on the premises.”

2. Future interest:

- a. **In grantor:** power of termination or right of entry.
 - i. Differs from fee simple determinable b/c it is not an automatic reverter to the grantor; he has discretion to take the property or not.
- b. **In 3rd party:** none.

D. Fee Simple Subject to Executory Limitation (FSSEL):

1. when the condition is broken, the estate is subject to divestment in favor of someone other than the grantor.

- a. Ex: “to A and his heirs, but if the property is ever used as a parking lot, then to B.”

2. Future interest:

- a. **In grantor:** none.
- b. **In 3rd party:** executory interest.
 - i. Shifting executory interest- divests the **grantee’s** preceding interest to the 3rd party.
 - ii. Springing executory interest- divests the **grantor’s** preceding interest to the 3rd party.

E. Life Estate

1. An estate held only for the duration of a specified person's life.
 - a. Ex: "to A for life."
2. **Future interest:**
 - a. **In grantor:** reversion.
 - b. **In 3rd party:** remainder- 2 types
 - i. **Vested remainder:** remainders to persons who are identifiable at the time of initial conveyance and for whom there are no conditions precedent.
 - (1) **Absolute vested remainders-** remainder that is not subject to change.
 - (a) "G to S for life, then to J & his heirs."
 - (2) **Vested remainders subject to open-** remainder that may be divided among persons who will be born in the future (some already born).
 - (a) "G to S for life, then to the children of B." B has some living children but may have more.
 - (3) **Vested remainder subject to divestment-** vested remainder that may be destroyed by an event that occurs after the original conveyance. It may be destroyed.
 - (a) "G to S for life, then to J unless J marries a millionaire."
 - ii. **Contingent remainder:** remainders are contingent if:
 - (1) Condition precedent- remainder will take effect only upon the happening of an event that is not certain to happen (condition precedent) OR
 - (2) Unascertained person- remainder will go to a person who cannot be ascertained at the time of the initial conveyance (unascertained/unborn). Indestructible.
 - (a) "G to S for life, then to J if J becomes President." If J becomes president after S dies, property still goes to J.
 - (b) "G to S for life, then to J's kids (J has no kids)."

F. Doctrine of Worthier Title

1. traditionally under this doctrine, couldn't grant remainder to own heirs; would have been considered remainder to O to prevent people from avoiding inheritance tax.
2. "O to A for life, remainder in the heirs of O" is constructed as "O to A for life remainder to O."

G. Regulation of Future Interests

1. future interests regulated by 3 rules:
 - a. presumption against forfeitures
 - b. rule against creation of new estates
 - c. rules against perpetuities and on alienation

H. Interpretation of Ambiguous Conveyances

1. **Rule: fee simple determinable**
 - a. To create a fee simple determinable, the conveyance that grants a fee simple estate for a special purpose must state the special circumstances that could trigger expiration of the estate.
 - i. *Wood v. Fremont*- the language granting land to the county for use as a hospital did not contain any reference to expiration if it wasn't used for that purpose.
2. **Rule: fee simple subject to condition subsequent**
 - a. The language of the conveyance must clearly state the grantor's intent to create a discretionary power to terminate the estate he conveys.
3. **Rule: presumption against forfeitures**
 - a. If it is possible to interpret the language to avoid loss of the property by the current owner, the courts generally will adopt this interpretation.
 - b. Conditions that tend to destroy estates, i.e. condition subsequents, are not favored in law. No provision will be interpreted to create such a condition if the language will bear any other reasonable interpretation. *Wood v. Board of County Comm. of Fremont County*
 - c. Policy:
 - i. Promotes interests of current owners in controlling property in their possession- gives greater freedom to change land uses as economic conditions and social values change
 - ii. Promotes social interests to allow property owners freedom to shift property to more valuable/desired uses.

4. **Rule: Cy Pres doctrine**
 - a. Settler establishes a charitable trust.
 - b. Charitable trust becomes impracticable or impossible to achieve.
 - c. Does settler have general intent to benefit some other charity and alternative charity is the kind the settler would have wished to benefit?
 - i. **If yes-** cy pres doctrine applies, grantor's intent is extended.
 - ii. **If no-** court must determine to whom the trust principal belongs.

