GENERALLY
I. Property – system of laws that govern people and their relationship with each other in relation to things.
   A. bundle of sticks - rights that one party can exercise against another
      1. No rights are absolute
   B. Alienable – being able to transfer a right, while retaining related rights

RIGHTS NOT RELATED TO LAND
I. Intangibles
   A. Right to publicity – limits rights of others to use your name or image commercially.
      1. look to common law of the state
      2. (TN) Right to publicity survives death (Elvis Presley Int. Mem. Found. v. Crowell – Presley’s name right to control his name passed to his estate at death and estate had right to control comm. exploitation of name and image)
      3. (GA) Need not exercise right to publicity in life for it to survive death (Martin Luther King – estate could prevent others from using his image)
         a. also held up by Fed. Ct.’s (Crazy Horse Malt Liquor)
      4. Ct.s must balance interests – indiv. who put themselves in public domain to gain notoriety are to an extent subject to public’s continued use of that notoriety
   B. Intellectual Property
      1. Ideas – ideas alone can’t be property unless there is contract
         a. even if K, idea must be novel and original (Downey v. Gen’l Foods – despite P’s assertion of a K, couldn’t recover for his Mr. Wiggle jell-o idea b/c it was not original, D had already been using it and it is an obvious characteristic of jell-o)
      2. Expression (key, must be expressed) of ideas are property when:
         a. Patent – idea for a unique process, machine, or substance, i.e., use
            i. must show some type of invention or social utility
            ii. must file an application for the right to be protected
               a. patents are only good for a limited duration (17-22 yrs.)
         b. Copyright – unique manner of expression of an idea, i.e., explanation
            i. historically a copyright had to be applied for in order to protect expressions of ideas (Holmes v. Hurst – P published uncopyrighted chapters of a book in magazine, then later secured copyright for entire book. Ct. ruled D could publish the chapters in aggregate b/c copy right did not protect chapters)
            ii. modern law – Congressional Act of 1976 - protection begins the moment a work is written down, no need to register
               a. if you want to sue for infringement, the copyright has to be registered
               b. protection of right lasts for life of author + 70 yrs.
            iii. fair use – 3rd ptsys may use a copyrighted work w/out copyright holder’s consent so long as it is reasonable
3. News/Facts – can’t be copyrighted but unique or original expression, organization or language regarding the facts can be. Ex. phonebook can’t be copyrighted – listing names in alphabetical order is not a novel organization
   a. b/c facts news aren’t copyrightable, infringement for unfair use of another’s facts usually decided as unfair competition cases
      i. quasi property right - **INS v. Assoc. Press** – P can not copyright news b/c it is public domain but has “quasi property right” to prevent competitors from fraudulently taking P’s news and re-reporting it as their own, unfair competition, D enjoined from re-reporting.
      ii. **NBA v. Motorola** – quasi property right does not extend to reporting updates of live games, even though P has copyright to live broadcasts of the games, quasi property right limited to:
         a. P generates/gathers info at cost
         b. information is time sensitive
         c. D’s use of info is constitutes free riding on P’s efforts
         d. D is in direct competition w/ product/service offered by P
         e. ability of ptsy to free ride on P’s efforts would reduce incentive to produce product that its existence or quality would be threatened
   b. ct.s don’t want to let other’s take advantage of the work a pty has done in gathering the news/facts

C. Cyberspace – analogous to somebody who trespasses and takes water from a replenishable well, nothing is lost but something is gained.

1. Computer time/services
   a. historically ct.s did not recognize computer time/services as a traditional property right like other chattels (**Lund v. Commonwealth** – theft of computer time by a student did not fall under def. of goods or chattels for purpose of state’s larceny statute).
      i. NY ct. held unauthorized use of machinery not larceny
   b. modern view – most states have enacted statutes defining unauthorized use of computer time as a crime.

2. Cybersquatting
   a. originally domain names were assigned on a first to register, first in right basis. Companies that wanted a domain that was already registered had to purchase it from the “cybersquatter.”
   b. modern law – Federal Trademark Dilution Act of 1995, requires ptsy holding a domain name to companies with the trademark for that name, without a showing of competition b/t themselves and the pty.
      i. 1999 Act passed to protect the public from “bad” faith abusive registration of Internet domain names

D. Other recognized intangible property rights – debts, mortgages, franchises, shares in companies

II. People
   A. Slavery – no longer legal anywhere
1. Used to be legal in some states and illegal in others. Problem arose when slave brought to non slavery state, then owner wanted to bring back to slavery state.
   
a. **Commonwealth v. Aves** – Mass ct. held that slavery against natural law and must be some positive law to make it enforceable. if brought to non slavery state, owner no longer had rights over slave and couldn’t force back to slavery state.
   
b. **Dred Scott v. Sandford** – Sup.Ct. held slaves residence in non slavery state did not automatically emancipate him and that slaves are subject to property rights like any other property.
   
2. 13th Amendment deemed slavery unconstitutional.

B. Body parts
   
1. Certain parts of body are treated as though property of the owner and other are not.
   
a. body parts that are property – parts that can be replenished and do not do harm to the health of the owner, ex. hair and blood.
   
b. body parts that can’t sell
     i. any part that removal of which would be fatal
     ii. some non fatal parts – kidneys, eyes, spleen
   
2. Ct.s reluctant to apply traditional rules of property to the use of:
   
a. cells, frozen sperm, ova, and pre-embryos

C. Dead bodies
   
1. Traditional rule that family members to not have property rights in deceased except for limited right to possess for burial purposes (not included as part of decedent’s estate, i.e., transferable upon death)
   
a. bodies/body parts can’t be sold upon death but may be gifted for transplants and medical research.
   
b. some state statutes (FL) allow for removal of body parts (corneal) during autopsy w/out requiring notice be given to family.

**ORIGINATION OF RIGHTS TO LAND**

I. Origination – land rights originate w/ a grant from the sovereign. Only those titles that can be traced by to the grant from the sovereign are recognized a superior to all others.

II. Indian land rights
   
A. Indians had right to use and posses land but could not sell land. Viewed only as occupants/possessor. (**Johnson v. McIntosh** – Ct. found in pty who title that could be traced by to transfer by sovereign had superior title to pty who had purchased land from Indians b/f gov’t had acquired it in a treaty)

   1. Congress passed act that Native Americans could not transfer interest in land unless duly authorized by treaty held under authority of gov’t
      a. has led to many tribes bringing suit against states that acquired their land not under treaty.

