PROPERTY OUTLINE

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I. CHAPTER 1: DEFINING PROPERTY-- Property is a set of rights that define relationships between people in respect to things, but none of those rights are absolute. The rights to use, possess, exclude, and transfer make up this bundle of sticks.

A. Property Rights don’t attach from mere pursuit, the attach from capture
   i. When a fisherman/hunter apprehends an animal by local custom he/she acquires title in that animal. Custom applies because it is extremely limited and applies to few people. Custom should apply if applicable to entire business and if application does not disturb settled expectations. Custom applies in our case because the industry depends greatly on it, AND the custom is universally accepted.

B. Water Rights:
   i. Water Rights—Two Different Systems
      a) Riparian (those who own property adjacent to a stream or other water source)—A riparian proprietor, therefore, though he has an undoubted right to use the water must so use it as to do no injury to any other riparian proprietor.
         • each land owner has the right to use a reasonable amount of water
         • the use must be on the land
         • don't actually own the water until its extracted from the source
         • no entitlement to the amount of water that you're using today
         • no first-come, first serve standard
      b) Prior appropriation (western states)
         • first in time, first in right
         • must be put to a beneficial use
         • the use does not have to be incident to any ownership to any piece of land
         • any person who subsequently gets a right to the water is limited by the pre-existing rights of others
   ii. Ground Water—3 Doctrines—Same apply to Oil and Gas because they are diffuse Resources
      a) Free use or absolute ownership—extract as much as you can, even if its beneath the surface of someone else's land
      b) Reasonable use—each surface owner is allowed to extract as much as is reasonable in the circumstance, given the harm to the other landowners and the use the water is being put to
      c) Correlative Rights—sophisticated technology makes it possible to know where the water is coming from, and thus you can apportion rights according to the correlative share of the resource; each owner has a right to a fair and equitable share of the oil and gas under his land as well as the right to protection from negligent damage to the producing formation

C. Natural Gas & Oil—originally a capture theory, but now moving toward a correlative rights standard

D. Rights to Land
   i. Johnson v. M'Intosh—perpetuates the falsity that Europeans were always more power. Indians had right of possession, not true title. The tribes sold their land to Johnson & Graham. Then later the tribes ceded their land to the U.S. gov't in a treaty. Then M'Intosh bought the land from the U.S. Ct says only US can transfer title, b/c Indians were never owners. They were occupants, sort of like tenants who only had a right to possession. In 1823 it was too late for the Indians—it would have overturned generations of ownership of land—sense of judicial inferiority. Also, there was a sense of cultural inferiority— that the Indian's use of the land was inferior to the European use of the land.
   ii. Doctrine of Discovery—discovery gave title to the government against all other European gov'ts.
   iii. Indian reservations are called “trust lands.” Historically this was because Indians were treated as being incapable of taking care of themselves. Indian land rights have been acknowledged in a variety of ways (all possessory) including treaties and executive orders. As for aboriginal title, it works in Canada but it doesn't here.
   iv. If the land is recognized by treaty and the US takes it, they have to pay for it, but if its under executive order or aboriginal title the US doesn't have to pay for it.

E. Rights to Persons--An owner of a slave in another state where such is legal who voluntarily brings said slave here has no authority to detain him or to carry him out of the state against his will. MA doesn't have to acknowledge LA's local laws. Think of radar detectors, fire arms, captive animals, etc.

F. Right to Publicity—right to limit the ability of others to commercially use your name or image
   i. Creature of common-law—no federal law answers these questions
   ii. The Questions
      a) Does the right exist in the given jurisdiction?
      b) Does the right of publicity survive death?
      c) If the right can survive death, does it matter whether the individual exploited the right of publicity in his or her lifetime?
   iii. Right is limited by the free speech rights of authors
   iv. The question posed to the court asks if there is a property right in one's own name and image and has the right to descend that right to his estate upon death? The court bases its decision on TN common law. Elvis Presley's right to control his name and image descended to his estate at his death and his estate has the right to control the commercial exploitation of Elvis Presley's name and image.
v. What if one doesn't commercially exploit his/her image during his/her lifetime? Does their estate have a right to the image? The MLK estate sued on this very issue.

vi. Crazy Horse Malt Liquor.

G. Property in Ideas
i. You can have a property right in an idea, but if your idea is submitted to another without a promise to pay and the elements of novelty and originality are not present, then you don't have a property right in that idea. (Jello case)

H. Copyright and Patent
i. Copyright—
   a) can't copy the same expressive content or copy verbatim
   b) facts and ideas are not copyrightable, but unique expressions of facts and ideas are copyrightable
   c) Now there is no need to actually apply for a copyright
   d) Right lasts 70 years after the death of the author
   e) Fair Use Exception—creature of statute, certain uses are allowed (see book)
   f) Constitution gives congress the power to regulate copyright and patents. It is an exclusive power of the U.S. congress—states can't make their own rights.

ii. Patent—for inventions that must (1) have social utility, (2) be novel, and (3) be invented.
   a) protect the property rights of inventors of new, useful, obvious inventions (products, processes, etc)
   b) must apply for a patent
   c) Good for 17-22 years after granted (of a limited duration)
   d) gives you an exclusive right to market that product or process
   e) Cannot patent an idea

I. News and its Presentation—Unfair Competition
i. Used in cases where copyright and patent don't necessarily apply. Court says there is a quasi-property right saying that you can't unfairly profit from the work of another by claiming it is your own or producing a product that is so similar to the original that you're obviously ripping it off

ii. INS was copying the AP's news and selling it as their own without attributing it to AP. News of current events is common property. Once it is published the publisher might lose property rights against the public at large. But when the issue is between competitors we've got a different case—quasi-property right

iii. Copyright laws consider recorded broadcasts of live performances copyrightable. Motorola is taking factual information about the underlying events, and they are selling that information for gain. Its exactly what fantasy sports leagues are doing—selling stats for profit. Ct. holds that the underlying events themselves are not subject to copyright and that there is no violation of the NY equivalent of the unfair competition laws brought up in ISN v. AP. Motorola is observing the events themselves and independently recording those events, not piggybacking on the NBA sportstrax. 1976 afford copyright protection to simultaneously recorded live broadcasts of events AND preempted state laws that effected things already covered by the Copyright act

iv. Elements required for “Hot News” to survive preemption are
   a) time sensitive factual information
   b) free-riding
   c) threat to very existence of service or product provided by plaintiff

J. Property rights in Cyberspace—Is using a computer when you don't have permission to use it considered taking property? Analogous to taking a bucket onto someone's land and taking water from a replenishing well. The time Lund took could have been as much as $26k, info on printouts worth $5k, paper itself is worth whatever scratch paper is worth

II. CHAPTER 2: SOVEREIGN RESTRICTIONS ON THE USE OF LAND
A. Limitations on the Right to Exclude:

i. Civil Trespass is the unprivileged intentional intrusion on property possessed by another. An offense against possession. There must be an intent to enter.

ii. Elements of Trespass
   a) non-privileged
   b) intentional
   c) intrusion on property
   d) possessed by another

iii. Can be committed by
   a) a person
   b) agent of person
   c) object

iv. Privilege arises from
   a) consent of the owner
   b) necessity—to prevent more serious harm to a person or property
   c) public policy—common-carrier laws, Civil Rights Act (public accommodations), (interest in unwanted inclusions vs ability to protect human life, access water ways, etc)
   d) free speech right of access in some states (CA and NJ) where state constitutions allow a free speech right to
access to certain types of property (like shopping malls). There can be reasonable time/place/manner restrictions placed on this right

- Barring the CA provision regarding free speech, the national Constitution's 1st Amendment does NOT grant the right to speak freely in a private shopping mall—Lloyd v. Tanner (Sup Ct) Does the CA constitutional provision amount to a regulatory taking? No, the court argues that, “appellants have failed to demonstrate that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a 'taking.'”

- **This case is important to us for two reasons:**
  - Illustrates that the US Constitution does not grant a right to free speech on private land.
  - Where a state requires a landowner to provide access greater than that of the US Constitution, it does not amount to a regulatory taking unless is substantially harms the use or the economic value of the property.

- US Sup Ct held that in the case of a company town individuals have a right to speak in the privately owned public places.
- There used was a common law exception to right to exclude for places like Inns known as “common carriers”. Today there are civil rights statutes that forbid discrimination in public accommodations.

  e) Prescriptive easements—had the right for so long and have used it continuously in an uninterrupted way

  f) Custom

  - The court uses custom to prove that the public has a right to the land. Custom is a background principle of property law. This particular custom predates the creation of any property rights in OR, or even statehood. Therefore, judicial recognition of the custom isn't a taking—the right to exclude never existed on this land

  - Custom requires:
    - antiquity
    - exercised w/out interruption
    - use be peaceable and free from dispute
    - reasonableness of use
    - be distinctive
    - must be obligatory

  v. **Eminent Domain:** 5th Amendment says the gov't may take private property for a public purpose if they provide just compensation

  vi. Regulatory takings don't take your property completely away, but they take a certain right away that may decrease the property's value to you

  vii. **The Right Defined**

  a) **Public Trust Doctrine**—It is presumed at the founding of the nation that the sovereign owns the navigable waterways and that they are thus common public property

  b) ebb and flow doctrine—because the waters ebb and flow it is sometimes navigable, sometimes not, but in all cases it govt property.

  c) The right to exclude is so fundamental that it falls in the group of rightsthat the govt cannot take without compensation. In Loretto a govt requirement that private property have a cable box on it is found to be a taking, and thus requires compensation.

  viii. **Control of Airspace**—Sup Ct held that the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land

**B. Concept of Reasonable Use**

i. **Nuisance**

  a) Nuisance is distinguished from trespass in that trespass is an invasion of the right to exclude, while nuisance is an invasion of the right to use and enjoy

  b) Non-trespassory invasion of the use and enjoyment of another's property (like blasting music all night long)

  c) Reasonable Use: weighs the gravity of the harm to the plaintiff against the utility of the defendant's use. The Restatement (second) directs one to look at

    - character of the harm
    - social value of the use invaded
    - the suitability of that use to the character of the area

  d) Interference must be **substantial and unreasonable**

  e) To determine if Interference is unreasonable courts consider

    - extent of harm
    - character of harm
    - social value of the use that is being invaded
    - suitability of the use that is being invaded to the area
    - what would the burden be on the person who's use is invaded to avoid the harm

  f) There is no bright line rule for determining whether or not something is a nuisance

  g) Factors Against Nuisances

    - Existing Industrial Uses
h) Generally the principle of nuisance holds that a property owner has the right to use property how they want, provided that such use does not injure the rights of your neighbor. Types of Nuisance are:

- Nuisance *per se* or at law, is conduct that is a nuisance itself
- Nuisance *per accidents* is otherwise lawful conduct that is wrongful because of the particular circumstances of the case
- Private nuisances do harm to an individual or group of individuals
- public nuisance is a harm to society at large

i) Remedies for Nuisance

- Injunction--has the problem of decreasing social utility of the nuisance and allows the plaintiff to set an extraordinarily high price to sell the injunction
- Award Damages--More likely if the nuisance has high social utility

ii. The Right to Support

a) Strict liability for withdrawal of lateral support for:

- adjacent land in natural condition
- buildings on adjacent land if buildings are fully supported by land in natural condition

b) Liability under negligence theory for negligent withdrawal of lateral support for buildings on adjacent land that are not fully supported by land in natural condition

c) When an actor who removes lateral support substitutes an artificial support he is responsible for maintaining that artificial structure.

iii. Rights to Natural Resources

a) Air

- MA/DC rule: no duty cut back branches
- CA/WA/NJ rule: duty to cut branches whether or not cause damage
- VA rule: duty to prevent tree from causing sensible damage.

b) Water

- **Common Enemy Rule**—
  - General rule is that neither the diversion nor the altered transmission, repulsion or retention of surface water gives rise to an actionable injury.
  - Exception: Where a D improving or altering land interferes with the flow of surface water, not by making a change in the grade or surface of the land, but by means of drains, ditches or other artificial contrivances for the very purpose of transmitting the water. D renders himself absolutely liable if by means of such an artificial device he causes surface water to be carried in a body large enough to do substantial injury.
  - Exception to the Exception: Exception does not apply where the surface water is brought to the locality substantially where it otherwise would have flowed.