VII. RULES TO PROMOTE MARKETABILITY

A. Rule against creation of new estates:

1. conveyance that does not fit within established categories must be interpreted to create the most closely analogous estate. (*Johnson v. Whiton*)

B. Rule against unreasonable restraints on alienation

1. **Rule for disabling restraints:** total restraints on alienation are uniformly held void.
 - a. **Ex:** "O conveys Blackacre to A and her heirs, but any transfer of Blackacre shall be null and void."
 - b. **Policy:**
 - i. Promotes dispersal of ownership of property and prevents concentration of land in passive family dynasties.
 - ii. Encourages individual autonomy by vesting control of resources in current owners.
 - iii. Promotes social utility and efficiency by allowing property to be transferred to its most valuable use.
2. **Rule for promissory restraints:** covenant by which grantee promises not to alienate his interest in the property. Generally struck.
 - a. **Ex:** "O conveys Blackacre to A in fee simple. A promises for himself and his heirs that Blackacre will not be transferred."
3. **Rule for forfeiture restraints:** provides for a future interest that will vest if owner attempts to transfer her interest in the property. Generally struck.
4. **Rule for restraints repugnant to fee:** when grantor transfers fee simple estate to grantee, a clause in a deed prohibiting the grantee from conveying land to another is void as repugnant to the nature of an estate in fee (grantor consent clauses).
 - a. Provision which forbids the conveyance, occupancy, or lease to people of specified race, creed, national origin or handicap is void. *Riste v. Eastern Washington Bible Camp*
 - b. Covenants that require owners to obtain consent of the grantor/developer of a subdivision usually struck down as unreasonable restraints. *Northwest Real Estate v. Serio*
 - i. Ensures that control over the land devolves to a current owner rather than absentee lord.
 - ii. **However-** covenants that grant such powers to a homeowners/condo association are ordinarily upheld if they:
 - (1) Require the association to act reasonably or
 - (2) Are in the form of preemptive rights that ensure owner can transfer unit for its fair market value to the assoc. or require holder of the right to match any bona fide offers made by a 3rd party.
 - (a) *Aquarian Foundation v. Sholom House, Wolinsky v. Kadison*
5. **Rule of reasonable restraints:** to be enforceable, restraints on alienation must be reasonable in view of justified interests of the parties. *Horse Pond Fish & Game Club v. Cormier*.
 - a. **Exception:** does not apply to charities- even reasonable restrictions on alienation will be void if the charity must sell the property.

C. Rule against perpetuities

1. **Traditional rule:** No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest.
 - a. **Policy**
 - i. Places limits on ability of current owners to create future interests- Dead Hand control
 - ii. Promotes alienability by limiting the powers of present owners to control the future use of their property.

- b. **Future interests subject to RAP:**
 - i. **Executory interests**
 - (1) **Ex:** “W to M so long as B is not used as a law office, but if it is, then to H.” Subject to the rule b/c it could be used as a law office in 1000 years.
 - ii. **Contingent remainders**
 - (1) Condition precedent- remainder that will take effect only upon the happening of an event that is not certain to happen.
 - (2) Unascertained person(s)- remainder will go to a person who cannot be ascertained at the time of the initial conveyance.
 - iii. **Vested remainders subject to open**
 - (1) Remainder that may be divided among persons who will be born in the future (some already born).
 - (a) Subject to the rule b/c some of the interests to the class members are vested and some are contingent- partially contingent.
 - c. **RAP does not apply to:**
 - i. Future interests in the grantor (reversions, possibility of reverter, right of entry)
 - ii. Vested remainders in 3rd parties (absolutely vested or vested subject to divestment)
 - iii. Charity to charity transfers.
 - (1) “W to United Way, but if B is ever used for commercial purposes, then to my church.” OK.
 - d. **Testing Future Interests:**
 - i. Identify the future interest
 - ii. If interest is subject, apply the rule- is it possible to vest more than 21 years from the death of some tester life?
 - (1) Measuring life: person who is alive at the time of the conveyance.
 - iii. If void, strike the offending language, and retest. Repeat until it complies.
2. **Majority: wait and see rule-** to determine whether a future interest will vest outside the perpetuities period, courts will wait for 21 years after the death of the parties, and if interest has vested within that time, it will be recognized as good.
 3. **CA: Uniform Statutory RAP-** limits perpetuities period to 90 years from date the future interest was created. Applies only to interests that would have been invalid under the traditional rule.

VIII. RULES TO PROMOTE EQUALITY & LIBERTY

A. Racial Restrictions

1. **Rule:** Racially restrictive covenants are prohibited by the 14th Amendment **if there is a state action**, private racial restrictions are valid. *Shelley v. Kraemer*.
 - a. **if courts help enforce racially restrictive covenant then it is a state action** and thus violates the 14th Amendment.
2. If a trust to the public violates the 14th Amendment and the intent of the grantor clearly is stated to be racially restrictive, property reverts to the grantor’s heirs and cy pres doctrine is inapplicable. *Evans v. Abney*.
 - a. Doesn’t violate *Shelley v. Kraemer* b/c courts are not enforcing discrimination but preventing it.
3. Racial restriction is valid if owner doesn’t want to sell to a minority. If both parties want to sell/buy, the restriction is invalid.