III. Prior Possessors
   
A. In early history, especially in CA, ppl settled on land b/f the gov’t granted title. A presumption arose that ppl using the public lands received a grant from the gov’t.
B. Prior possessors maintain superior title over subsequent claims to land so long as:

1. The subsequent claimant does not have title that can be traced back to grant by sovereign and
2. The land had not been abandoned, which must be proved through use
   a. used proved through fencing and cultivating when applicable
   b. can also be shown through other distinct ways of marking boundaries
      (Plume v. Seward – ct. found prior possessor held superior title by displaying use through laying the land into town lots and selling them)
   c. acts of ownership must correspond to size of land

RIGHT TO THINGS ON/BELOW/ABOVE LAND

I Natural resources – gen’l theme: first to possess = first in right

A. Wild animals

1. first to capture or mortally wound wins (Pierson v. Post – fox hunters both in pursuit)
2. custom plays role in determining outcome if it is in line w/ public policy
   (Ghen v. Rich – whaler mortally wounded whale as is custom w/ industry, whale found by D and sold to 3rd pty, ct. found for whaler)
3. Modern view
   a. owner of land has superior right above any trespasser
   b. sovereign may confiscate any animal taken in violation of law

B. Water rights

1. Prior appropriation – first to possess have right above down stream users to use as much as they were already using so long as being put to beneficial use.
   a. rule in the West b/c arid, water in short supply
   b. can transport off property
2. Riparian rights – reasonable use & can’t transport off property
   a. rule in the East/Midwest (Evans v. Merriweather – Evans had mill upstream first, drought occurred, Evans took all stream water, ct. held illegal)
      i. reasonable use determined by balancing:
         a. benefit derived by upstream user and
         b. harm suffered by downstream user
3. running water treated differently than other personal property (animals) b/c it is possible for more than one person to use
4. can sell right to use water w/ out selling right to use land (alienable)

C. Sub-surface rights - Oil/Gas/Ground water

1. solid minerals/non-moving ground water – owner of land owns all beneath it, absolute ownership
2. moving minerals/water (oil/gas)
   a. can drill and extract whatever is beneath your own land – even if you know it is coming from another’s land (Barard v. Monongahela Nat. Gas Co. – Gas Co. drilled near boundary line which drew gas from neighbor’s land, ct. ruled it was legal)
b. modern advent of tech. not determine where gas is coming from (from your own land or that of another) plays larger role in ct. decision’s now – ct.’s split b/t:
   i. ownership in place (only w/ below your land) and
   ii. non-ownership (only have right until it migrates)
c. doctrine of correlative rights – another new view used by ct.’s that owner’s only have right to fair and equitable use of oil and gas under their land.

D. Airspace – landowner owns at least as much of the space above the ground as he can occupy and use in connection w/ the land
   1. Intrusion has to be such to subtract from owner’s use of property (Geller v. Brownstone Condo Ass’n – ct. would not enjoin D from using scaffolding which extended over P’s property based solely on the fact that scaffolding could cause fall and cause harm in future)
   2. Navigable airspace above the country is public domain
      a. outer space determined as lowest altitude satellite can orbit

GOV’T IMPOSED RESTRICTIONS & TAKINGS
I. Limitation on right to exclude
   A. Public Access
      1. Custom may allow public use to privately owned land where the custom is:
         (Thorton v. Hay – Or. allowed public use of dry sand area along beach, even on privately owned property b/c it had been the “custom” in Or.)
         a. Ancient, long and general usage
         b. the right exercised w/out interruption
         c. is peaceable and free from dispute (land owner’s protests don’t count)
         d. reasonable
         e. certainty
         f. obligatory – not left open to the landowner’s discretion
         g. not inconsistent w/ any other law
      2. 1st Amendment right of free speech on privately owned land (Minority rule based on state constitutions)
         a. Pruneyard shopping cntr. v. Robins – where pty was exercising their free speech right in a peaceful and orderly manner in a large privately owned shopping cntr ct. held that allowing the pty use of the premise to exercise their 1st amend. rights, thereby limiting shopping cntr.’s right to exclude did not so unreasonably impair the value or the use of the mall to qualify as a taking.

HOW DOES THIS INTERPLAY W/ THE “CATEGORICAL” TAKINGS TEST OF PHYSICAL INVASION?
   b. Key points
      i. pty was exercising a right guaranteed to them under the constit.
      ii. right to exclude was did not substantially interfere w/ shopping cntr.’s business (it was a large mall attracting 25,000/day)
      iii. decision limited to scope of facts in case
c. U.S. Constitution does not guarantee rights of access for free speech

3. Public places of accommodation can’t discriminate
   a. Violates civil right

II. Limitation on right to use property (limited to reasonable use)
   A. Nuisance – property owner has right to use land in a reasonable manner, so long as it does not interfere w/ others right to use or enjoy their land.
      1. When evaluating whether a use is a nuisance ct.s weight the utility of D’s use against the harm to P.
         a. Factors ct.’s consider:
            i. character of the harm
               a. large financial loss
               b. observable physical damage to premises/P’s body or mental well being
               c. costly for P to avoid
               d. little value to D
               e. harm is of long duration or unremitting
            ii. social value of the use invaded
               a. began after P began using her land
               b. carried on by methods that create more disturbance than other available methods
               c. little value to society
            iii. suitability of the use to the character of the area
               b. basically balancing competing interests (Phah v. Maretti pg. 110 – ct. held that P did state a claim upon which relief could be granted under the nuisance doc. where P had built lot 1st and set up solar collectors and D later built a lot which blocked the sunlight, both the collection of sunlight and right to build where want are socially beneficial purposes)
               c. KEY - looking at how the area is zoned (Bove v. Donner Coke Corp. pg. 92- ct. held that D’s operation of a coke factory which sent dirt, dust, gases, and odors onto P’s property was not a nuisance even though P’s residence was built b/f D’s factory b/c P should have been aware of the industrial character of the area at the time she purchased the property)
   2. Types of nuisances
      a. Public nuisance – interference w/ rights of the public
      b. Private nuisance – invasion of the interest in enjoyment of the land

3. Legal Definitions:
   a. Nuisance per se – conduct that is itself a nuisance (prostitution house)
   b. Nuisance per accidens – otherwise lawful conduct that is wrongful b/c of the particular circumstances (halfway house/soup kitchen in a residential area)

4. Injunction is the usual remedy for nuisance
   a. ct.s will allow damages but allow nuisance to continue if it provides a great social utility

B. Duty not to withdraw support
   1. Landowners are entitled to lateral support in the adjacent land for their soil
a. subsequent owners have an obligation to maintain artificial methods of lateral support put in place by their predecessor.
   i. implementation of artificial support is not necessary
2. Strict liability for withdrawal of lateral support through acts of commission or omission for:
   a. Adjacent land in natural condition
   b. Buildings on adjacent land if buildings are full support by land in natural condition. (Noone v. Price – house on hill slid down hill. P claimed it was result of D’s retaining wall further down the hill deteriorating thereby withdrawing lateral support for their land. Ct. held question of fact for jury to decide if retaining wall could support land in its natural state, then allowing wall to deteriorate was actionable.
3. Liability under negligence theory for negligent withdrawal of lateral support for:
   a. Buildings on adjacent land that are not fully supported by land in natural condition
C. Duty to cut overhanging branches when:
   1. They actually cause or there is imminent danger of them causing sensible harm to property other than plant life in way other than by case shade or dropping leaves/flower/fruit (type of nuisance claim)
      a. Endangered neighbor may hold the owner of the tree liable for damages.
      b. if owner doesn’t cut back tree, endangered neighbor may cut back the tree at tree owner’s expense.
   2. land owners may always cut at their own expense any part of neighboring landowner’s plant life that extends onto their property.
   3. The law varies from state to state
      a. some states say there is no duty, others so duty whether or not damage occurs (Whitesell v. Houlton pg. 102 – est. rule set out above where P had asked neighbor to cut back tree after it had damaged their house and car, P had to pay to have tree cut back. ct. held P could recover for damages and costs of cutting tree)
D. Duties re: expulsion of ground water – 3 rules depending on jurisdiction
   1. Common enemy rule – can not by artificial means (drains/ditches) expel surface water in a way that negatively effects neighboring land.
      a. exception: where artificial means cause water to flow in the same place it would naturally, and increase in amount of water is not actionable (Yonadi v. Homestead Country Homes – ct. held P, landowner did not have an action where D, developer caused increase run off 3X the amount of normal to flow onto P’s property through ditches and drains)
   2. Civil law rule – owner of higher ground has a natural servitude to accommodate natural flow over water from his land
   3. Reasonable use – person altering his land has a duty in connection w/ surface water not to act unreasonably under the circumstances
a. recent trend towards reasonable use but problem is don’t want to
discourage development of land