- **Civil Law Rule**—proprietor of the higher land has a natural servitude in the lower land to accommodate the natural flow (and no more than the natural flow) of surface water from his land.

- **Reasonable Use Rule**—A person altering his land is placed under a duty in connection with surface water not to act unreasonably under the circumstances. Many states moving toward this rule now

c) Sunlight

- Historically the US didn't recognize a right to sunlight because you used to have a right to do what you want with your land if you don't cause physical damage to others, sunlight's not important because there is artificial illumination, and there was a need to encourage building. Today things like zoning have overturned the idea that you have absolute rights to you land minus physical damage to others, in recent years there are more important uses like solar energy, and we don't have the need for building that we did in the past. Only one jurisdiction other than WI has followed the “right to sunlight” rule

- In order for P to win a “right to sunlight” case he has to prove
  - invasion is unreasonable—there was a less intrusive method, little value to defendant, began after P started using land
  - There is a large financial loss in loss of solar collectors, harm is unremitting

III. CHAPTER 3: LAND DEVELOPMENT AND THE POLICE POWER

A. Foundation: Police Power and Land Use

i. *Pennsylvania Coal Co. V. Mahon* (mining coal/subsurface support case)—grandparent of modern regulatory takings law

a) if there is a particular land use that can be a nuisance to the public, the state has the right to regulate that land use

b) Factors to consider when determining if a regulation amounts to a taking

- diminution in value of property due to a government regulation
- average reciprocity of advantage—regulation is for benefit of all in society, including the person who's land
is being regulated

- Character ofGov't action—is it designed to protect health and safety of citizens, does it effect public or private land, etc.
- Does the regulation abolish or destroy a recognized property right?
  - Youpee (Indian lands—gov't take back small interests and give back to tribe—Sup Ct. ruled this a taking)
  - Washington Legal Services—challenged the methods of funding legal services for the poor—i.e. Requiring lawyers who receive trust funds from clients (like retainers) to sign over the interest on those trusts over to the bar, and then that $ is given to Legal Services—this practice was ruled a taking

ii. Court upholds zoning ordinance on its face, saying it doesn't amount to a regulatory taking, but says that the application of the ordinance COULD be a taking, but the application is not an issue before the court. Zoning laws are a way of taking care of on the front end what nuisance law takes care of on the back end

iii. Nectow V. Cambridge—application of ordinance so diminished the value of a piece of property that it amounted to a regulatory taking

iv. Uncontested Paradigms
   a) Eminent domain
      - condemnation of land: transfer of all rights of possession, use, and enjoyment to gov't
      - constitutes a taking
   b) Police power—
      - regulation designed to prevent public nuisance
      - does not constitute a taking

v. Bifurcated Inquiry
   a) Categorical rules
      - some actions always constitute takings
        - Permanent physical occupations—Loretto
          - Occupation can be trivial
          - Gov't rationale doesn't matter
          - uninvited third-party occupations count
          - Permanent—“repeated but non-continues use of private property by public” counts
          - Seizures of core property rights
          - Complete loss of economic value—Lucas
            - Regulation leaves property without any market value
            - regulation bars development of land
            - How do we define the unite of property—affected vs. unaffected areas
            - Common law nuisance except to rule—this often requires back door balancing test
      - some actions never constitute takings
        - regulations designed to prevent public nuisance—Euclid v. Amber Realty
        - Forfeiture of property used in commission of crimes
        - Destruction of property to stop a fire
   b) Ad hoc balancing test—used only if categorical rules do not apply
      - Penn Central
        - diminution in value of property—doesn't have to be 100% loss of value, just has to be significant enough. Reasonable investment backed expectations come in to play here.
        - Reasonable investment-backed expectations
        - character of govt. action—is it more like a taking or like regulating a nuisance/noxious use.
          Doesn't have anything to do with the success of the program or the goal of the program. Its like eminent domain vs. police power
      - Pennsylvania Coal
        - Noxious use of property
        - Average reciprocity of advantage—is the court really singling out one person to benefit the community, or is that person benefiting as much as everyone else?
        - Destroys recognized property or contract rights

B. Regulatory Takings
   i. Penn Central Transportation Co. v. City of New York
      a) The application of a law restricting an owner's use of his property does not constitute a taking where the ordinance or law does not interfere with the owners primary use for the property or deny the owner a reasonable economic return on his investment. When a law which does not hamper an owner's main expectation concerning the use of his property and allows him to receive a reasonable return on his investment, a “taking” which demands “just compensation” has not occurred
      b) Ad hoc Balancing Test—leads to very fact-based inquiry. More as applied cases rather than on face challenges
        - Diminution in Value—Transferable development rights mitigate this
• Reasonable Investment-backed Expectations—
  • Penn still gets to run their trains, which was their primary expectation.
  • What expectations are reasonable, though?
  • character of government action

ii. Lucas v. South Carolina Coastal Counsel
a) This is a categorical taking. The new category is a total taking—a regulation that deprives owner of all economically beneficial or productive use of the land. Only a categorical test if ALL economic value has been lost.
b) Noxious uses are never considered regulatory takings, but very few uses are considered “noxious.”
c) Court says SC can show its not a taking if they can find a background principle in nuisance law or other state property law that would show that Lucas never had the property right in the first place.
  • On remand the court finds that there is no such background principle
d) Issue: Can the government enforce land-use regulations on an owner’s property without regard to its economic impact on that property?
e) When land-use regulations deprive an owner of all economically valuable uses of his property, a taking has occurred deserving of just compensation so long as the background principles of nuisance and property law are not present.

iii. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency
a) Issue: Whether a moratorium on development imposed during the process of devisor a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause.
b) Holding: Sometimes. The district court erred when it disaggregated the property into temporal segments corresponding to the regulations at issue and then analyzed whether they were deprived of all economically viable use during each period. The starting point for the courts analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central should have been applied
c) Issue: Whether the interest in protecting individual property owners from bearing public burdens justifies a new rule for takings—nope.
d) Holding: Whether the concepts of fairness and justice that underly the takings clause will be better served by a categorical rule—nope—stick with Penn
e) Court declines to create a new categorical rule for temporary bans on development of land should always be considered a taking.

iv. Lingle v. Chevron
a) Whether the “substantially advances” formula announced in Agins is an appropriate test for determining whether a regulation effects a Fifth Amendment Taking—It does not.
b) The “substantially advances” formula announced in Agins is not a valid method of identifying regulatory takings for which the 5th Amendment requires just compensation.
c) The “substantially advances” formula is not a valid takings test, and it has no proper place in takings jurisprudence. A P seeking to challenge a government regulation ans an uncompensated taking of private property may proceed under the following theories:
  • “physical taking”
  • “total regulatory taking” Lucas
  • Penn Central taking
  • Land-use extraction violating the standards of Nollan and Dolan

C. Land Development Conditions—Exactions
i. Exactions are when the government grants a permit for a particular activity but conditions that permit in some manner (you can build the property you want to build BUT we are going to attach some condition to it).
  a) Unconstitutional conditions doctrine—The exaction will be upheld if it substantially advances the same gov’t interest that would furnish a ground for denial of the permit to begin with.
  b) Certain conditions are unconstitutional and thus unenforceable under a three part test (see Nolan beach access case):
    • there is a valid basis for denial of the permit
    • there is a nexus between the condition and the problem the development will cause
    • proportionality between the condition and the extent of the problem the development will cause

ii. What's the difference between this and regulatory takings?
  a) If the legislature enacts a law that amounts to a taking, its a regulatory taking
  b) Exactions are agency decisions that allow an individual to do something on the condition that they give up some right

iii. There are two different types of land management on the parts of municipalities
  a) Euclidian Zoning—
    • traditional model under which every parcel property is regulated for a certain use in accordance with a comprehensive plan
    • requirements for new development are rather restrictive
    • land owners may have to petition for an amendment to the zoning ordinance to make the best use of his/her
land
- Locality could demand an exaction
b) Special Use Permit Regime
- All major development within city requires a special use permit from the city or county
- Guidelines in for determining when and how these permits are issued based on broad goals rather than a strict zoning map
- Locality could demand an exaction

iv. 3-part test for whether an exaction is constitutional (*Nollan* and *Dolan*)
  a) Valid grounds exist to deny “permit”
  b) Exaction substantially advances same interest that would furnish grounds to deny “permit”
  c) Exaction is “roughly proportionate” to problem caused by development

v. *Nollan v. California Coastal Commission*
  a) About a whether can require an easement across the beach
  b) You have a constitutional right to be compensated when government takes your right to exclude
  c) court gave little to no deference to the commissions finding of facts as to the nexus and whether it existed. In this case, its almost clear as a mater of logic that the nexus does not exist.

vi. *Dolan v. City of Tigard*
  a) Doctrine of Unconstitutional Conditions: The government may not require a person to give up a constitutions right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit
  b) Proportionality comes into play starting in this case

vii. If you win that an exaction is unconstitutional, what could you get?
  a) Court upholds permit but withdraws exaction
  b) Withdrawal of the exaction on part of municipality, or
  c) Negotiation for better exaction, or
  d) Just get a denial of permit and not be able to develop at all

D. Inclusionary Zoning
i. Designed to promote mixed income and mixed race housing in areas that are predominately segregated along those lines

ii. Response to places like St. Louis that were exclusionary zoning—zoning that has the effect of excluding a certain group
  a) predominately zoned single family
  b) large lot sizes
  c) dwelling be a certain distance away from the street
  d) that the dwelling be of a minimum size

iii. Exclusionary zoning has the effect of allowing only rich people, and thus, has the de facto effect of keeping or making neighborhoods white

iv. Inclusionary zoning is the law in New Jersey, DC, Boston, San Fransisco

v. Inclusionary zoning is:
  a) about 5% of the US population lives in areas that have mandatory inclusionary zoning laws
  b) Whenever new housing built or substantial rehab of housing, a certain percentage must be set aside for low income families (normally 15%)--if you are rehabilitating your own home, you don't have to, though. Normally a trigger point around 10 or more units
  c) There are bonuses sometimes for being inclusionary—relaxed parking regulations, subsidies, and mainly the density bonus.
    - A density bonus lets you decrease the size of each lot.
    - Montgomery County, where this started has a 22% density bonus. So if you normally would get 100 market rate units in an area, you could build 104 market rate units and 18 affordable units. This offsets the profit loss.
  d) Affordable units are available to people at or below 80% of median area income
  e) Affordable prices are set up so they are 30% of Income, and require long term price controls to remain affordable over time
  f) Affordable units must be relatively similar in size and appearance and built at the same time as the market properties.

IV. CHAPTER 4: INVOLUNTARY TRANSFERS
A. Involuntary Transfers Between Private Parties
i. Abandonment
  a) *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*
    - At common law, abandonment requires intent to not recover the property.
    - Common law rule of finds—finders keepers
      - encourages competition in finding sunken property
      - encourages people to act secretly and hid their findings
• much more like *Pierson v. Post*

Maritime law of Salvage
• assumes property belongs to original owner while awarding a generous finders fee
• To demonstrate that the finder should have title the finder must show that owner abandoned the property

Public Policy
• reduces competition between original owner and those who make salvage
• doesn't reduce competition between those who would make salvage
• Much more like *Ghen v. Rich*

Had insurers abandoned or retained a right to their property?
• Trial Court says yes because
  • Destruction of documents
  • no action to recover gold since 1858
• Appellate Court says no, because 134 years means its likely that the documents were accidentally lost

### ii. Adverse Possession of Real Property

a) Legislature will say “any claim re: an interest in real property must arise in X amount of years”
• In MO its 10 years
• In IA its 40 years
• Typical period is 10 years, 20 years is second most common

b) Elements of Adverse Possession

Possession must be Actual
• How much of the property do you possess? Possession of ¼ of the property might constitute possession of the whole if a) you built a fence around the whole or b) you had a defective title to the whole (constructively possess the remaining ¾). Otherwise, you've only got a claim to the ¼ you are occupying
• What if its impracticable to occupy the whole for the entire year, but during one season of the year you can possess the whole? This overlaps with continuity problems. You use if in the same manner w/the same continuity as would an actual titled owner. If the land can't be used year round, you won't be expected to use it year round.