B. Restrictions on Marriage

1. **Rule:** generally, restraints on marriage in transfer of property are void UNLESS:
 - a. Between spouses;
 - b. Provide for support until marriage (*Lewis v. Searles*);
 - c. Not a full restriction (*Shapira v. Union National Bank*);
 - d. The restraint is reasonable under all circumstances.

IX. COMMON OWNERSHIP- ways in which two or more people may own present possessory interests in the same property.

A. Tenants in common

1. Each tenant has an undivided interest- the right to possess the whole property. Fractional amount only important for questions of how purchase price is divided upon sale of the property.
2. **Language:**
 - a. O to A and B as tenants in common.
 - b. O to A, B, and C as tenants in common w/ $\frac{1}{4}$ undivided interest in A, $\frac{1}{4}$ undivided interest in B and $\frac{1}{2}$ undivided interest in C.
3. **Rules:**
 - a. **Survivorship:** If one tenant in common dies then their interest passes to their heirs.
 - b. **Rent:**
 - i. No duty for possessing co-tenant to pay rent unless “ousted.”
 - (1) **Ouster:** explicit act by which one co-owner wrongfully excludes others from the jointly owned property.
 - (2) **Constructive ouster:** property is too small to be occupied by all co-tenants.
 - (a) Constructive ouster in marital context: arises when emotions of divorce make it impossible for spouses to share marital property.
 - (i) No ouster if hostility only flows from one party. *Olivas v. Olivas*
 - ii. If co-tenants rent the property they are entitled to the fractional amount of their share.
 - iii. Each co-tenant has right to lease their interest w/o consent of other co-tenants, so can’t kick lessor out, but can sue for partition. *Carr v. Deking*
 - c. **Expenses:**
 - i. Non-possessing co-tenant doesn’t have to pay expenses if they are less than the rental value of the share.
 - (1) If expenses are more than rental value of their share, then they split the expenses according to their share.
 - ii. No duty to share in costs for major improvements unless agreed.

B. Joint tenancy

1. **Elements:**
 - a. **Time-** interest created at the same time
 - b. **Title-** interest must be created by the same instrument
 - c. **Interest-** must be equal shares
 - d. **Possession-** all tenants must have right to possess entire property.
2. **Severance**
 - a. The transfer of undivided interest by one joint tenant destroys joint tenancy and makes it a tenancy in common.
 - b. Does a lease sever joint tenancy? 3 possible outcomes:
 - i. Lease **does sever joint tenancy.**
 - ii. Lease **doesn’t sever joint tenancy,** and **lease doesn’t survive.** *Tenhet v. Boswell*
 - iii. Lease **doesn’t sever joint tenancy,** and **lease does survive.** *Kresha v. Kresha*
3. **Language:**
 - a. O to A and B as joint tenants.
 - b. O to A and B as joint tenants with the right of survivorship.
4. **Rules:**
 - a. **Survivorship:** when a joint tenant dies, her property interest immediately transfers to the remaining joint tenants in equal shares. Main difference between joint tenancy and tenancy in common.
 - b. **Rent:**
 - i. No duty for possessing joint tenant to pay rent unless “ousted”
 - (1) **Ouster:** explicit act by which one co-owner wrongfully excludes others from the jointly owned property.
 - (2) **Constructive ouster:** property is too small to be occupied by all co-tenants.

- (a) Constructive ouster in marital context: arises when emotions of divorce make it impossible for spouses to share marital property.
 - (i) No ouster if hostility only flows from one party. *Olivas v. Olivas*
 - ii. If co-tenants rent the property they are entitled to the fractional amount of their share.
 - iii. Each co-tenant has right to lease their interest w/o consent of other co-tenants, so can't kick lessor out, but can sue for partition. *Carr v. Deking*
 - c. **Expenses**
 - i. Non-possessing joint tenant doesn't have to pay expenses if they are less than the rental value of their share.
 - (1) If expenses are more than rental value of their share, then they split the expenses according to their share.
 - ii. No duty to share in costs for major improvements unless agreed.
 - 5. **Rules for Divorce:**
 - a. Where a co-tenant takes possession through a divorce proceeding, she takes it subject to any encumbrances, i.e. leases. *Kresha v. Kresha*
- C. **Remedies for disputes btw joint tenants and tenants in common:**
 - 1. **Partition:**
 - a. Physical division of property OR
 - b. Property sold and proceeds divided in proportion to their ownership shares
 - c. Restrictions against partition are void.
- D. **Adverse Possession**
 - 1. to get property through AP a co-tenant in possession must notify non-possessory tenant that he is asserting full ownership rights in the property to the exclusion of the other co-tenant.