III. Eminent Domain - states have a power to condemn land and transfer all right
possession, use, and enjoyment to government conferred on them by the 14th Amend.
A. Requirements(5th Amendment):
1. Public Use
   a. public use test: must be rationally related to a conceivable public
      purpose
   b. Public use doctrine – public use test is satisfied by a use that benefits
      the public, the property need not be available for public use
      i. Berman v. Parker pg. 227 – ct. held condemnation of blighted
         area met public use test. Single property out of many that was not
         blighted is not exempt from condemnation b/c look at social
         problem as whole, not piecemeal.
      ii. Hawaii Housing Authority v. Midkiff
         – ct. held state could condemn landowner’s leased land, thereby giving the landowner’s
         tax breaks, and sell the land to the leasee’s in order to break up the
         oligopoly of land owners which was skewing prices of land and
         injury public tranquility and welfare.
      ii. Kelo –
         taking privately owned property and giving it to
         developers as part of a comprehensive city plan is allowable.
         public use doctrine can be used not jut to abate social ills but also
         to add to benefit of society.
   c. courts have narrow role in reviewing what legislature constitutes as a
      public purpose
      i. taking not allowed (does not meet public use test) where taking
         occurs for no reason other than to confer a private benefit on a
         particular private pty
         a. examples where did not meet test pg. 229
            i. condemn a beer distributor’s warehouse and transfer
               as it to another pty
            ii. condemn blighted buildings next to car dealership so
                it could expand and non leave its location
            iii. authority did not conduct a study to formulate an
                 economic plan and advertised it would condemn land
                 for private use by developers
            iv. failed to consider or even discuss integration of P’s
                property into redevelopment plan
            v. condemnation of store at request of a competitor

2. Just Compensation

IV. Police Power – states have a “police power” to regulate the use of property, which
they may exercise for the benefit of the general health, safety, and welfare of the public.
However, the use sometimes clashes w/ the interest of the individual whose property is
subject to the “beneficial” regulation. If the regulation goes too far, it is considered a regulatory taking and the land owner is subject to compensation under eminent domain.

A. Regulatory taking – when the state’s use of police power to regulate property goes to far and they must compensate the property owner (First big case to est. “regulatory taking”: Penn. Coal v. Mahon – where deed was granted w/ grantor retaining all mining rights to subsurface coal and stating grantee entered K at own risk, ct. held that using police power to enforce of an act which banned subsurface mining if it caused structures to subside would be a taking b/c it would serve to abolish grantor’s primary interest in the land.

1. Actions that are always a taking (categorical takings):
   a. Permanent physical occupations, which may be:
      i. trivial (Loretto – law requiring landlords to allow cable co. to install boxes on their property even though it was 1 1/2 cubic ft.
      ii. by 3rd pts (Kaiser Aetna – ct. held pond was not a navigable servitude as intended to give control over streams for use in commerce and thus gov’t didn’t have right to open to the public. If gov’t did open to public, would have to exercise eminent domain and pay compensation)
      iii. repeated but non-continuous use of private property by public (forced easements - Nollan – it is a taking to condition the permit to build a house on allowing public right away along beach front b/c the condition doesn’t serve the same purpose as the ban from public to view beach & restricts property owner’s right to exclude)
      iv. if complete occupation, gov’t rationale doesn’t matter
   b. Seizures of core property rights
      i. Babbit v. Youpee – NOT ASSIGNED READING
      ii. Washington Legal Srvc.
      iii. Kaiser & Nollan – both involved right to exclude
   c. Complete loss of economic value
      i. Lucus – purchased to beachfront lots, state then enacted beachfront management act barring P from building any permanent structures on lot which deprived him of all ec. use of land.
      ii. exceptions where loss of ec. use is not a taking
         a. where the use proscribed use interests were not part of the landowners title to being with.
         b. if there is a background law or nuisance law to prohibit landowner from using the land in specified manner (requires standard nuisance balancing test b/t conflicting interests)
            i. shows that right never existed to being with

2. Actions that are never takings
   a. Regulations designed to prevent public nuisance
      i. zoning ordinances on a whole are not unconstitutional (Village of Euclid v. Amber Realty – P has been maintaining a tract of land to sell for Indus. use. State them zoned portions of the area for residential use only which severely limited the value of P’s land. ct. held state imposed zoning ord. on a whole were not
unconstitutional but implied in dicta that if ord. challenged on a individual basis, may find a taking
   a. zoning on its face is prima facie constitutional – designed to preserve residential neighborhoods (promotes social value of the American home → wealth/satiability of nation)
   b. Forfeiture of property used in commission of crimes
   c. Destruction of property to stop a fire
   e. Gen’l rule – not a taking if substantially advances state interests and does not deny owner economically viable use of land.
3. If it doesn’t fall into categorical taking use Ad hoc test to determine whether takings whether it is a taking. Two main cases which set out test. (Penn Central – ct. held city’s landmark preservation act which prevented landholder from having an office building built above the land mark was not a taking b/c did not interfere w/ present uses or uses or primary expectations, was beneficial to society, and allowed landholders to further enhance the site and other sites.)
   a. Character of the gov’t action
      i. gov’t action analogous to physical invasion
      ii. designed to prevent public harm
         a. When zoning not designed to promote gen’l welfare of community ct. held unconstitutional as violation of due process Nectow (note case pg. 131)
         iii. unfairly singles out one or few to bear burden for public
         iv. main principle, gov’t must be able to justify its action
   b. Diminution in value
      i. value of property b/f and after regulation went into effect
      ii. no bright line rule
      iii. does not require a complete loss of value, just diminution
      iv. being able to transfer development rights counts against diminution in value (Penn Central)
   c. Reasonable investment back expectations
      i. regulation reflects sharp and unanticipated change in premis. use
      ii. substant’l investment made in property for use which reg. limits
      iii. reasonable, good faith reliance on continuation of prior law (Penn Coal – see above for case description WHEN DO WE USE THIS ???
      a. Noxious use of property
         i. abatement of harmful spillover effects
         ii. harm need not rise to level of nuisance (Miller v. Schoene – gov’t ordered destruction of diseased trees to prevent spread to nearby orchard)
      b. Average Reciprocity of advantage
         i. adversely affect owners not singled out, but subject to gen’l laws of widespread applicability.
         ii. adversely affected owners also benefit (Penn Central – all benefit from the preservation of historical landmarks)
c. Destroys recognized property or contract right
4. Taking compensation available for temporary or partial takings as well
5. Must evaluate the property as a whole
Ex. if take part of land, can’t claim complete taking for that part, have to claim partial taking for the whole of land. (Est. in Penn Coal.)
i. Tahoe-Sierra – Ct. held where gov’t imposed halt to development restricted investment backed expectations for almost 6 yrs. was not a taking b/c only temporary loss and under Lucas test, must be permanent.
   a. Dissent said diff. b/t temporary and permanent taking was tenuous and should be able to recover for temp. loss of ec. value
**HOW DOES THE TAHOE SIERRA OPINION PLAY INTO TEMPORARY TAKINGS?? DOES THIS MEAN TEMPORARY TAKINGS OF LAND IS SUBJECT TO COMPENSATION BUT TEMPORARY TAKING OF ECONOMIC VALUE IS NOT?**