Possession must be Open and Notorious—so that titled owner will know you are there
• Reason is so that owners of the land will be able to see upon reasonable inspection that someone is using there land.
• But there are problems with mistaken boundaries. Also, cave problems.
• If the owner has a question about a mistaken boundary they can hire a surveyor

Hostile—not with owner's consent or permission,
• Some jurisdictions add requirements to this, like you have to have color of title (defective deed) or that you have to have a claim of right (rightfully believe it to be your own) or that you can't act in bad faith. These are MINORITY rules.
• In the majority of jurisdictions possessing in some way that is hostile to the actual owner is sufficient. Without permission = hostile

Exclusive—as between adverse possessor(s) and true owner. Possession must be exclusive of the true title owner. The true title owner can't be possessing the land at the same time as you, the adverse possessor, are possessing the land. But there can be two adverse possessors working together

Continuous—must possess for a continuous period of time prescribed by statute (varies from state to state)

c) Really a question of what the statute of limitations is on trespass (if you do not take action to eject someone within the statutory period, you will be time bared from pursuing an action for trespass.)

d) Adverse possessor can file an action to “quiet title” to get title to the land once all of the elements are met.

e) Tackings
• You can tack periods of adverse possession together IF there is privity of estate between the parties who are adversely possessing
• All the adverse possessors must have met all of the requirements for adverse possession
• cannot dispossess an adverse possessor via adverse possession and then tack those two periods together.

### iii. Adverse Possession of Personal Property

a) The tort is conversion. It normally has a shorter statute of limitations than trespass.

b) *Songbyrd, Inc. v. Estate of Albert B. Grossman*
• duty of due diligence—you have to keep track of the use of your property
• Discovery (New Jersey ) rule—you don't start the running of the statute of limitations until you “discover” the adverse possession of your property
• Demand and refusal rule: If you are trying to recover your stolen property from a Bona Fide Purchaser For Value, the statute of limitations doesn't start running until you demand the property from them and they refuse to give it to you
iv. Lien Enforcement
   a) Involuntary transfer of property from one private party to another
   b) A lien is
      • Mortgage: A security interest that secures performance on the note, and if there is a default on the note the mortgagee (the holder of the note) can foreclose on its interest in the property which means they can force the sale of the property through a judicial proceeding in order to get their money
      • Judgment lien—if A sues B and wins a judgment, and then B doesn't pay, A can get a lien on B's real property that is recorded on the deed, and ultimately if A doesn't get paid A can foreclose on B's property
      • Security Interest on a car loan
c) Two types of Mortgage States
   • Judicial Foreclosure States—Really properly
      • Mortgagee (lender) acquires a security interest that is memorialized in the mortgage. The mortgage is recorded in the land records. If there is a default, the mortgagee doesn't automatically own the land—they have to go through a judicial process of foreclosure where the debtor can offer a wide variety of defenses.
      • Deficiency Judgment: Entered if sale of property doesn't pay off debt
   • Power of Sale States (MO is one)
      • don't have real mortgages
      • have a “deed of trust” The lender holds the deed in trust for the borrower, if certain conditions are made like making house payments. If there is a default here, the lender can just sell the property without a judicial proceeding. Notice is given that the property will be sold, and then it is sold.
      • The trust says that you don't have a lot of options for defenses. All you can do is
        • file for bankruptcy (automatically stays the sale of the house)
        • seek an injunction of some sort enjoining the sale of the property—almost NEVER happens and it is very hard to have this happen quickly enough
d) Vermont is a Strict Foreclosure state—take deed to property in lieu of foreclosure. Lender can demand this, but borrowers can't.
e) SEE MORTGAGE CHART AT END OF OUTLINE
B. Public Use Doctrine
   i. There are limitations built into the federal and state constitutions on the ability of the governments to take property.
      a) The 5th Amendment to the Federal Constitution applies to the Federal government-- “Nor shall private property be taken for public use without just compensation”
      b) The 14th Amendment sticks the states with the 5th Amendment
   ii. Differing views on what Public Use is:
      a) Supreme court has repeatedly rejected the notion that the government can take private property from A and give it to private entity B
      b) Supreme court has rejected the notion that the public has to actually have access to the property
      c) Taking for public use means “for some public benefit or advantage” according to Kelo.
   iii. Three Types of Judicial Deference
      a) There is no test that the courts use to make sure that takings are for public use. The courts give great deference to the state in determining what a public benefit or advantage really is. (ends)
      b) There is also great deference to the state as to the means of the taking
      c) Likelihood that means will result in ends
   iv. The rule is: **Taking has to be rationally related to a conceivable public purpose**
v. **The test is not abate social ills, its add social advantage**

V. CHAPTER 5: VOLUNTARY TRANSFERS
A. The Uniqueness of the Real Estate Transaction
   i. Statute of Frauds
      a) Sales contract and the deed is subject to the Statute of Frauds
      b) Statute of Frauds requires
         • words of intent to transfer (if its a future intent, it could be a problem)
         • party names—if deed when deed is signed, then its a mistaken grantee and it isn't valid
         • description of the land
         • signed by grantor (person conveying the land)
         • some jurisdictions require witnesses (MO requires notarization)
   ii. The Right of Specific Performance
      a) Contracts for sale of land or other real property interests have been long held to be enforceable by specific performance
      b) Damages sustained by a condominium sponsor resulting from the breach of the sales agreement are readily measurable and the damage remedy at law is wholly adequate.
   iii. Equitable Conversion
a) A conditional contract has been defined as “an executory contract, the performance of which depends on a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do, or not to do, something, but it is a contract whose very existence and performance depends on a contingency and condition.

B. Contracts for the Sale of Land
i. The Concept of Marketable Title
a) Marketable title exists when the current owner's claim to a parcel of land is free, or virtually free, from the claims of others. Marketable title is not the same as fee simple title; a seller can own land in fee simple absolute but be unable to deliver marketable title because of the existence of easements, covenants, or liens which do not affect his ownership of the property but restrict the ways in which the property may be used.

b) A marketable title does not have to be a perfect title. Its about whether or not there's a risk of litigation.

c) There is an implied warranty of marketable title in a contract for sale of land

d) The implied warranty of marketability will be breached if there is a substantial and unreasonable risk of litigation against the purchaser, even if they aren't meritorious (but title does NOT have to be perfect)

ii. The Sales Contract
a) Remedies include rescission of the contract and restitution of any money paid. The buyer can also get bargain loss damages or specific performance with an abatement in purchase price

b) Parties ordinarily begin with pre-printed form contracts and work from there. However, in the residential real estate context, the contract for sale is usually provided by a realtor and is signed by both parties without the assistance of attorneys. Consequently, the contents of a form contract drafted by neither of the parties is often controlling.

C. The Deed
i. Components of the Deed
a) Must contain the names of the grantor and grantee, words indicating an intention to transfer, a description of the land, the grantor's signature, and in some states, the signatures of two witnesses

b) Four methods of description of the land

• meets and bounds—start with fixed landmark and then literally indicate the relationship of that property to the landmark (national landmarks are best, natural things are worst)

• Government Survey System—map things by latitude/longitude etc. This is in effect in the majority

• Plats divided into parcels. One parcel on a plat.

• Omnibus description—I convey to you all the land I own in St. Louis county

c) Traditional deed is composed of:

• the premises—identify the parties (at least grantor), describe the land, make some mention of the consideration, and includes words of grant or transfer

• the habendum—is used for declarations of trust in those situations where the grantee is to hold the land for the benefit of someone else. If there is no intention to create a trust, it states that the grantee holds for his/her own use. Often omitted.

• the reddendum—exceptions and/or reservations clause used to retain or create an interest in the land for the grantor.

• warranties of title—pledge the grantor to support the grantee if his title to the land is challenged

• signature

• acknowledgment—notary's assertion that the signature is authentic.

ii. Delivery Requirement
a) The delivery of the deed legally marks the transfer of land.

b) It is the transfer of the deed, not its drafting or signing, that is the critical legal event

c) Delivery is what effects conveyance, not the signing or recording of a deed. When there is no actual delivery the presumption is that there is no intent for the deed to be operative.

d) The intent to deliver can be inferred by words or circumstances.

e) Conditional delivery—

• A transfers property to B, give the deed to B while living and says, “Hold on to this. When I die, the property will be yours.”---this is ineffective delivery.

• But not all conditional deliveries are no good. For example, conditioning it on “when you graduate law school.” The delivery actually occurs when hand over deed. The difference here is that it doesn't run against the public policy of upholding the will/probate process. So delivery is immediate. Of course, that's not what A intended, because A wanted to convey a future interest.

iii. Covenants of Title
a) quick claim—contains no guarantees (covenants of title)—I convey to you everything I have.

b) Warranty Deed (two sub-classes)

• special warranty deed—I don't know about from the beginning of time if there have been defects, but I know that I haven't done anything

• general warranty deed—promise these things for all time—generally has six covenants except you can make exceptions
• 3 present covenants—go to what is being conveyed
  • the covenant of season—you own the interest
  • the covenant of the right to convey—you have the right to transfer an interest
  • covenant against encumbrances—no easements/liens/restricted covenants/etc.
• 3 future covenants—go to use
  • covenant of warranty—grantor will defend the grantee against any loss due to superior title of a third party to all or part of the property
  • quiet enjoyment—essentially the exact same thing as covenant of warranty—you will be able to use and enjoy what I am conveying
  • covenant of further assurances—grantor will sign additional documents if necessary to perfect the grantee's title (enforceable by specific performance)

c) If the deed is silent on covenants, then they are presumed by many states to exist as a general warranty deed. If you want a quick claim or special warranty deed you better make it clear.
d) Things that will make a deed void
  • non-existent grantee
  • failure of formalities
  • if the grantor was induced to sign the deed by fraud.
  • Lack of remedy
e) The covenants of title only protect against actual defects, and do not protect against the “risk of litigation.”
f) Remedies only include damages—you get your money back plus interest, but you don't get damages for changes in market price or the benefit of the bargain
g) Doctrine of merger—loose your ability to sue on sales contract grounds once the covenants of title kick in and merger takes place at closing.
h) If a home is new there an implied warranty of habitability in a majority of jurisdictions. There is in all residential housing, but not in all commercial structures.

i) If you have closed and your old house's roof caves in, you have a rough road ahead of you trying to prove that a latent defect existed and that the seller knew about it

iv. Title insurance
  a) Is a guarantee, provided by an insurance company, that the title is of a certain quality. Ordinarily, this means a title free from encumbrances other than those specifically excepted in the title insurance policy.
b) Title insurance policies usually reserve a right of subrogation for the insurer.
c) Fidelity National Title Insurance Co. v. Miller
  • Miller argues that bad faith precludes Fidelity from enjoining rights under equitable subrogation, the abstract of title didn't show the encumbrance, and that the abstract superseded any implied warranty
  • Fidelity says it was just a draft so shouldn't be relied upon
d) Title insurance is good as to the claims that are included within it. Often this does not include things like Native American's claims to land

D. Security of title
  i. The Recording System
  a) Individuals are not required to record their deeds, and the failure to record has no effect on the validity of the document between buyer and seller
  b) A purchaser of an interest in real estate who fails to record may find that his interest is legally inferior to that of a subsequently acquired interest held by a third party.
  c) The governmental office also maintains an index to these documents. The most common form of index is one which provides a brief description of each land transaction and lists it alphabetically by the name of both grantor and grantee
  d) In some urban areas, tract indexes are used. Entries in a tract index are made by block and lot number, rather than by the name of the grantor or grantee.--this does not work well with land that is subdivided or consolidated with other parcels.

  ii. Recording Acts—Will Be On Exam
  a) There are three major types of recording acts:
    • **Race**—priority among competing grantees of the same parcel of land is determined solely by the order in which the grantees recorded. Very few states are like this.
    • **Notice**—a subsequent bona fide purchaser prevails over an earlier grantee who has failed to record so long as the later purchaser has no actual or constructive notice of the prior transaction at the time of his purchase. In about half the states.
    • **Race-Notice**—subsequent grantees who purchase without notice are protected against prior purchasers who have failed to record, so long as the record prior to the previous grantee. In about half the states.
  b) **Shelter Rule**—C enjoys the shelter of B's valid title in the following hypo
    • O -->A (does not record)
    • O -->B (without notice of O --> A)
    • B records deed
• B --> C
c) **Wild Deeds**—deeds not in the chain of title (recorded too early or too late)
  • Recorded too early example—In this hypo X recovers because X had no notice and took for value
    • O --> A (O does not own)
    • A records (wild deed because its recorded too early)
    • OO (the real owner) -->O (Estoppel by deed—this is by operation of law, but nothing actually happens on the land records, so A should re-record if he knows that O doesn't acquire the property until this point.)
    • O -->X (without notice of O -->A)
  • Recorded too late example—In a contest between B and Z, Z will win in the majority of jurisdictions because Z takes without notice
    • O-->A
    • A-->B
    • B records A-->B
    • O-->Z who takes without notice of O-->A and Z records
    • B records O-->A

iii. ** Marketable Title Acts**
  a) In addition to removing clouds on title, marketable title acts may also eliminate what might otherwise be a valid claim to ownership had it been asserted earlier.
  b) Although adverse possession has cleared more title defects than any other legal devise, those who hold title by adverse possession often have trouble selling their property to a buyer who insists upon marketable title. Owners without a valid deed are ordinarily required to go through a formal legal proceeding to quiet title before they can establish marketable title. A successful action to quiet title concludes with the court issuing what is in effect a new deed from the sovereign to the adverse possessor.

iii. ** Curative Acts**—statutes that cure relatively minor defects in deeds--Some states have rules like, “no challenge can be brought to a deed for not being witnessed after two years pass.” or for things like not being notarized.