X. LANDLORD-TENANT LAW

A. Leaseholds

- 1. **4 types:**
 - a. **term of years:** lasts for a specified number of years.
 - b. **periodic tenancy:** month to month tenancies, renew automatically at specified periods.
 - c. **tenancy at will:** can be terminated w/o notice. No longer exists.
 - d. **tenancy at sufferance:** formerly legitimate tenant who stays after leasehold has terminated.
- 2. **Difference between lease and license:** license, owner transfers partial possession; lease, owner transfers exclusive possession.
- 3. *Vasquez v. Glassboro Service Assoc.*- migrant farm workers, although not deemed tenants, can be kicked out w/o notice and eviction proceedings that actual tenants are entitled to under state statute.

B. Constructive Eviction

- 1. **Rule: implied covenant of quiet enjoyment-** prohibits a landlord from intending to disturb tenant. Landlord can be liable for disturbance from other tenants.
 - a. **Constructive eviction** occurs when the landlord substantially interferes with the tenant's quiet enjoyment of the premises. Defense allows tenant to stop rent payments and move out before the end of the lease term.
 - i. Tenant can only use this defense if he moves out within a reasonable period of time.
 - ii. Landlord must perform some act with intent of depriving tenant of quiet enjoyment, or breach covenant by failing to act. *Blackett v. Olanoff*- disturbing condition of neighboring bar was natural and probable consequence of landlord's allowing it to be there.
 - b. **Partial constructive eviction:** tenant may assert a defense of non-payment due to constructive eviction even if she only abandoned part of the premises due to the landlord's acts in making that part unusable/unlivable by the tenant.
 - i. *Minjak v. Randolph* (NYC loft)

C. Implied Warranty of Habitability

- 1. **New rule:** implied warranty of habitability in all lease agreements and tenant doesn't have to pay rent if premises are uninhabitable. *Javins v. 1st Natl. Realty Corp.*
- 2. **Old rule:** no warranty of habitability.
- 3. **Can't waive warranty of habitability.**

4. Remedies available for breach:

- a. Rescission- right to move out before the end of the lease term.
- b. Rent withholding
- c. Rent abatement (reduction in rent)
- d. Repair and deduct
- e. Injunctive relief or specific performance- ordering landlord to comply w/housing code.
- f. Criminal penalties

XI. ANTIDISCRIMINATION LAW IN THE HOUSING MARKET

A. **Fair Housing Act:** no discrimination against people on basis of color, sex, disability in getting housing.

B. Race:

1. **Rule:** § 3604 of FHA prohibits discrimination b/c of race, color or national origin in the sale or rental of housing.
2. **Rule:** Racial quotas are allowed if:
 - a. Temporary in nature AND
 - b. Based on some history of racial discrimination AND
 - c. Quotas must increase or ensure minority participation. *US v. Starrett City*
 - i. Starretts' quotas acted as a ceiling to their access, did not provide access, so in violation.

C. Disability:

1. **Rule:** dispersal requirement as part of licensing process is a legitimate means to de-institutionalize the mentally ill so it doesn't violate FHA. *Familystyle v. City of St. Paul*.

XII. TAKINGS

A. **5th Amendment:** (clause applies to state govts. via 14th Amendment due process) prohibits federal govt. from:

1. taking private property
2. unless for a public use
 - a. must effectuate a legitimate public purpose
3. without paying just compensation

B. Physical invasions (in order of no taking → taking)

1. *Pruneyard Shopping Center v. Robins*- owner of large shopping center to allow public to distribute leaflets on property does not constitute a taking of the property despite the fact that the law limits owner's right to exclude. Invasion is temporary, non-physical, limited, and economic value of property is not being taken away.
2. *Yee v. Escondido*- mobile home park regulations not taking; plaintiffs invited tenants onto the land. Govt. taking only when landowner required to submit to physical occupation of the land.
3. *Block v. Hirsch*- protected tenancy for life not a taking.
4. *Seawall*- anti-warehousing law does is a taking, plaintiffs had not invited tenants onto the land.
5. *Kaiser-Aetna*- making private lagoon subject to federal navigational servitude is a taking. Owner had invested in development w/expectation it would remain private.
6. *Nollan*- city offered permit to builders if they would grant a public easement in front of their house on the beach. Taking b/c coerced owners to grant easement which was a physical invasion; no nexus between allowing permit and granting easement.
7. *Loretto v. Teleprompter Manhattan CATV*- law required landlords to permit cable equipment be installed on buildings. Permanent forced physical invasion of property is per se taking.