**B. To bring a claim for a taking, must either bring it under**
A. Physical taking (Kaiser)
B. Complete loss of economic value (Lucas)
C. Ad hoc test (Penn Central)
D. Unconstitutional land use exactions (Nollan/Dollan)
   1. see 3 part test below
E. Bringing an action based solely on arg. that it does not substantially advance state interests is not a valid claim (Lingell – could not bring claim on state imposed gas price cap as a regulatory taking based solely on arg. that it did not “substantially advance”)

**GOV’T LAND USE/DEVELOPMENT REGS AND ZONING**
I. Types of regulations on land development and use
   A. Euclidian Zoning (traditional) – each parcel is zoned for particular uses based on a comprehensive plan.
      1. Inclusionary zoning – designed to promoted mixed race/housing
         a. designed as a response to exclusionary zoning which excluded ppl. off lower incomes and had de facto effect of making areas whiter
            i. proactive – way of trying to get around income/race segregation
         b. requires set aside, whenever there is new construct./reconstruct of 15% low income housing
            i. typically requires at least 10 or more residential units in the new/reconstruction area
         c. encouraged through various bonuses to developers
            i. density bonus – allowed to build more unites in developed area
         d. low income housing usually mad available to families at or below 80% of area median income.
            i. low income family typically pays 30% of income to mortgage/rent
      2. Elements of zoning
         a. Zoning enabling act
b. Comprehensive plan – general plan to control and direct the use and development of property in a municipality by dividing it into districts according to the present and potential use of the properties.

c. Zoning ordinance

3. Types of Zoning ordinances
   a. Use zoning
      i. divides municipality into districts
      ii. regulates types of uses permitted within districts
   b. Area Zoning
      i. regulates size and shape of lots and buildings

4. Amendments & Exceptions
   a. amendments
      i. contracts zoning - allows primarily only one type of use, but allows other kinds of uses on an amendment by amendment basis called:
         a. classic map amendment - (Bartram – area zoned as residential, city commission gave amendment to builder to change lot in residential area to business zone. Ct. held zoning authority has broad discretion to change zoning in accordance w/ public good even against protests of local residents.)
         b. illegal “spot zoning”: action by a zoning authority which gives to a single lot or a small area privileges which are not extended to other land in the vicinity which is against public policy and obnoxious to the law.
            a. justified only when it is done in furtherance of a gen’l plan properly adopted for and designed to serve the best interests of the community of the whole. (Bartram)
        b. floating zones - unmapped district that authorizes a developer who meets specified conditions, applies for district, then it becomes mapped.
           i. appears to “rezone” a parcel, but is distinguished b/c it is approved in advanced and not legally “rezonated” and already have leg./admin. approval to use a parcel for that particular use (no amendment needed)
   c. special or conditional uses – special uses permitted w/in a zone that normally would require an amendment. the special uses are written into the plan so just have to apply for them and be approved by zoning board or legislative body if certain conditions are met, don’t have to seek an amendment if conditions are met.
      i. used for infrequent types of land use which are necessary and desirable but incompatible w/ uses allowed in typical zones.
         conditions must be met to ensure compatibility w/ the area where the special use is being allowed (Kotrich v. Du Page pg. 667 – ct. held special use for country club in residential are permissible despite residents’ protests and disapproval of zoning board. county
board approved the special use permit and ct. held it was necessary to allow permits for infrequent beneficial uses where the use wouldn’t fit on any other type of zone.)

**ii.** different from amendments and variances b/c permit doesn’t require approval by 3/4 of legislative body.

5. Protections of Pre-existing rights
   a. Prior non-conforming uses
      i. continuation of use lawful at time zoning law adopted
         a. amortization period – most ordinances allow non-conforming uses to continue for only a reasonable period of time.
            i. continuation of nonconforming use allowed for indefinite period of time only where the owner is vested and the property can’t be used for any purpose other than the non-conforming use. (*City of L.A. v. Gage* pg. 678 – ct. held requiring non-conforming use to cease w/in 5 yrs. after rezoning was w/in states police power b/c even though Gage would suffer financial hardship, public benefit outweighed and he could use the property for the purpose it was rezoned for (residential rather than plumbing business.))
            ii. factors considered in deciding reasonableness of amortization period
               a. justification by city
               b. investment by owner
      ii. no intensification or change of use
         a. if non conforming use is discontinued or more than 50% destroyed (by fire) then can not resume
   b. Variances
      i. deviations from zoning law when application would impose unnecessary hardship unique to the property (*Topanga v. County of L.A.* pg. 672 – ct. held administrative agency review application for variance must accompanied by their findings of fact and ct. reviewing must scrutinize the findings to decide whether evidence supports variance and all requirements have been met. ct. held findings in this case did not support grant where although mobile harm park in area zoned single family residents would be beneficial the area requested was too large for a variance and findings of admin agency did not show disparity b/t area requested for variance and surrounding area.)
         a. granted only to the extent needed to avoid unnec. hardship
         b. may be granted after the fact
      ii. proposed use would not be contrary to public interest or impair purpose of zoning law
   c. Vested Rights
i. substantial expenditures in good faith reliance on particular zoning designation

B. Special use permit regime – all construction requires a special use permit and there are guidelines for how permits are allocated

C. Either system could request an exaction return for a permit or amendment
   1. Exaction – a transfer in the interest of the land, very common
   2. Three part test in determining if exaction is constitutional
      a. valid grounds to deny permit
      b. exaction substantially advances same interest that would furnish grounds to deny permit
         i. Doctrine of Unconstitutional conditions – gov’t may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the gov’t where the problem sought has little or not relationship to the benefit (Nollan – requiring permit to build on an exaction to grant public right of way across beach front did not serve purpose as grounds for not denying the permit that building house blocked publics view of the beach)
         ii. if the first two requirements are met it creates a necessary nexus
      c. exaction is roughly proportionate to problem caused by development (Dolan v. City of Tigard – where city conditioned building on exaction of dedicating percentage of property to public use for walking/riding path, ct. held it was not a reasonable relationship b/t the cities problem of reserving land for a floodplain.