E. **Fraudulent Transfers**
  i. **Forged Deeds**
    a) A forged or wild deed can gain priority over a legitimate deed through the operation of a marketable title act. However, such a result can occur only if the true owner fails to enforce his or her right over a long period of time. If the true owner objects in a more timely fashion, nothing will validate a chain of title that originates in a forgery, even if the ultimate owner is a bona fide purchaser for value who acquired the property without notice of the fraud.
    b) Recording a deed is usually said to give rise to a rebuttable presumption that the deed is valid, but proof of forgery will always overcome that presumption.

ii. **Deeds Fraudulently Acquired**
    a) So long as the land in question is held by the grantee, a fraudulent deed is void, or at least voidable.
    b) Once the land is conveyed to a bona fide purchaser without notice of the fraud, the bona fide purchaser will prevail if the defrauded party was sufficiently negligent to share part of the blame. He will be stopped from challenging the BFP's deed. The grantor will not be able to reclaim the land, but will still have a cause of action against the grantee if it can be found.
    c) Fraud in the factum fraud over what it is you are signing. It renders the deed void between the original parties. But if a BFP exists, the question turns to whether or not the defrauded party was negligent.
    d) Fraud in inducement is fraud about what inducing the signing. It creates voidable title.

F. **Anti-Discrimination Statutes**
  i. When the property at issue is residential, civil rights statutes may limit the ability of the seller to discriminate on the basis of race or other immutable characteristics.
  ii. 42 U.S.C 1982—all citizens should have the same rights as white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. This applies to both public entities and private citizens.
  iii. *Jones v. Alfred H. Mayer Co.* is the first case holding that the 13th Amendment applies to private citizens as well as the government.
  iv. Fair Housing of 1968 passed by congress under premise that congress has commerce clause grounds to pass it. The modern authority, in light of *Alfred Mayer* extends 13th Amendment justification for Fair Housing Act.

G. **Real Estate Transactions**
  i. **Land Sales Contract**
    a) **Requirements**
      • must be in writing
      • Exception for part performance on contract—buyer pays the price, or buyer improves the property, or buyer takes possession—something like that. Normally requires 2 out of 3
      • must be signed by grantor
      • must contain essential terms
• some description of property
• some description of the parties
• price
• must express an intent to convey

b) Defects in the Premises—What remedy does the buyer have?
• Traditional rule is buyer beware—no duty to disclose
• There is a duty not to conceal or actively misrepresent
• Misrepresentation: Statement of material fact that is known to be false, intending the person to rely on representation
• Affirmative Concealment—putting extra coat of drywall over a massively defective wall
• In minority of jurisdictions there is a duty to disclose latent defects—those that are not readily discoverable

ii. Executory Period—between signing of sales contract and closing
   a) What's going on at this time?
      • Buyer is trying to get financing
      • Seller is getting title search for marketable title
      • Buyer is inspecting
      • Seller is fixing flaws
   b) Who owns the property?
      • Title belongs to the seller, but that's all the seller has. Their interest in the property has really been reduced to an interest in the sales price in the contract. So its a personal property interest
      • The buyer has a real property interest, and they are equitably converted into being the true owner of the premises. So if the home burns down during this period the risk falls to the buyer, not the seller. So the buyer takes out property insurance for this period of time. ALSO, this is only a presumption, so it can be contracted around

iii. Marketable Title
   a) does not mean that there is 100% certainty that the owner has clear and perfect title
   b) does not mean that there are no encumbrances
   c) DOES mean that title will not be marketable if
      • a reasonable person knowing all the facts would be justified in believing that the seller does not own the whole title alleged, or
      • if there are encumbrances that were not disclosed
      • if there is an unreasonable risk of litigation

iv. Remedies if the deal falls through (no closing)
   a) Real property is unique so specific performance is available for a buyer where a seller refuses to sell. In some jurisdictions this goes both ways (mutuality of remedy).
   b) Actual damages are also available.
      • Measured for the buyer as fair market value minus price.
      • Measured for the seller as price minus fair market value.
   c) Sometimes the parties will agree on damages up front = liquidated damages. These have to be reasonable and are available

H. Title
   i. Three types of deed--
      a) Quick claim—no covenants
      b) Special Warranty—against defects arising out of the grantor's ownership
      c) General Warranty—against all types of defects—has all six covenants
   ii. Deeds must
      a) identify the parties
      b) intent to transfer
      c) signed by grantor
      d) describe the land
         • meets and bounds
         • government survey
         • plats
      e) witness requirement (some states)
      f) NOT required to state the price
   iii. Covenants of Title
      a) Present—breached at time of closing—only original buyer can raise a claim as to these
         • seizin—own the thing trying to sell
         • right to convey
         • no undisclosed encumbrances
      b) Future—run with the property—can be enforced by successors
         • quiet enjoyment—buyer will not be disturbed by a third party asserting a valid claim to the property
• warranty
• further assurances

iv. Delivery Requirements
   a) Title is effective when it is delivered
   b) Title does not pass without delivery (grantor's intent is key)
   c) There is a rebuttable presumption of no delivery if deliverer maintains possession
   d) Third party (escrow agent, for example) it depends whether or not you have the power to retrieve it from the third party, then no delivery
   e) Deed actually has to be accepted (acceptance is presumed any time the transfer gives a benefit to the grantee. You can only refuse at the time of delivery)

I. Newly constructed housing has a warranty of habitability, but if you buy an old house, you're screwed unless there is an express warranty in your sales contract

J. Technically the contract and the deed merge at closing. So you would sue on both as merged after closing.

K. All of the information on recording WILL BE ON THE EXAM, SO LEARN IT!!!!

VI. CHAPTER 6: SHARED OWNERSHIP OF REAL & PERSONAL PROPERTY

A. Concurrent Estates
   i. Three Types of Concurrent Estates—more than one person has the same interest in the same parcel of property
      a) Joint Tenancies—equal and undivided interest to possess the whole, must have equal shares, right of survivorship, can be severed (if only two joint tenants, the resulting estate will be a tenancy in common, if more than two the remaining joint tenants will continue in joint tenancy, while the new tenant will be a tenant in common)
      b) Tenancies in Common—ownership is undivided, not required to have equal shares (can be something like a 70/30 split), goes to heirs
      c) Tenancy by Entireties
   ii. Under modern law, if a conveyance is made from O to A and B, the result is a tenancy in common.
   iii. Survivorship—If A and B are joint tenants and A dies, B acquires A's interest rather than A's heirs

iv. Joint Tenancies and Tenancies in Common
   a) Both are forms of ownership in which the property is undivided, but a joint tenancy differs from a tenancy in common in two important respects
      • Joint tenancy includes a right of survivorship while tenancy in common does not
      • All joint tenants have identical fractional interests in the property while the interests of tenants in common need not be identical
   b) To create a valid joint tenancy, the traditional rule was that four unites must be satisfied
      • unity of time
      • unity of title
      • unity of interest—equal interest
      • unity of possession
   c) Traditionally,
      • if any of the unities are missing, the parties create a tenancy in common which requires only unity of possession.
      • if any of the unities are destroyed, the joint tenancy is severed and becomes a tenancy in common.
   d) There is a modern trend toward a relaxation of the requirements and a greater focus on the intention of the parties. This means that today only unity of interest and unity of possession are required for joint tenancy, along with intent to create a joint tenancy.
   e) What can sever a joint tenancy?
      • A will cannot sever a joint tenancy because of the right of survivorship.
      • The joint tenants can agree to sever the joint tenancy.
      • B could sell his interest to a third party. If B sold to C, the joint tenancy is severed, and then A and C are tenants in common.
      • Jurisdictions are divided as to whether leasing of the interest severs the joint tenancy
      • In an equitable conversion state, a contract for sale will sever joint tenancy
      • If you are in a lien theory state a mortgage will not sever, but if you are in a title theory jurisdiction like MO then the “mortgage” may sever because you are conveying the title to a third party.
      • Attachment by a creditor is not enough in most jurisdictions

v. Rights of Concurrent Tenants
   a) In most jurisdictions a cotenant must be ousted from the property before he or she can bring an action for the reasonable rental value of property that is occupied by a cotenant in sole possession.
   b) Absent an agreement, a cotenant in possession is not entitled to contribution from non-possessory cotenants for repairs or improvements, but in an accounting to his cotenants he will normally have the right to off-set the costs of necessary repairs against income derived from the property.
   c) Ordinarily an individual tenant in a co-tenancy is entitled to profits from his activity on property unless you've
ousted the other tenants, in which case you have to pay them fair rental rates. In the case of minerals or other natural resources you must account to the others, however, on the theory that the removal of those sort of resources decreases the value of the property. Everyone is entitled to their share of third party rents.

d) Any joint tenant or tenant in common has the right to bring an action for partition. This is the right of one co-tenant to seek partition which includes the sale and division of the proceeds, or the physical division of the parcel into separate equal shares.

e) Expenses include:
   • Taxes—each has a duty to pay a share equal to their ownership interest for taxes and mortgage. The co-tenant in possession has the duty to pay, and then they have to seek reimbursement from the other co-tenants.
   • Repairs—Majority of jurisdictions hold that a tenant is entitled to contributions for necessary repairs. If you make repairs that are not necessary you are not entitled to contribution for those unnecessary repairs.
   • Improvements—You are not entitled to contribution for unnecessary improvements, but then you are entitled to increased profits attributable to those improvements at the time of sale.

f) To establish adverse possession to get title to the whole you would have to oust your cotenants or come up with some sort of hostile claim to sole ownership and put the other tenants on notice.

vi. Condominiums and Common Ownership

a) Condominiums differ from traditional tenancy in that condominium owners are almost always prevented by statute from either forcing a partition of the common areas or from transferring their interest in the common areas separate from their interest in their primary unit.

b) Condos are covered by state statutes.

c) TX court does not extend joint and severable liability for common areas. They only do a pro-rata share.