C. Conceptual Severance

1. *Hodel v. Irving*- act which prohibited fractionated land from passing on to heirs by escheating it to the tribe a taking. Value of the property was non minimal, little interference w/expectation but the character of govt. action extraordinary as it was taking away the right to pass on property to heirs.
 - a. *Andrus v. Allard*- eagle feather case. Statute prohibiting sale of feathers not a taking b/c it was only taking away one stick in the bundle- right to sell.
 - b. *Lone Wolf v. Hitchcock*- SC upheld forced allotment in 1903; Congress had plenary power over American Indian nations, so not limited by any constitutional provisions.

2. **Hodel Test to determine a taking:**
 - a. **Economic impact of the regulation**
 - b. **Extent of the interference with reasonable investment-backed expectations**
 - c. **Character of the govt. action**
- D. **Land use restrictions**
 1. **Rule:** necessary exercise of police power when state chooses one interest over another to protect the public interest. *Miller v. Schoene*
 2. **Lucas Rule:** when a regulation denies all economic viable use of land, it is a taking, unless the regulation is prohibiting a use already proscribed by background principles of state property or nuisance law; in that case, the property owner would not have been in expectation of that right in the first place.
 - a. Only applies to regulations of land, not personal property. A person does not expect land to be rendered valueless.
- E. **Public use**
 1. **Rule:** courts are extremely deferential to legislative decisions of what constitutes a public use. *Hawaii Housing Authority v. Midkiff*, *Poletown Neighborhood Council v. City of Detroit*.
- F. **Per se takings**
 1. permanent physical invasions
 - a. see *Loretto*.
 - b. But also see *Pruneyard & Yee*.
 2. abolition of a core property right
 - a. see *Hodel*- right to pass on property to heirs is a core property right.
 - b. But see *Andrus*- taking away right to sell not a taking b/c other sticks left in the bundle.
 3. total takings: denial of all economic viable use of land is a taking. *Lucas*
 - a. unless already proscribed by background principles of property or nuisance.
 4. **Otherwise, apply 3-part Hodel test.**
- G. **TAKINGS FLOW CHART**
 1. **1st step:** state elements for taking clause
 - a. taking
 - b. for public use
 - c. w/o just compensation
 2. **2nd step:** is it a per se taking?
 - a. **Physical invasion**
 - i. **Shows taking:**
 - (1) Permanent occupation
 - (2) Complete/total
 - (3) Involving intruders or 3rd parties
 - (4) No economic value left
 - ii. **Shows no taking:**
 - Temporary occupation
 - Non-physical
 - Limited
 - Some economic value left
 - b. **Abolition of a core property right**
 - i. Only core right SC has said is a per se taking is right to devise property to heirs.
 - c. **“Total Taking”**
 - i. **Apply Lucas test:** if govt. restriction on land renders the property valueless then it is a taking unless already proscribed by background principles of property or nuisance law.
 - (1) **Flaws:**
 - (a) Hard to define what “valueless” means.
 - (b) Finding it a nuisance is hard b/c there are some nuisances today that didn’t exist, or weren’t recognized before.
 - d. **Apply Hodel test**
 3. **3rd step:** is the taking for public use?
 - a. **Rule:** govt. can’t take property and give to another unless it is rationally related to a conceivable public purpose w/great deference to legislature.
 - b. If the taking benefits a private interest, the public benefit must be clear and significant.
 4. **4th step:** was there just compensation?
 - a. **Rule:** govt. must give fair market value for the taking.

XIII. BEYOND REAL PROPERTY

A. Copyright

1. **Rule:** owners of original works of authorship that are fixed in a tangible medium of expression have exclusive rights to copy, distribute, perform or display those works publicly.
 - A. ideas and facts cannot be copyrighted, only original expressions of ideas can be protected by copyright law.
 - B. Compilations of facts not copyrightable unless they are organized in an original way. *Feist v. Rural Telephone Svc.*
 - C. **Fair use exception-** allows copying of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship or research.
 - I. VCR's fall into fair use exception b/c they allow viewers to "time-shift." *Sony v. Universal Studios.*
2. Living things are not patentable; something discovered not patentable, but bacteria created can be b/c it was a non-naturally occurring thing. *Diamond v. Chakrabarty.*

B. Slavery

C. Children & Frozen embryos