II. Endangered species protection – how to balance protection of environment w/ society’s need for economic growth.
   A. Endangered species act provides:
      1. Ecosystems upon which endangered and threatened species depend may be conserved
      2. Program for the conservation of endangered and threatened species
      3. Take appropriate steps to achieve the purposes of the goals set forth
         a. Main issue: whether the development of land constitutes a “taking” of an endangered or threatened species of plan or animal
            i. taking – to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct (Def. of Wildlife v. Bernal – ct. held where proposed development of land for school did not substantially interfere w/ owl behavior and patterns P had not burden of proof to show a taking)
               a. incidental taking permit – developer can apply for permit to grant temporary taking. not mandatory, but if don’t get permit and taking in fact occurs, developer faces civil and criminal penalties

HOUSING DISCRIMINATION
I. Federal Fair Housing Law
II. Facialy Neutral Discrimination
PRIVATELY IMPOSED LIMITATIONS ON USE OF LAND

I. Conditional and Determinable Estates

A. Qualified forms of free simple (restrictions on fee simple absolute) where estate may be divested

1. Fee simple determinable – automatically ends when some specified event occurs
   a. created by language of duration
      i. ex. “for so long as…” or “during…” or “until…”
   b. possibility of reverter in grantor
   c. reversion is automatic
      i. grantor must take possession or risk adverse possession

2. Fee simple subject to condition subsequent – violation of created condition gives grantor option to terminate if he chooses
   a. created by language of condition
      i. ex. “but if…then ”
   b. MUST HAVE right of entry expressed in document
   c. reversion is not automatic
      i. grantor has option to re-enter

3. Fee simple subject to executory limitation – accompanied by future interest in 3rd pty rather than grantor
   a. created by same language (duration or condition) as other estates but reserves reversion rights to a party other than grantor
   b. 3rd pty holds future interest
   c. reversion to executory interest is automatic if condition occurs

4. If language of neither duration or condition are present, assumption is fee simple absolute (Storke v. Penn Mutual pg. 517 – deed did not contain language of duration (no determinable) and did not reserve right of re-entry (no conditional limitation). ct. held although condition did occur, grantee retains estate and deed construed as fee simple absolute b/c elements for other defeasible fees not met)
   a. rationale – the law disfavors foreitures
   b. if deed is unclear but right of re-entry is reserved, presumption is condition subsequent over determinable

B. Defeasible Estates and RAP

1. Executory interests – interest created in a transferee which become possessory by prematurely terminating a preceding estate or vested future interest
   a. different from remainder interest which becomes possessory only upon natural termination of proceeding estate (death of life estate or termination of estate for years)
   b. defeasible fees allow executory interests to divest remainder interests
   c. types of executory interests
i. shifting – divest estate transferred to another by grantor
ii. springing – divest the grantor’s interests

2. RAP does not apply to first pty future interests, thus will always apply to executory interests (Fletcher v. Ferrill pg. 524 NEED TO EXPAND)

3. Words of purchase v. limitation
   a. words of purchase define WHO receives a limitation/interest
      ex. “to A for 10 yrs. then to B” – then to B describes the owner of the remainder
   b. words of limitation define the estate they will receive
      ex. “to A and his heirs” – and his heirs describes a limit on the estate as fee simple absolute, it does not give any interests to A’s heirs

II. Negative Easements – see below under servitudes

III. Equitable Servitudes – interest in property only entitled to injunctive relief
   1. Creation
      a. must be in writing signed by grantor or
      b. implied negative reciprocal servitude – when purchaser purchases land in expectation that will be entitled to mutual benefits of subsequently created servitude
         i. subdivisions w/in common scheme and
         ii. grantee has notice of restrictions in other parcels w/in the subdivision/the restrictions are contained in deeds
            a. actual notice
            b. constructive notice – record notice (from deeds)
            c. inquiry notice – should have known from looking at uniform properties of subdivision
               i. common plan doctrine – if can be est. that restrictive cov. consistent w/ common plan for subdivision and plan in place at time lot purchased, cov. enforced against purchaser who did not have notice through title

   2. Remedies (in equity)
      a. injunctive relief is only remedy
      b. 3rd ptys may bring suit
         i. prior grantee can sue on a covenant made by its grantor to a different grantee b/c viewed as 3rd pty beneficiaries (Rodgers v. Reimann pg 544 – P purchased lot from grantee subject to restrictive cov. Grantor then sold another lot to D but did not put covenant in deed. P brought suit on grounds of reciprocal servitude. ct. held didn’t apply b/c D did not have notice)

   3. Transferability (see chart)
      a. successors in interest are bound to predecessors equitable servitude if:
         i. in writing or neg. reciprocal servitude
         ii. ptys to original covenant intended successors to be bound and
         iii. it touches and concerns the land and
         iv. if successors take w/ notice of the covenants (Cheatham v. Taylor pg. 535 – where landowner laid land out in plots for city and put restrictive covenants on certain areas and purchaser later acquired a
IV. Real Covenants – contract, not an interest in land

1. Creation
   a. **must** be in writing signed by grantor
      i. same as ordinary contract requirements

2. Remedies (at law)
   a. money damages
   b. can also bring claim as an equitable servitude for injunctive relief

3. Transferability (see chart)
   a. successor in interest are bound to predecessors covenant if (*Moseley v. Bishop* pg. 550 – see case brief):
      i. elements of burden running w/ land (harder for burden to run)
         a. must be in writing
         b. original ptys intended covenant to run w/ land
         c. cov. touches and concerns the land (effect ptys as land owners)(anti-competitive covenants viewed as touching and concerning land *Kotseas pg. 558* – see brief)
      d. must have horizontal and vertical privity (modern rule does not require horizontal privity)
         i. horizontal privity est. by:
            a. successor has leasehold w/ reversion in grantor
            b. cov. concerns an easement b/t ptys in the land
            c. if ptys to were grantor/grantee to land affected by cov
         ii. vertical privity est. by:
            a. ptys are successors in title (no adverse possession)

V. Modifying or terminating covenants (equitable servitudes and real covenants)

1. Changed conditions
2. Agreement
   a. expiration by own terms
   b. release in writing
3. Merger
4. Equitable limitations on enforcement
   a. unclean hands – if you are guilty of doing same thing you suing to enjoin another pty from doing, claim is barred
   b. estoppel
   c. waiver or abandonment
   d. laches – if owner waits too long to enforce covenant

V. Unification of Servitudes

1. Great overlap b/t real covenants and equitable servitudes
   a. few meaningful distinctions b/t neg. easements, real cov., and eq. servitudes
2. Restatement favors a unification of all 3 – call them covenants that run w/ land
3. Modern rule relaxes privity requirements
   a. beneficiary of covenant must have legitimate interest in enforcement and
b. burdened pty must have notice at time of conveyance
4. Damages and injunctive relief available for all servitudes