B. Marital Property

i. Tenancy by the Entirety

a) Presumed when a married couple acquires property

b) A tenancy by the entirety (tenancy by the entireties) can be created only between husband and wife.

c) It resembles a joint tenancy and includes the right to survivorship with the requirement of a valid marriage functioning as a fifth unity

d) Because it was originally rooted in the legal fiction that husband and wife were one person, it differed from the joint tenancy in that it could not be severed by the actions of one party—if either husband or wife attempts to transfer their interest, the attempted transfer fails.

e) Neither party has the right to request a judicial partition

f) Land is held beyond the reach of creditors of either husband or wife (but obviously not creditors of both)

g) Property held by tenants by the entirety is subject to a federal tax lien against one of the owners.

h) A valid divorce terminates an estate of tenancy by the entirety. Then it becomes a tenancy in common.

i) How Can it be Severed
   • mutual agreement
   • attachment by a MUTUAL creditor in a title jurisdiction
   • death by one spouse will convert to a fee simple absolute
   • divorce—resulting estate is a tenancy in common (unless divorce settlement distributes this otherwise)

ii. Other Forms of Marital Property

a) In the majority of jurisdictions a professional degree acquired during the marriage is not considered marital property and is not subject to division upon dissolution of the marriage. (New York is the exception)

b) Many jurisdictions will allow for reimbursement alimony which reimburses for the actual sacrifice of the non-degree seeking spouse when the degree-holding spouse is seeking that degree.

C. Present Estates in Land and Future Interests—See Chart at End of Outline

i. The Estate Concept

a) Fee Simple Absolute
   • highest form of estate
   • The duration of the owner's ownership is potentially infinite (fee); there are no restrictions on the inheritability of the property (simple); and no event will automatically divest the owner of his interest (absolute).
   • When an owner possesses an estate in fee simple absolute, no future interests are held by anyone.
   • Historically required a writing which made use of the phrase “and his heirs,” or it would be considered a life estate, but this requirement no longer exists

b) Present estates less than fee simple include the life estate and the estate for years (commonly referred to as a leasehold and available for any duration). In addition, some states still have fee tail.

c) Reversions are retained by the original grantor while remainders created for third parties by the original grantor. Remainders and reversions always take effect immediately upon the expiration of the proceeding estate.

d) Reverter= To A so long as A does not use the land to sell liqueur. A sells liquor. Goes back to grantor.
e) The estate for years, periodic tenancy, tenancy at will, and tenancy at sufferance are non-free-hold estates. Holders of these estates have only possession, and thus was treated as a chattel interest.
f) life estate and fee tail are freehold estates. The holder of a freehold estate has “seisin” (legal ownership). Thus it was treated as a real property interest.

ii. Duties of Life Tenants
a) Life estates may be created either for the life of the grantee or for the life of a third party. Because of the uncertainty in regard to their length, life estates are rarely used today, except in the context of transfers between members of the same family.
b) The holder of the life estate has the exclusive right of present possession and the use of the property and can exclude all others, including the holder of the reversion or remainder.
c) The life tenant does not have the right to change the fundamental character or to diminish the economic value of the land subject to the life estate.
d) The doctrine of waste is designed to protect future interest holders who, while not having the present right to use the land, have a substantial interest in it. If waste occurs, the holders of future interest may enjoin the conduct that constitutes waste, and they may recover damages.
e) Two types of waste
   • affirmative (voluntary) involves the destruction of buildings or structures on the land or the exploitation of natural resources
   • Permissive (involuntary) occurs when the present estate holder allows the property to fall into disrepair or fails to make reasonable measures to protect the property from harm.
f) A life tenant has at least a limited duty to make repairs on the property and to pay taxes, mortgage interest, and special assessments.
g) If the holder of the life estate and the reversioner or remainders agree, the life estate can be terminated and a fee simple absolute can be sold to a willing buyer.

iii. The Law of Remainders
a) contingent remainders
   • Remainders are contingent if there is an unsatisfied condition precedent, or if it is not yet possible to ascertain the identity of the remainderman. A condition precedent is a condition expressly stated in the document creating the remainder which must be satisfied before the remainder interest can become possessory. However, the termination of the previous estate is not a condition precedent.
   • The holder of a contingent remainder is normally not required to survive the previous estate. For survivorship to be a condition precedent, it must be specifically so stated in the instrument creating the interest.
   • O --> A for life, then to B if B has graduated law school. A dies before B graduates. The land goes to O through reversion. Then B graduates law school. Under the modern rule, O has it under FSSEL. When B graduates law school, he gets the land.
   • Used to be a rule that B would not have gotten the land—see destructibility of contingent remainders
b) vesting of remainders
   • A contingent remainder becomes vested when there are no remaining conditions precedent and when the holder of the remainder can be ascertained. It is not necessary that the holder of the remainder be eligible to take immediate possession for a contingent remainder to vest.
   • Unless there is a vested remainder in fee simple absolute, the original grantor retains a reversion.
c) destructibility of contingent remainders
   • Under the traditional rule, all contingent remainders were required to vest at or before the termination of the preceding estate or else they were destroyed. Today most states have done away with this.
   • It is also possible to destroy a contingent remainder through the principle of merger. If ), the fee simple owner of Blackacre, transferred a life estate to A, he divided his interest into a present estate and a vested future interest (a reversion). If the present estate and the reversion were transferred to a common owner, the component parts merged back into an estate in fee simple absolute. In the past, merger did not require the party reassembling the component parts to acquire title to contingent future interests. Today most states no longer permit the destruction of contingent remainders via this method.
   • The Rule in Shelley's Case: It provided that if O conveyed or devised a life estate in land to A with a remainder to the heirs of A in fee simple, the remainder interest went to A, not A's heirs. Consequently, A's life estate and the remainder then merged into a present state fee simple absolute, and A was able to transfer complete title if he chose to do so.
   • O --> A for life then to heirs of A becomes O --> A for life, then to A
   • O --> A for life, then to heirs of O becomes O --> A for life, then to O. Both of these can be used for estate tax evasion. Also, if O survives A, we may not know who O's heirs are at the time of A's death.

iv. The Transfer of Future Interests
a) While ordinary life estates cannot be passed along at death, life estates pur autre vie may be. Thus, if O transfers Blackacre to A for the life of B, and A dies before B, the estate would pass to A's heir or to whomever A designated if he had a valid will. This process could continue until the death of B, at which time the right of
present possession would revert to O, or to whomever held O's interest. O's reversion could have been sold or passed to another party at the time of O's death.
b) All future interests can be transferred by will or by deed. As a general rule, restraints on the alienation on future interests imposed by private parties are unenforceable.
c) Life estates pur autre vie = life estate for the life of another (A to B for the life of C)

v. The Rule Against Perpetuities
a) Effort to limit dead hand control
b) To be valid certain future interests must vest, if at all, not later than 21 years after a life in being
c) Certain future interests are not subject to the RAP
   • Any interest in the grantor
   • Vested remainders (except the vested remainder subject to open)
d) Subject to the rule are:
   • Executory interests
   • Contingent remainders

e) If executory interests or contingent remainders MAY vest 21 years after a life in being, then the interests are void from the beginning. Its irrelevant what actually happens.
f) Example: O --> A for so long as used for residential purposes (fee simple determinative), then to B
   • A has fee simple subject to an executory limitation (alienable)
   • B has the executory interest (alienable)
   • This property could be held by A or A's heirs for generations. But if at any point in the future it were not used for residential purposes, it would go to B or B's heirs. BUT B's executory interest is subject to the RAP, so since its possible that B's interest may not vest within 21 years of a life in being, B's interest is void.
   • So when B's interest is void, then A's interest is fee simple determinable with a possibility of reverter in O.
   • A has FSD so its fully alienable to A's heirs. O has a possibility of reverter, so that is alienable to O's heirs.
g) Example: O --> A but if the property is not used for residential purposes, then to B.
   • "Then to B" drops out because of the RAP, so you are left with O--> A but if the property is not used for residential purposes—incomplete language
   • When there is an incomplete condition subsequent, it all drops out and you're left with a fee simple absolute in A
h) Example: O--> A but if the property is not used for residential purposes, then to O.
   • "then to O" is not subject to RAP because grantor's future interests are considered to have vested at the time of the original conveyance.
i) Example: O --> A for life, then to AA for life, then to AAA for life, etc
   • Those are contingent remainders if the remaindermen (AAA, for example) are not known under RAP time limit, so its a no go
j) Example (vested remainder that falls under RAP): O --> A for life, then to the grandchildren of A, and A has one grandchild at the time of the initial conveyance. So you have a vested remainder subject to open. The class of A's grandchildren may grow. It is possible that the interests of other grandchildren would not vest within 21 years of a life in being. If A dies, and one of A's children has a child 22 years after A dies, RAP
   • The traditional rule is that the entire gift would fail
   • Modern rule is to allow those interests that do vest or have vested at the time of A's death to take, and not to invalidate the entire class gift

k) What is the life in being? It can be any person who is alive at the time of the conveyance.

l) Modern Modifications to RAP
   • Wait and See approach—wait and see, and if the interest does indeed vest within 21 years then the RAP doesn't put the smack down.
   • Under the uniform statutory rule, any interest that vests in under 90 years is good to go
   • Courts may modify the conveyance to make it ok under the RAP

D. Concurrent Ownership
i. Common Ownership
   a) See Appendix 3
   b) In the majority of jurisdictions a lease will not sever a joint tenancy, and the lessee will only have an interest as long as the life as the party who leased it to him/her b/c of right of survivorship.
   c) In a lien theory state a mortgage will not sever a joint tenancy, but in a title theory state a "mortgage" (really a deed of trust) WILL sever a joint tenancy.
   d) Tenancy by Entireties is only for married couples.
   e) Unities
      • Unity of time: Used to be that for joint tenancy the interests had to be acquired at the same time
      • Unity of title: Used to have to take possession on same deed
      • Still have unities of interest and possession
   f) The joint tenancy and tenancy by entireties are frequently used as a will substitute.
g) One joint tenant murdering another terminates the right to survivorship, but it does not terminate the murderer's interest. If there is a simultaneous death and the joint tenants have different heirs then the right of survivorship is terminated and they can devise their share of the estate to their own heirs.

ii. Rights and Duties of Co-Tenants
   a) Possession
      • Each Co-Tenant has equal right of possession
      • Adverse Possession by one co-tenant requires more than mere ouster of others
      • Refusal of Demand to share possession
      • Notice of hostile claim for sole ownership
      • Attempt to convey ownership of entire estate
   b) Profits
      • Own efforts
      • Each co-tenant is entitled to profits from his own use of the property
      • No duty to pay rent unless the co-tenant has ousted others
      • Third party rents--All co-tenants are entitled to proportionate share of rents
   c) Expenses
      • Taxes, insurance, and mortgages
      • Each co-tenant must pay proportionate share
      • Co-tenant in possession must first pay and then seek reimbursement
      • Necessary repairs—each co-tenant must pay proportionate share (majority view)
      • Improvements
      • No right to contribution from co-tenants
      • Co-tenant who improves property entitled to increased value attributable to improvements (but you aren't entitled to the cost of your improvements)
   d) Remedies
      • Accounting
      • Co-tenant who rents to third party must share profits
      • That co-tenant can deduct for costs of taxes, insurance, mortgage, and necessary repairs
      • Partition—file judicial action to have court settle the issue
      • In kind—divide up property
      • By final sale—divide up profits of the sale of the property
      • Settlement upon Final Sale
      • Costs: Co-tenant reimbursed for costs of taxes, insurance, mortgage, and repairs
      • Improvements: Co-tenant who improves entitled to increased value attributable to improvements (but you aren't entitled to the cost of your improvements)

E. Present Estates and Future Interests
   i. Present Possessory Estates
      a) Fee Simple
         • Absolute—you own it from now until infinity
         • Defeasible—conditional present possessory estate
         • Fee simple determinable—if the condition is no longer satisfied then the estate will terminate (form O to A for so long as is used as a baseball diamond. O has an automatic reverter if condition is not met)
         • Fee simple subject to a condition subsequent—to O A so long as is used as a baseball diamond, but if it is not, O has a right of re-entry
         • Fee simple subject to an executory—grantor retains nothing, and if the condition is not satisfied it goes to a third party
         • Fee tail—NOT ON EXAM
      b) Life—an estate that you have for the length of a life
         • Own—have the estate for grantee's own life.
         • Autre Vie—for the life of someone else (not very marketable)
      c) Term—landlord tenant material; really only a right of possession
         • Years—for 99 years, for 5 years, etc (any fixed duration)
         • Periodic—week to week; month to month
         • Will—at will (GUNN DOESN'T REALLY CARE ABOUT)
         • Sufferance—holdover tenancy

F. Future Interests
   i. Grantor
      a) Possibility of Reverter (FSD)
      b) Right of Entry (FSSCS)
      c) Reversion (Life Estate)
   ii. Third Party
      a) Executory Interest
      b) Remainder (Life Estate)
Vested—
- Absolutely (From O to A for life, and then to B, if B is in existence at the time of the original conveyance)
- Condition Subsequent (From O to A for life, and then to B, but if B is disbarred, then to C)
- Subject to Open—from O to A for life, then to A's grandchildren where A has one grandchild but could have more grandchildren
- Contingent
  - Condition precedent (from O to A for life, and if B has graduated law school, then to B)
  - unascertained person (to A's children (if the kids haven’t been born yet))

iii. “and A's heirs” are not words of purchase, they are words of limitation. Words of purchase say who's getting it, words of limitation say what kind of estate you are getting.

G. Waste
i. affirmative or voluntary—actually do something with the property that is wasteful (like tear down a mansion and replace it with a chicken coop)
ii. permissive—negligence—just where you let the property get run down
iii. ameliorative—tare down the sentimentally valuable $3million house and replace it with a $10million mansion
iv. Economic waste—the life estate holder can’t afford to keep the property up, so he can sue to get permission to do something more economically beneficial with the property

H. Special Rules of Construction
i. Destructibility of contingent remainders—traditional rule was that if a remainder was contingent and the contingency wasn't satisfied at the death of the previous estate the contingent remainder was gone. Not the case anymore. Now becomes a springing executory interest.
ii. Merger—holder of present estate acquires the future interest, so they merge, or visa versa
iii. Rule in Shelley's case—It provided that if O conveyed or devised a life estate in land to A with a remainder to the heirs of A in fee simple, the remainder interest went to A, not A's heirs. Consequently, A's life estate and the remainder then merged into a present state fee simple absolute, and A was able to transfer complete title if he chose to do so.
iv. Doctrine of Worthier title—from O to A for life, remainder in O's heirs, becomes from O to A for life, in which case, O has a reversion

I. Rule Against Perpetuities—Future Interests Subject to RAP
i. Executory Interests
ii. Contingent Remainders
iii. Vested Remainders subject to open

VII. CHAPTER 7: LANDLORD & TENANT: HOUSING AS A PUBLIC UTILITY
A. The Landlord Tenant Relationship
i. Types of Tenancy
  a) Tenancy for years—
     - definite term, fixed in advance
     - Creation
       - express agreement
       - If more than a year, generally must be in writing
     - Termination—Automatically at expiration of term
  b) Periodic tenancy (month to month tenancy)—
     - an estate for a fixed period of time which continues for periods equal to the original one unless either the landlord or tenant give notice of an intention to terminate the estate (rarely less than a week or more than a year). If its month to month, each month is a new tenancy. It can be terminated upon the giving of notice by either party, and ordinarily the length of the notice required is the length of the tenancy itself. One huge caveat, is termination for fault (like not paying your rent) which doesn't fall under that rule. There is no need for a new agreement each month—a new tenancy will just spring up if the tenant retains possession and the landlord acquiesces (absence of any affirmative act to dispossess the tenant)
     - Indefinite duration; fixed length of recurring period
     - Creation
       - Express agreement OR
       - Implication
     - Termination
       - Notice Required
       - Minimum time before end of recurring period
  c) Tenancy at will—
     - an arrangement whereby either the landlord or the tenant can terminate the estate at any time (if only one party has the right to terminate, it is not a tenancy at will)
     - Permissive Possession without any agreement regarding term of tenancy
• Terminable at any time by either party (in some jurisdictions notice is required, but in those jurisdictions it really resembles a periodic tenancy)
• Not very common

d) **Tenancy at sufferance** (holdover tenant)—
• when an estate holder remains on the land after the expiration of his or her estate. The holder can be evicted at any time. No fixed term (day to day—however long it takes landlord to evict tenant or agree to a new tenancy). Can't be treated like a trespasser. In order to be dispossessed the landlord has to bring a judicial action for eviction.
• Wrongful holdover after termination of prior tenancy
• Distinguished from trespass
• Terminable by landlord upon giving of notice

ii. Covenants
a) Seller
• seisin
• right to convey
• against encumbrances
• warranty
• quiet enjoyment
• further assurances

b) Landlord
• “seisin”
• right to lease
• no third party with paramount legal right of possession:
  • landlord will not prevent tenant from taking possession
• quiet enjoyment
• implied warranty of habitability (no covenant of usability for certain purpose)

iii. **Lease for Intended Use**
a) Under common-law, a purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities.
b) Under common-law, there is no implied warranty that leased premises are fit for the purposes for which they are let. When an action is based on fraudulent concealment, a duty to disclose the truth must be shown. The rule of *caveat emptor* applies in the relation of landlord and tenant unless material representations constituting fraud are specifically alleged, or there is a showing of a fiduciary relationship between the parties.

iv. **The Duty to Put the Tenant Into Possession**
a) Landlord Tenant relationships are more and more so being covered by contract and consumer protection law rather than property law
b) Traditionally, if what a landlord is conveying is an estate for years, the tenant has the legal right of possession and thus has the responsibility/right to oust unlawful third-parties. Under modern law, its up to the landlord put the tenant into possession.
c) “**American Rule**”: rarely used anymore—was more common when tenant relationships were just regarding land, rather than housing—if someone has wrongful possession of the property the tenant has a cause of action against them for damages and possession, but does not have a cause of action against the landlord, nor a basis for termination of the lease.
d) **English Rule**: The landlord must ensure that the tenant can take actual possession at the start of the lease. This applies unless specifically negated in the lease.
e) Landlord's duty to Deliver Possession
• Legal Possession: Implied covenant that no third party has legal right of possession paramount to that of tenant—American and English Rules: Yes
• Actual Possession: Implied covenant that no third party will have actual possession at inception of tenancy.
  • American Rule: No
  • English Rule: Yes
  • URLTA: Yes

v. **Sublease and Assignment**
a) Assignment
• Complete transfer of all interests in lease
• Assignee in privity of estate with landlord
• Assignee liable to landlord for breach of lease
b) Sublease
• Tenant retains reversion
• Sublessee not in privity of estate with landlord
• Sublessee liable to sublessor, but not landlord
c) Formalism vs. Intent of Parties

d) Right to Transfer

- Presumptive right to assign or sublease
- Restrictions
  - Complete restraint on alienation disfavored
  - Requirement of landlord consent = OK
    - No reason necessary
    - What are tenant's remedies if landlord refuses consent?

B. Abandonment and Constructive Eviction

i. Abandonment

- Tenant still owes rent unless landlord accepts tenant's surrender
- What constitutes acceptance?
  - Reletting alone insufficient if landlord has duty to mitigate damages
  - What else would be sufficient? A letter saying “I accept your surrender.”

ii. Landlord's Duty to Mitigate

- Traditional Rule
  - May constitute unwanted acceptance
  - Lease is complete conveyance such that landlord has no possessory interest
  - Unfair to require landlord to act
  - Abandonment invites vandalism
- Modern Rule: Yes Duty Exists
  - Reletting promotes economic efficiency
  - Punitive contract damages disfavored
  - Mitigation of damages favored in contracts (and torts)

- What is extent of duty and who bears costs?
  - Have to take proactive steps to let the apartment?
  - Tenant who abandoned is responsible for the costs.

iii. Constructive Eviction

- Covenant of Quiet Enjoyment
  - Breached by:
    - Acts or omissions by landlord that so substantially interfere with tenant's
      - possession or
      - use and enjoyment of the premises
    - As to
      - physically dispossess tenant or
      - justify tenant's abandonment
  - Cannot be waived

- Constructive eviction arose as a court-imposed limitation on the acts or omissions that give rise to claims of constructive eviction very, but generally include problems with heat, gas, electricity, running water, hot water, and waste disposal. Many courts use local housing codes.

- Move out requirement: Courts have experimented with ways to get out of this.
  - Massachusetts utilizes equitable constructive eviction that allows a tenant to remain in possession and still receive equitable relief declaring constructive eviction. So if one would normally leave, but doesn't have the means to abandon, then they can recover.
  - Partial constructive eviction—tenant must vacate only the affected portion of the premises and recovers a prorated portion of the rent.

C. Contemporary Issues in Landlord-Tenant Law

i. The Implied Warranty of Habitability

- Duty to put and keep premises in condition fit for human habitation
- Breached by landlord's failure to remedy or repair substandard conditions that materially affect tenant's health or welfare
- Elements
  - Existence of condition materially affecting health or safety
  - Tenant did not cause condition
  - Landlord had actual or constructive notice (doesn't have to be actual if the landlord SHOULD have known)
  - Landlord fails to remedy or repair condition within reasonable time after notice
  - Injury—some actual material effect on health or welfare.

- Remedy for Breach of IWH
  - May warrant termination of tenancy by the tenant
  - Repair and deduct (some states, including MO)
  - Rent withholding—if a tenant simply doesn't pay rent, the eviction is not retaliatory, so other options:
    - Payment of rent into court? Works pretty well, but you have to be suing the landlord to do it.
• Payment of rent into escrow account? Uncommon b/c requires tenant to come up with many months rent at a time and is pretty draconian.
• Suit for damages and injunctive relief
• Measure of damages = contract rent minus actual value
• Housing code remedies—ordinarily enforceable by criminal penalties
e) Cannot contract around the warranty of habitability

ii. Landlord Responsibility for Crime
a) One can not generally be held liable for the criminal acts of a third party unless
   • Special relationship—inkeeper/guest; common-carrier/passenger—does not apply to landlord/tenant relationship
   • Opportunity for criminal misconduct—like known physical defect on premises (can apply to tenant/landlord)--Landlord doesn't fix the window he broke
   • Overriding foreseeability--(can apply to tenant/landlord)
   • Voluntary assumption of duty(can apply to tenant/landlord)--Landlord installs parking lot lights and then doesn't keep them in good repair.

b) There is no unanimity between states on this issue. The exceptions above are the kinds of exceptions you may see in states that are actually willing to do something about this issue.

D. Statutory Intervention in the Landlord Tenant Relationship

i. The Modern Urban Housing Code
   a) Retaliatory Eviction
      • Housing codes require the maintenance of housing in good condition, the provision of necessary facilities, and limit occupancy by requiring a minimum amount of space for each occupant of a dwelling.
      •Most code enforcement agencies rely heavily on private reporting of code violations as the basis for their code enforcement programs. However, tenants in substandard housing run a risk of eviction if their landlord discovers that they reported code violations in his property. Because most of these tenants do not have a lease and are usually on a month-to-month tenancy, there is nothing to prevent their eviction under standard common-law rules.
      • Today there are statutory rules that protect tenants for a period of time from retaliatory eviction after they have participated in a protected activity like filing a housing complaint, joining a tenant's union, etc. These rules basically say there is a presumption of retaliation and puts it on the landlord to prove he/she wasn't retaliating.
      • There are exceptions, including tenant wasn't paying rent. Tenant would prevail, however, if could show breach of habitability.

b) Types of Federal Housing for the Poor
   • Public Housing—aka the projects—designed to be temporary in nature—owned by gov't
   • Project Based (Section 8)—housing that is constructed and owned by private landlords and is subsidized to one degree or another by the government (Section 8 of the housing act of 1947)--get grants to construct or rehab housing—rent is set at 30% of adjusted household income and gov't pays the rest. The subsidy is with the unit
   • Tenant Based Section 8 vouchers—tenants can use these on the market to cover the difference between contract rent and 30% of tenant household income. In most states landlords can refuse to take these vouchers.

c) Many states replicate these three types of housing on the state level

d) The modern trend is toward tenant based vouchers. In Chicago there has been a demolition of 10s of thousands of public housing units

e) There are two types of poor—those who have benefits and those who don't. Its not an entitlement. There are long waiting lists. In urban areas they are years long. The list isn't even open in STL.