LIMITATIONS ON PRIVATE LAND USE CONTROLS
I. Limitations on covenants
   A. Changed circumstances
      1. Change must be substantial or drastic
      2. If circumstances w/ in an area have changed so drastically that enforcement
         of servitude will have no benefit to dominant estate (El Di v. Town of
         Bethany Beach pg. 571 – ct. held restrictive cov. prohibiting sale of alcohol
         not enforceable b/c even though town was trying to enforce cov. ct. thought
         town had changed since cov. created and reasons for restriction no longer
         valid)
         a. must be change in essential character of area
   B. Unlawful restraint on:
      1. Absolute restraints on alienation almost never allowed
         a. types of restrain on alienation
            i. Forfeiture – estate will be forfeited if grantee attempts to sell or
               transfer it
            ii. Disabling – prohibits grantee from selling or transferring estate
                but contains no forfeiture provision
            iii. Promissory – grantee promises on behalf of himself and
                successors not to transfer
      b. partial restraints on alienation also disfavored but will be allowed if:
         i. reasonable and
            a. types of restraints that have been held reasonable
               i. restraints on transfer for brief period of time
               ii. sales approval rights to condo boards (but
                   Lauderbaugh v. Williams – ct. held sales approval
                   right to condo board unreasonable where could only sell
                   to indiv. approved by condo board and all but two
                   condo board members had to approve)
               iii. agreement by co-tenants not to portion property for
                   certain period of time
               iv. forfeiture or promissory restraints on life estates
               v. restrictions on land use
            ii. limited in time
      2. Competition
   C. Public Policy
      1. Want property to be disbursable (don’t want property concentrated)
      2. Freedom to do what want w/ land
      3. Social utility in allowing property to transfer from present use to most
         valuable social use (Crane Neck Ass’n v. New York City pg. 581 – ct. held
         rest. cov. on neighborhood for single family homes did not apply to group
         home for mentally disabled b/c such a restriction would violate public policy –
         Mental Hygiene law)
4. Restatement view of servitutes that violate public policy pg. 586
   a. that which is arbitrary, spiteful or capricious
   b. that unreasonably burdens a fundamental constitutional right
   c. that imposes an unreasonable restrain on alienation
   d. that imposes an unreasonable restrain on trade or competition
   e. that is unconscionable

D. Constitutional Limitations
   1. Racial discrimination (Shelley v. Kraemer pg. 602 – S. Ct. held that lower
courts decision to uphold a restrictive cov. denying occupancy of property to any
persons but white was a violation of constitutional rights not to deprive of
property w/out due process and equal protection under the law)
      a. other courts have expanded rule that courts upholding restrictive cov.
based on families w/ children, age, religion is a violation of due process
   2. Fair Housing Act of 1968 (above) later codified this rule

INVOlUNTARY TRANSFERS OF PROPERTY
I. Between private parties
   A. Abandonment –voluntary act of discarding property w/ no hope of or intent to
return to claim.
   1. Can be either express statement of intention or implied from circumstances
   2. Two different line of laws re: abandon property
      a. Law of finds – finder gains interest in title of property (finders keepers)
         i. requires finder demonstrate intent to recover and possession
         ii. disfavored by admiralty courts b/c since only one party can retain
title and the other party gets nothing, if parties are acting in
conjunction to salvage abandon property, it encourages people to
act secretly, hide findings
         a. if original owner did not intend to abandon, encourages
ptys to hide property from original owner(ex. Pierson v. Post)
         iii. used for sunken ships where previous owners have abandon
property, either owners have expressly abandon or no owner comes
forward to claim.
      b. Law of salvage – interest in property stays w/ owner unless finder can
prove abandonment. If can’t prove abandonment, finder still entitled to
finders fee.
         i. effect – reduces competition b/t original owner and those who
seek salvage(ex. Ghen v. Rich)
         ii. favored by admiralty courts, only not used when abandonment
proven (Columbus-America Discovery Group v. Atlantic
Mutual Ins. Co. pg. 191 – ct. held law of salvage should apply to
treasure hunters who found ship wreck and recovered gold but ins.
co. who underwrote contents of the ship claimed title to possession
after it had been found and destruction. ct. held destruction of
some docs was not evidence of abandonment)
B. Adverse possession – possession adverse to owner for statutory period

1. Elements
   a. Actual – must est. dominion, whatever acts are normal and appropriate use in accord w/ character of the land
   b. Open and notorious – as a reasonable owner would discover upon inspection (Morengo Cave v. Ross – ct. held operating tourist attraction in cave which ran under neighbors land was not open and notorious possession b/c impossible for a landowner to rationally know if someone is trespassing below the surface w/out a survey)
   c. Hostile (w/out permission) – not w/ consent of owner
   d. Exclusive – exclusive of true title owner, but can have joint enterprise of adverse possession (tenants in common)
   e. Continuous for statutory period (varies from state to state 5 to 40 yrs)

2. Tacking – can’t tack periods of adverse possession b/t parties together to meet the statutory requirement unless there is privity of estate. (Campbell v. Hipawai Corp. pg 205 – ct. held transfers of property by deed w/in statutory period created question for jury whether D had acquired title by conveyances and adverse possession when P had paper title but D’s predecessor’s in interest had been cultivating the property)
   a. privity created when either the previous adverse possessor transferred his or her interest to the successor w/ a deed or that the successor was the heir of the previous possessor.

3. Color of title – defect in title leads title holder to believe it has possession of property in question.

4. Vested title – if title was achieved through adverse possession, it is transferable, continuous possession is not required

5. Rationale for adverse possession – encourage productive use of land

6. Exceptions to standard adverse possession laws
   a. Can’t acquire title by adverse possession against a government owner
   b. Many statutes allow for an unlimited period for minors, those in prison, insane or incompetent, to eject adverse possessors.

C. Conversion – like adverse possession except w/ personal property not land

1. When a pty entrusts another pty w/ property conversion does not occur until:
   a. when the pty entrusted w/ the property beings using the property in manner inconsistent w/ the purpose it was entrusted. (Songbyrd v. Estate of Grossman pg. 210 – ct. held where P made recordings that came into poss. of D, when D licensed the recordings to a 3rd pty contrary to P’s interests, that is when the stat. of limitations began running and P could not bring suit for conversion after stat. of limitations has run up, regardless of when he became aware recordings were being used contrary to his interests.)

2. statute of limitations begins to run at time of conversion
a. pty need not be aware conversion has occurred (diff. from adverse poss. w/ real property where stat. of limitations does not begin to run until rightful owner should reasonably be aware of adverse possession)
b. conversion had shorter statutory period of limitations than real prop.

3. Different rules:
a. New Jersey’s Discovery rule – statute does not begin to run until the owner knows or should know by exercising due diligence where the stolen objects are located
b. New York’s Demand and Refusal rule – statute does not begin to run until the owner demands the return of the property from a good faith purchaser of a stolen chattel (ct. in Songbryd held rule did not apply b/c property was entrusted to D, it was not a bona fide purchaser for value)

D. Lien Enforcement – same thing as mortgage – security interest in property that secures performance on a note/loan. If owner of property defaults on note/loan holder of mortgage can foreclose to pay off note.