E. Property Interests
i. Tenant: Present possessory estate
ii. Landlord: Reversioner
   a) In fee simple
   b) In life estate
   c) In leasehold (subleases)

VIII. CHAPTER 8: RIGHTS TO USE THE LAND OF ANOTHER

A. Easements
i. Servitudes
   a) Rights to use land of another
      • licenses: temporary invitations (revocable at will)
      • Easements: more permanent rights of access
      • profits—right to use the land of another attached with a right to remove material from the premises or otherwise commercially benefit from the land
   b) Limitations or burdens on use of land
• negative easements
• restrictive covenants
• equitable servitudes

ii. Substantive Limitations
• Negative easements
  • traditionally disfavored
  • Now accepted in many contexts:
    • Light, air, lateral support, and artificial streams
    • Conservation easements
    • Historic preservation easements
  • Similar to restrictive covenants
    • Restatement (Third) of Property (Servitudes would eliminate distinction between restrictive covenants and negative easements

iii. If a private land owner allows a continuous access to his/her land that is uninterrupted for a long period of time the public acquires a proscriptive easement and the owner will be precluded from barring access to that land.

iv. Easements Appurtenant
  a) Appurtenant easements “run with the land”
    • Benefit runs to future owners of dominant estate
    • Burden runs to future owners of servient estate
  b) Easements will run with the land if:
    • Parties intended easement to run with the land
      • language of deed or other conveyance
      • surrounding circumstances
    • Reduced to writing
    • Future owners of servient estate has notice of easement—actual, constructive, and inquiry notice
  c) Scope of Easement—The extend of an easement created by a conveyance is fixed by the conveyance. First you look to the language of the grant itself, but if there is not enough info there, then you can go to surrounding circumstances.
    • Intent of Grantor—determined by language, surrounding circumstances, conduct of parties
    • Manner of use
      • kind of use
      • quantity or intensity of use
    • Overburdening—reasonable use
    • Divisibility, extensions, and relocation
  d) When an easement is appurtenant and the dominant estate is subsequently divided into parcels, each parcel has right to use “as long as the easement is applicable to the new parcel, and provided the easement can be used by the parcels without additional burden to the servient estate.” So generally additional cars on a right of way won't be an additional burden unless it is unreasonable (going from 3 cars a day to 47 Army tanks)
  e) In VA if it is an easement appurtenant it is automatically conveyed along with the dominant estate by statutory law. It is appurtenant if the language of the document itself supports it being an easement appurtenant. Clear language for a deed includes phrases like, “and their heirs and assigns”

v. Easements in Gross--
  a) Easements in gross are not linked to ownership of a particular state (really is no dominant estate)
  b) There may be the intent that the burden will run with the servient estate, but the benefit is to an entity, not a dominant estate, so there is no dominant estate for the right to run with.
  c) The easement in gross is presumed personal to its holder and is usually not transferable. The intent of the parties is what is most important, though.
  d) Apportionment
    • Exclusivity Test
      • Apportionable if exclusive i.e. Owner of servient estate has no right to use easement in same way as easement owner
      • Not apportionable if nonexclusive, i.e., owner of servient estate retains right to conduct same use as easement owner over same land
    • Exception: “One Stock” rule—It is no apportionment (or division) to transfer an easement to two or more persons who will use it as “one stock.”
    • Restatement (Third) of Property (Servitudes)—Apportionable unless this s contrary to grantor's intent or division unreasonably increases the burden on servient estate.
  e) Transferability
    • Traditionally, easements i gross were not transferable
    • Under modern law, easements in gross are transferable if they:
      • serve a commercial purpose, or
• Were intended to benefit persons other than the immediate grantee
• Under Restatement (Third) of Property (Servitudes), all servitudes in gross are freely transferable (not necessarily the law)

vi. The Creation of Affirmative Easements
a) Express Easements—easement created by a writing. The writing is known as the deed of easement. May be created by grant or by reservation. The modern trend is to allow easements to be reserved on behalf of third persons. Creation of Express Easements is in writing:
  • Deeds
  • Easement only
  • Conveyance of land with grant or reservation of easement
b) Easements by Operation of Law
  • An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. Many states still require “strict necessity” for an easement by necessity, meaning that the proposed right of way must be the only access. A number of states have repudiated the common law’s insistence upon “absolute necessity” and have instead imposed a standard of reasonableness under which an easement will be implied where alternative means of access do exist but are too inconvenient or too costly to utilize.
  • Because there is no writing, it is necessary for the court to determine its scope. The general rule is that the scope of easement by necessity depends on the reasonable needs, present and future, of dominant estate as well as accommodation of full reasonable enjoyment of servient estate.
  • Strict Necessity: its the ONLY way to get to your property
  • Elements of Easement of Necessity
    • Former unity of title
    • Landlocked parcel (has no other access to public road than through servient estate)
    • No prior use is required.
  • Easement Implied by Prior Use
    • Former Unity of Title
    • Apparent and continuous use of “quasi-easement”
    • Reasonable necessity for easement for quiet enjoyment of dominant estate
c) Easements by Prescription
  • Since acquisition of an easement by prescription is analogous to the acquisition of title by adverse possession, the tacking of successive adverse uses is permitted.
  • Traditionally American law frowned upon the idea of a public prescriptive easement, however, this is changing.
  • Easement by Prescription must be: Open, notorious, continuous, and adverse and the owner of the servient estate must know about the use
  • Not as much of an exclusivity requirement as there is for adverse possession, if any at all

vii. Termination of Easements—Easements may be terminated in the following ways
a) Expiration by their own terms
b) Unity of title—merger of servient and dominant estates
c) Release by easement owner (in writing)
d) Abandonment—non-use coupled with some affirmative act evidencing the intent to abandon the easement
e) Frustration of Purpose
  • Purpose is impossible to accomplish
  • Easement no longer serves intended purpose
f) Estoppel—servient estate relies on expression by dominant estate holder that dominant estate holder would terminate the easement
g) Prescription
h) Lack of necessity (easements by necessity)
i) condemnation of the servient estate

B. Profits À Prendre
i. profits—right to use the land of another attached with a right to remove material from the premises or otherwise commercially benefit from the land

C. Licenses
i. Created formally or informally—compare dinner invitation with written grant
ii. The Revocation of Licenses
  a) revocable at will by the grantor under most circumstances, unless there has been substantial investment, in which case the court may deem the license irrevocable for a reasonable period of time...it may even become an
easement by estoppel. It may also may be irrevocable on certain grounds (license to go to hotel can't be revoked on racial grounds).

b) Substantial investment on reasonable reliance will not be revoked.

IX. CHAPTER 9: PRIVATELY IMPOSED LIMITATIONS ON THE USE OF LAND

A. Conditional and Determinable Estates

i. Fee simple determinable—from O to A until A graduates
   a) language of duration
   b) possibility of reverter
   c) automatic reversion

ii. Fee simple subject to a condition subsequent—from O to A, provided that the premises are used for residential purposes, and if not, O has a right of re-entry
   a) language of condition
   b) right of entry
   c) no automatic reversion

iii. Fee simple subject to executory limitation—from to A for so long as used for residential purposes, and then to B
   a) Third party holds future interest
   b) language of duration or condition
   c) automatic forfeiture

iv. Rule Against Perpetuities
   a) Invalidates certain future interests unless:
      - They must vest, if at all
      - No later than 21 after
      - The death of life in being at the creation of interest
   b) Future Interests subject to RAP
      - executory interests
      - contingent remainders
      - vested remainder subject to open
   c) Future interests exempt from RAP
      - Future interests in grantor
      - possibilities of reverter
      - rights of entry
      - reversions
      - Vested remainders in third parties
      - Future interests in charities—if present estate also held by charity
   d) Definitions
      - Creation of interest
      - *inter vivos* transfer: created moment of conveyance
      - Will: created at moment testator dies
      - Vesting—happens moment condition occurs
      - Life in being
      - alive at time of creation of interest
      - party to transfer unless otherwise specified
   e) Modern Modifications of RAP
      - Wait and see approach—future interest not invalidated unless it actually fails to vest within perpetuities period
      - Uniform statutory rule against perpetuities
      - future interest not invalidated unless it actually fails to vest within 90 years of creation
      - transactions for value exempted
      - Equitable reformation
      - Statutory cut-offs for reversions and rights of entry—MA: 30 yrs from date of creation
      - O→A for so long as used for residential purposes, then to B. Executory interest in B violates RAP
      - O→A for so long as used for residential purposes. O conveys possibility of reverter to B. Possibility of reverter in B not subject to RAP
      - O→B in FSA then B→A for so long as used for residential purposes. Possibility of reverter in B not subject to RAP

B. Negative Easements (must be express)

i. Four types traditionally recognized:
   a) light
   b) air
   c) lateral or subjacent support
   d) flow of artificial streams

ii. Now accepted in many contexts
a) Easement of view  
b) Conservation easements  
c) historic preservation easements  
iii. Preferences  
a) Fee simple is tops  
b) present estate over future estate  
c) condition subsequent over determinable  
iv. Creation—Writing signed by grantor  
v. Remedies—Damages or injunction  

C. Restrictive Covenants  
i. Restrictive covenants are enforceable by damages at law (get money damages)  
ii. Required to be in writing and be signed by the grantor  
iii. Not an interest in land  

D. Equitable Servitudes  
i. Enforced in equity (get an injunction)  
ii. Is an interest in property  
iii. Requirement for Creation—in writing signed by the grantor  
iv. Successors will be bound if:  
a) in writing  
b) parties intended that successors be bound  
c) if it actually has to do with the land itself and is not personal to the owner of the land  
d) if successors take with notice  
v. Really serves the same purpose as a negative easement, except negative easements traditionally only apply in four areas  
vi. Creation  
a) Writing signed by grantor OR  
b) Implied negative reciprocal servitudes  
• subdivisions with common scheme  
• grantee has notice of restrictions in other, prior deeds  
• actual  
• constructive  
• inquiry  
vii. Remedy—Injunction  

E. Covenants Running with the Land  
i. For the Benefit to run with the land:  
a) the conveyors intend it to run  
b) the covenant touches and concerns the land  
c) vertical privity  
d) In writing or notice is given  
ii. For the Burden to run with the land  
a) be in writing/notice  
b) intent  
c) vertical privity  
d) horizontal privity  
e) touches and concerns the land  

F. Modifying or Terminating Covenants  
i. changed conditions  
ii. agreement  
a) expiration by own terms  
b) release in writing  
iii. merger  
iv. equitable limitations on enforcement  
a) unclean hands  
b) estoppel  
c) waiver or abandonment  
d) laches  
v. prescription  

G. conditional and defeasible estates  
H. servitudes  
i. negative easements  
ii. equitable servitudes  
iii. real covenants
X. CHAPTER 10: LIMITATIONS ON PRIVATE LAND USE CONTROLS

A. Public Policy Limitations on Covenants
   i. Unlawful Restraints on Alienation
      a) restraints on alienation may concentrate land in too few hands
      b) should have option to sell and move
      c) some social utility in allowing property to transfer from its present use to the most valued use
      d) Absolute restraints are almost always disallowed
      e) Restraints that are not absolute are allowed if they are reasonable
   ii. Change of Circumstances--Court will not enforce a covenant if circumstances have changed so much that the covenant is no longer beneficial to the dominant estates.
   iii. Covenants Violation of Public Policy

XI. CHAPTER 11: HOUSING DISCRIMINATION

A. US Constitution
   i. 5th and 14th Amendments
   ii. Equal protection of the laws
   iii. State action requirement
   iv. Enforcement of real covenants
      a) Racially restrictive covenants—Shelly v. Kraemer (1948)
      b) Covenants that burden fundamental constitutional rights—Restatement 3rd

B. Federal Statutes
   i. Civil Rights Act of 1866
      a) Prohibits race-based discrimination in:
      • making and enforcing contracts (42 U.S.C. Section 1981)
      • Inheriting, purchasing, leasing, selling, holding, and conveying of real and personal property (42 U.S.C. Section 1982)
      b) Applies to state and private action—Jones v. Alfred Mayer Co. (1968)
      c) Does not apply to non-race-based discrimination
   ii. Fair Housing Act of 1968
      a) Protected classes
      • Fair Housing Act of 1968
      • Race, color
      • National origin
      • Religion
      • Housing and Community Development Act of 1974—sex
      • Fair Housing Amendments Act of 1988
      • Disability
      • Familial Status
      • No protection for convicted drug dealers
      b) Prohibited conduct (42 U.S.C. Section 3604)
      • Refusal to sell or rent
      • “Otherwise make unavailable”
      • Steering
      • Discriminatory zoning
      • Terms, conditions, and services
      • Advertisements, covenants
      • Misrepresentation
      • Blockbusting---telling whites that blacks are moving into the neighborhood to induce panic sales
      • Real Estate Finance
      • Refusal to make mortgage loans/redlining (refusal to lend to people who live in predominately minority neighborhoods)
      • Loan terms, conditions
      • Information about available loans
      • Retaliation
   c) Types of claims
      • Discriminatory treatment--Intentional discrimination
      • Facially neutral policies that have disparate impact on protected class members
   d) Proving discrimination
      • Plaintiff's *prima facie* case—creates rebuttable presumption of discrimination
      • Protected class member
      • applied for and was qualified to purchase or rent
      • Denied opportunity to purchase or rent
• Unit remained on market
• Defendant's rebuttal—legitimate nondiscriminatory reason
• Plaintiff's reply—pretext
e) Proving Disparate Impact
• Plaintiff's prima facie case—rebuttable presumption
• Statistical evidence that policy has significantly greater impact on protected class members than others
• Policy tends to perpetuate segregation
• Defendant's rebuttal
• Bona fide and legitimate justifications
• No less discriminatory alternatives available
• Balancing impact and justification
f) Scope of Fair Housing Act
• Residential Housing
• Exclusions
  • Single family homes sold or rented without broker
  • Owner-occupied four-family dwellings
  • Private clubs and religious residences
• Hotels?
  • Excluded under FHA
  • Covered by:
    • Section 1981 of Civil Rights Act of 1866
    • Civil Rights Act of 1964
    • State Public Accommodations Laws

iii. Special Protections for Disabled
  a) Discrimination in sale or rental because of disability of buyer or renter or persons associated with buyer or renter
  b) Terms, conditions, services
  c) Reasonable modifications
  d) Reasonable accommodations

C. State constitutions, statutes, and common law

XII. CHAPTER 12: ZONING
A. Common Law Land Use Restrictions
   i. Nuisance
      a) Prohibits uses of land that result in substantial and unreasonable interference with another's use and enjoyment of his or her land
      b) Balancing test
   ii. Servitudes
      a) Negative easements, equitable servitudes, real covenants
      b) Private agreements restricting use of affected parcels
   iii. These approaches have limited utility for land use planning or large scale regulation
B. Zoning Planning Process
   i. Zoning enabling act
   ii. Comprehensive plan
   iii. Zoning ordinance
C. Zoning Ordinances
   i. Use Zoning
      a) divides municipality into districts
      b) regulates types of uses permitted within districts
   ii. Area Zoning—regulates size and shape of lots and buildings
D. Amendments & Exceptions
   i. Amendments
      a) Contract zoning
      b) Illegal “spot zoning”
   ii. Floating zones
   iii. Special or conditional uses
E. Protections of Pre-existing Rights
   i. Prior non-conforming uses—applicable to uses of property that have already commenced and were legal at the time they commenced.
      a) Allow for continuation of use lawful at time zoning law adopted
      b) Provided that there is no intensification or change of use
      c) These provisions are normally built into the code itself
   ii. Variances
a) deviations from zoning law when application would impose unnecessary hardship
b) proposed use would not be contrary to public interest or impair purpose of zoning law
c) Variances for area restrictions are much more common than variances for use restrictions. Some zoning ordinances ONLY allow for area restriction variances.
d) If a variance is granted, it will only be granted to the extent necessary and it must be consistent with the purposes of the zoning scheme. Variances can be granted before the fact or after the fact.
e) may alter the use to which property may be put or grant area or bulk concessions

iii. Vested rights—
   a) substantial expenditures in good faith reliance on particular zoning designation.
   b) This is to avoid regulatory takings. The govt allows for this because they don't want to get stuck paying just compensation
c) The more substantial the investment and the more reasonable the expectation, the more likely the court is to say that they should be able to continue the use, and if they are not allowed to do so, that it will be a regulatory taking
d) There may or may not be a time limited amortization period in the ordinance
e) discontinuation of the use will end the vested right
f) destruction of the structure will terminate the vested right

XIII. Chapter 13: Environmental Protection—Clean Air, Clean Water, and Use of Property
A. Endangered Species Act
   i. Critical habitat designation—the federal govt can't do a whole lot there, private actors should apply for an ITP (incidental take permit) if they think they might risk a taking of an animal.
   ii. Taking of a species can result in criminal and civil penalties
   iii. A taking of a species requires either
       a) harm (actually killing or injury the animal), or
       b) harass—negligently or intentionally creating the likelihood of injury or killing of an animal

XIV. Federal Housing Programs Worksheet
A. Public housing: government-owned and managed housing developments with subsidized rents
   i. Supply of public housing nationwide
      a) approximately 1.3 million public housing units
      b) Approx. 10,000 public housing developments
      c) Approx. 50% of all public housing developments contain more than 200 units
   ii. Nature of the public housing program
      a) Housing projects are administered by 3,300 local public housing agencies (PHAs)
      b) PHAs receive funds from HUD to make up the difference between rents paid by tenants and operating costs
      c) Tenants pay:
         • 30% of monthly adjusted income;
         • 10% of monthly income;
         • welfare rent, if applicable; or
         • a $25 minimum rent or higher amount (up to $50) set by a PHA
   iii. Tenant eligibility is based on:
      a) annual gross income
         • Quality Housing and Work Responsibility Act (QHWRA) of 1998 eliminated old requirement that all persons in public housing must have incomes at or below 30% of area median income (AMI) (STL MSA: $19,750 for family of 4)
         • QHWRA established a new requirement that only 40% of new families must have incomes at or below 30% of AMI and other admissions must be at or below 80%of AMI (STL MSA: $52,700 for family of 4)
      b) U.S. citizenship or eligible immigration status
      c) Special housing for the elderly, person with disabilities, and families
      d) QHWRA repealed (non-income related) federal preferences for public housing admissions, allowing PHAs to set preferences based on local needs
   iv. Demographics of public housing residents
      a) Family status
         • 49% of all residents are in families with children
         • 34% are elderly
      b) Race
         • Of all public housing residents, 47% are Black, 13% Hispanic, 37% White, 3% Asian
         • Of all non-elderly residents, 67% Black, 20% Hispanic, 13% White & Asian
   v. Shortcomings of the program
      a) Insufficient supply of public housing units. The trend is toward replacing public housing with vouchers. For example, Chicago will demolish 1/3 of its public housing units (15,000 units). QHWRA repealed one-for-one replacement requirement for demolition of obsolete public housing properties
      b) low housing quality resulting from insufficient funds. Also, problems of low-income and racial ghettos, lack of
police enforcement, bad management, HUD and local bureaucracy resulting in inefficiency, corruption, etc.

c) The average waiting time for public housing is 11 months nationwide. In large cities the average is 33 months. These waits may be shorter for elderly and disabled housing.

B. Project-based subsidized housing: privately-owned and managed housing developments with project-based subsidies
   i. Supply: 1.5 million housing units nationwide
   ii. Various Programs
      a) Project-Based Section 8 Assistance
      b) Other Programs Include:
         • Section 202: direct loans for housing for the elderly or handicapped
         • Section 221(d)(3): Below market mortgages insured by Federal Housing Administration (FHA)
         • Section 236: interest supplement on rental housing and cooperative housing mortgages
         • Rental Supplement Program for projects insured under Sections 221(d)(3) and 236
         • Set-Aside Program for projects Section 202, 221(d)(3), and 236
         • New construction and substantial rehabilitation programs
         • property disposition set-aside program for the disposition of HUD-owned projects
         • Section 8 with 202 Housing

   iii. Nature of project-based subsidized housing programs
      a) HUD contracts w/private owners of rental housing to provide subsidies for low-income individuals & families who reside in the housing For project-based section 8:
         • QHWRA established new income targeting requirements (40% of new families must have incomes at or below 30% of AMI)
         • QHWRA prohibits private owners from passing over the lowest income families on the waiting list to reach higher income families
      b) The subsidy runs with the unit, not with the tenant occupant
      c) Tenants apply directly to the private owners, not the local PHA, for admission to these housing developments
      d) Tenants generally pay 30% of adjusted household income for rent

   iv. Shortcomings
      a) Insufficient supply of project-based subsidized housing
      b) Expiring contracts
         • In 1998 alone, 13,000 housing units were taken out of the Project-Based Section 8 program
         • By 2004, 2/3s of all Project-Based Section 8 contracts expired, affecting nearly 14,000 properties containing one million subsidized units

C. Tenant-based housing subsidies: portable vouchers that can be applied toward the rental of approved apartments on the private market
   i. Supply: 1.9 million tenant-based subsidies nationwide
   ii. Section 8 Housing choice vouchers
      a) Tenant participants hold vouchers that can be used nationwide to subsidize rents of privately-owned apartments
      b) QHWRA established new income targeting requirements:
         • 75% of the families must have incomes at or below 30% of AMI
         • Other admissions must be at or below 80% of AMI
      c) QHWRA repealed (non-income-related) federal preferences for selection of Section 8 participants, allowing PHAs to set preferences based on local needs.
      d) Apartments must meet minimum housing quality standards.
      e) Federal government establishes uniform “payment standards” based on apartment size and fair market rents (FMRs). PHAs have limited ability to adjust payment standards based on local needs.
      f) Tenants pay 30% of adjusted household income for rent, provided that if they rent an apartment with a rent greater than the payment standard, they are responsible for paying 30% of adjusted household income plus the difference between the contract rent and the payment standard.
      g) PHA pays the difference between 30% of adjusted household income and the payment standard.

   iii. Homeownership—QHWRA allows limited application of Section 8 voucher subsidies toward mortgage payments.
   iv. Shortcomings:
      a) Insufficient supply of Section 8 vouchers
      b) Average waiting time for vouchers is 28 months
      c) Difficulty using vouchers because of low payment standards in tight housing markets and landlord discrimination
Outline Appendix 1: Mortgage Chart

My Happy Mortgage Chart

<table>
<thead>
<tr>
<th>Notice of</th>
<th>Suit</th>
<th>Judgment</th>
<th>Redemption</th>
</tr>
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<tbody>
<tr>
<td>Default</td>
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<td>Decree</td>
<td>Period Lapses</td>
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<tr>
<td>Default in Payment</td>
<td>Notice of</td>
<td>Sale on Intent to Courthouse</td>
<td>Sell</td>
</tr>
</tbody>
</table>

Outline Appendix #2: Estate Chart

<table>
<thead>
<tr>
<th>Present Estate</th>
<th>Future Interest (grantor)</th>
<th>Future Interest 3d Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee simple absolute</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Fee simple determinative</td>
<td>Reverter</td>
<td>None</td>
</tr>
<tr>
<td>Fee Simple Subject to a Condition Subsequent</td>
<td>Right of Entry</td>
<td>None</td>
</tr>
<tr>
<td>Fee Simple Subject to Executory Limitation</td>
<td>None</td>
<td>Executory Interest</td>
</tr>
<tr>
<td>Life Estate</td>
<td>Reversion</td>
<td>Remainder—Vested or Contingent</td>
</tr>
</tbody>
</table>

Outline Appendix 3: Common Ownership

<table>
<thead>
<tr>
<th>Right of Possession</th>
<th>Tenancy in Common</th>
<th>Joint Tenancy</th>
<th>Tenancy by Entireties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership Share</td>
<td>Equal %</td>
<td>Equal %</td>
<td>Own as Unit</td>
</tr>
<tr>
<td>Sell?</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Assign?</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Mortgage?</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Devise?</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right of Survivorship?</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Special Requirements for Creation?

Four Unitities: Time Title Interest Possession

Same as Joint Tenancy, plus Marriage

What Severs?

Sale: Lease? Mortgage?

Divorce

Partition?

N/A: Yes

No, Except in Divorce