1. Types of liens
   a. tax lien
   b. judgment lien
   c. personal property lien – car, furniture, etc.

2. Types of mortgage states
   a. Title state – mortgage temporarily conveys title to the lender while the borrower remains in possession.
   b. Lien state – title does not pass to lender but creates an enforceable lien in favor of lender should borrower default.
      i. majority rule

3. Types of foreclosures states
   a. Judicial foreclosure state – lender acquires security interest in property. If borrower defaults, lender can sell property to pay off loan
      i. ct. supervises foreclosure
      ii. borrower entitled to surplus from sale
   b. Power of sale state – lender acquires deed of trust rather than mortgage; borrower deeds property to lender. If borrower defaults, trust provided lender can sell property
      i. no supervision by court
      ii. only options to retain property are to file bankruptcy or seek injunction to stay sale of property
      iii. borrower entitled to surplus from sale???
   c. Strict foreclosure/deed inn lieu of foreclosure state – lender gets to keep entire value of property, don’t have to sell it. (Diefenbach – ct. held state’s strict foreclosure laws are not unconstitutional b/c it is related to state’s legitimate interest in compensating lenders for the risk they take in making loans; property could be worth less than amount owed)
      i. only Vermont and Connecticut use this rule

4. Process of foreclosure
   a. Judicial foreclosure state
Default payment → notice of intent to sell → Sale on courthouse steps → borrower gets surplus from sale

b. Power of Sale state
Default payment → notice of default → Suit for money judgment → judgment decree → redemption period elapses (can pay off loan until this time) → judicial sale of property (requires eviction) → borrower can buy back for price of highest bid or gets surplus from sale
c. Strict foreclosure state
Default payment → notice of default → Suit for title → judgment decree → redemption period elapses (can pay off loan until this time) → title passes to lender

II. To the Sovereign
A. Eminent Domain and Takings (see above)
B. Public Trust Doctrine
1. Definition – submerged and submersible lands are persevered for public use in navigation, fishing, recreation, and state as trustees for the people bears responsibility of preserving and protecting the right of the public use of waters for those purposes
   a. submerged and submersible lands include tide lands, coastlines, harbors, and navigable bodies of water
   b. Test: Is touched by ebb and flow of tides?
   c. extends to dry sand area landward of high tide line to vegetation line (Mathews – see below)
2. Limit on sovereign’s ability to transfer such lands to private owners
   a. exception where parcels used in improvement of public interest or when can be alienated w/out detriment to public interest
3. Sovereign has right to reclaim property w/out compensation
   a. Equal footing doctrine – when state enters the union it is placed on equal footing w/ all other states and acquires all land subject to public trust doctrine w/in its borders subject to a federal easement
   b. even where sovereign transferred it in the past, may reclaim w/out compensating other than for improvements (Phillips Petro. v. Mississippi – ct. held state could take property which was not navigable but touched by waters from Gulf of Mexico that P held in record title. ct. held P could not claim reasonable investment backed expectations where they have been paying taxes on land b/c they were on notice that state had superseding rights to tidelands. Dissent – breaking a chain of title that reaches back 150 yrs. upsets expectations of owners)
4. If the most reasonable access to public land extends across private land, then the Public Trust Doctrine extends to provide right of access across private land (Matthews v. Bay Head Improv. Ass’n – ct. held where private beach owned by quasi public entity public had right to enter beach as reasonably necessary including bathing swimming, fishing, etc.)
5. Environmentalist perspective
   a. use the doctrine as limitation on the ability of gov’t to misuse or mismanage natural resources
VOLUNTARY TRANSFERS OF LAND

I. Real Estate Transactions: Unique features

   A. Requirements of sales contract, including donative gifts (statute of frauds)
      1. K for sale of land or lease for more than one yr. must be in writing and
         signed by pty to be charged or by its agent
         a. K may be proved by other evidence as long as some memorandum
            disclosing an intent to transfer is in writing and signed
         b. a judicial admission made in ct. proceedings renders statute of frauds
            inoperative (Timberlake v. Heflin – pty’s entered a parol agreement to
            divide assets during divorce w/ husband gaining interest in house. Wife
            later repudiated claiming agreement barred by statute of frauds. Ct. held,
            wife’s signed affidavit submitted in the divorce proceedings was enough
            to enforce specific performance)
      2. must identify the parties to the transaction
      3. describe the land being transferred
      4. indicate the terms and conditions of the agreement
      5. Exceptions to statute of frauds
         a. leases for not more than one yr.
         b. written K may be revoked by oral agreement
         c. full performance
         d. part performance where intent to transfer is clear
         e. devise/intestate transfer (someone dies w/out a will)
      6. Purpose of statute of frauds
         a. protect both parties from fraud or manipulations in transfers
         b. promote orderly system of transfer of land

   B. Specific Performance – standard remedy available to seller and buyer for breach
      of land K
      1. Rationale – land transfers are unique and money damages are not adequate
         compensation b/c no substitutions are available.
      2. Exception – not available to seller in minority of states where parcel is not
         unique (condos) therefore seller does not suffer economic injury for which
         money remedy is not adequate (Centex Homes v. Boag – ct. did not grant
         specific performance where buyer breached b/c mutuality of remedy alone is
         not specific reason to support specific performance and codos are not unique
         parcels of land)
      3. When non-breaching pty elects money damages
         a. K price – FMV
         b. English rule – non-breaching pty can only recover where K breached
            willfully by seller or instances of fraud
         c. American rule – can recover expectancy damages regardless of reason
            for breach

   C. Liquidated damages – many K allow seller to keep down payment in event of
      breach.
      1. liquidated damages can be recovered where buyer can show it is punitive or
         unreasonably large
D. Equitable Conversion – divides interest in title of land into real and equitable title during executory period b/t making of K and transfer of possession or during period of installment payments

1. vendor retains real title while vendee has equitable title (possession)
2. who bears risk of loss during executory period?
   a. Majority rule – vendee bears risk of loss b/c vendor only holds title in trust for vendee not beneficial incidents of ownership (Ross v. Bumstead – buyer had made down payment but would not take possession until title insurance, deed, and mortgage were ready for delivery. Prior to delivery warehouse burned down. Ct. held vendee could not receive abatement from K price for the loss b/c it could have gotten insurance during the executory period.)
   b. Minority rule – vendee not required to assume loss that which it could non take possession of
3. if one pty dies during executory period
   a. rule is that during executory period vendor’s interest in converted to personal property and vendees interest is real property, thus those interests would be devised to heirs accordingly
4. options K – equitable conversion does not occur until option is exercised.

II. Contracts for the sale of land

A. Marketable title- where current owner’s claim to parcel of land is free from reasonable risk of claim of interest in land by others (shows clean chain of title back to original transfer from sovereign)

1. different from Fee Simple Absolute – can own in fee simple but be unable to produce marketable title b/c of existence of easements, covenants, or liens which don’t affect the ownership but restrict ways in which property may be used (Tri-State v. Sphinx – ct. held buyer could cancel sales K as provided where marketable title not produced by certain date. Although seller held legal title, during title search to provide abstracts it was discovered seller had been adversely possessing a small portion of the land. The adverse possession was not contested and could be settled through a claim to quiet title to that portion of land, but it still did not meet the requirements for marketable title by the date required in sales K)
2. Abstract of marketable title – title which shows on its face that there is a marketable title
3. Insurable title – title of sufficient quality to obtain an insurance policy from a title company, which may contain insignificant encumbrances.
4. Marketable title acts – acts created to combat the problem created by inability to deliver marketable title which inhibits a landowners ability to alienate the property.
   a. usually provide titles to become marketable by invalidating certain types of encumbrances, especially old ones (Marshall v. Hollywood pg. 332 – where deed was conveyed through forgery and P, heirs of original owner brought suit 40 yrs later to recover title against pty forged deed had been conveyed to. Ct. held marketable title act rendered otherwise unmarketable deed after statutory period had been
met and fraudulently conveyed deed had become valid. Heirs of defrauded pty could not recover.

b. goes further than adverse possession b/c marketable title act does not require litigation to file quiet title

B. The sales contract
1. Usually brokered by real estate agents
   a. Traditional rule is that broker were agents of sell and owed fiduciary duty to sell b/c sell non buyer usually paid all brokerage fees (3% to buyer’s broker and 3% to seller’s broker)

2. Fixtures – personal property which becomes affixed to the land and is therefore sold as part of the land
   a. requirements to become a fixture
      i. intended to come a permanent part of the land
      ii. must be actually annexed to the land (ex. furnace)
      iii. specially adapted to use of the land

III. The Deed – like all sales K, subject to statute of frauds
A. Components
   1. name of grantor and grantee
   2. words of intent to transfer
   3. description of land – must be sufficiently specific
      a. methods of description
         i. meets & bounds – relationship of property to landmark
         ii. gov’t surveys – where available (all states north of the Ohio River or West of the Mississippi except Texas and including Fl, Al., Miss.
         iii. subdivision plat – modern way
         iv. omnibus desc. – whatever property X owns in Y area
   4. signed by grantor
      a. need not be signed by grantee
   5. some jurisdictions require signatures of two witnesses or notarized

B. Types of deeds
   1. Quitclaim deed – no guarantees/covenants of title other than conveyance of what grantor owns, including all liens, easements, etc.
   2. Warranty deed – grantor promises to come to defense of grantee if the title is challenged and to indemnify him if the challenge is successful
      a. Gen’l warranty deed – warrant against all title defects, whatever their source. Includes all six covenants of title, see below
      b. Special warranty deed – warrants against title defects created by grantor only
   3. In the absence of other language, presumption is gen’l warranty deed

C. Covenants – developed b/c although marketable title shows proof of no reasonable adverse claims to interest in property, it is not a guarantee
   1. Six title covenants in gen’l warranty deed
      a. Present covenants – breached, if at all at time of conveyance and statute of limitations starts running at time of conveyance (Brown v. Lober pg. 312 – P buys land then later leases subsurface right to coal
co., later finds out that prior grantor had reserved 2/3 interests in subsurface rights. P brings suit under breach of seisen but fails b/c stat. of limitations had run up)

i. seisen – own what you are purporting to sell

ii. right to convey – not restrained inn any way from alienating land conveyed

iii. encumbrances – no undisclosed encumbrances (mortgage, liens, easements, etc.

b. Future covenants – breached, if at all, only when grantee is actually challenged by a 3rd pty w. superior legal interest in property. future covenants run w/ the land entitling subsequent grantees down the line to benefits under the covenant (successors can enforce against prior grantors)

i. quiet enjoyment – buyer will not be disturbed by 3rd pty claiming title to property and grantor will defend grantee against 3rd pty claims (Brown (see above) – also tries to bring suit under quiet enjoyment but fails b/c only breached if 3rd pty tries to eject)

ii. warranty – same as quiet enjoyment

iii. further assurances – grantor will sign documents or take other actions necessary to prefect buyer’s title if title turns out to be imperfect

c. limitations on covenants

i. KEY - covenants only apply to title defects (ex. could not sue for breach of implied warranty of habitability)

ii. present covenants subject to statue of limitations

iii. “ouster” required for future covenants

iv. monetary cap on damages (covers damages only)

a. solivency of grantor

b. no damages for loss on bargain

D. Delivery requirements – title does not pass until delivery takes place, however, once delivery does take place title passes, do not have to record

1. actual delivery – provides evidence of the requisite intent to transfer

2. if grantor retains deed there is a rebuttable presumption of no intent to transfer – intent is the key

3. if given to escrow agent – depends on what power grantor maintains over escrow. If grantor retains power to retrieve, then can not presume intent to deliver. If does not reserve right to recall then intent to deliver can be inferred (Capozzella pg. 304 – intend to deliver is judged by circumstances. where husband gave deed to his attorneys as trustees w/ instructions to have wife put on deed but couple later separated b/f deed actually conveyed, ct. held attorney’s testimony of the instructions was evidence of intent to transfer even though delivery never took place Dissent – held intention is not enough, actual delivery must take place)

4. Deed must be accepted by – acceptance is presumed when benefit is given to grantee
NOTE: Trying to use deed as will substitute – fails where grantor writes deed but retains until after death b/c delivery never takes place

5. Doctrine of merger – once buyer accepts deed, terms of the sales K are superseded by those of the deed.

6. Spousal interest – where grantor is married, spouse may also have interest in title, in which case it would have to sign title in order to convey property

IV. Security Title

A. Implied warranty of marketability – covers risk of litigation, whether or not meritorious

1. Different from covenants, b/c it covers against actual defects in title, whereas covenants only covers defects in deed

2. Marketable title acts – see above

B. Title insurance – primary way purchaser of real estate protect against clouds on title

1. Def. – guarantee provided by an insurance company that the title is of certain quality

2. Provides more protection for buyers than deed covenants:
   a. Insurer liable for litigation costs arising out of challenges of the insured’s ownership of parcel (protects only present grantee)
   b. Remedies not limited to purchase price (Fidelity v. Miller pg. 319 – P brings suit against D, grantor to P’s insured for claim P had to pay insured, grantor conveyed property w/ encumbrance P did not find out about in search. P had to pay insured for dim. in value for unknown encumbrance. ct. sent back for trial re. whether D conveyed deed w/ covenant or P was responsible for neg’l not discovery encumbrance during title search)
   c. Does not require “ouster”

3. Does not cover physical defects in property for consequences of zoning changes or gov’t actions

C. Recording systems

1. Use – once a deed has been delivered buyer usually takes it to a county office where it is recorded into public land records
   a. Main point of systems is to allow potential purchasers to determine chain of ownership of land

2. Types of recording systems
   a. Tract Index – recorded by block and lot number rather than by grantor/grantee
   b. Grantor/Grantee Index – provides brief description of land transaction and lists alphabetically by name of both grantor and grantee
   c. Torrens System – deed are replaced by title certificates. when land changes hand grantee presents previous owner’s title certificate to gov’t agency which issues a new title
      i. not the dominant system in any state and only available in ten st.
3. Recording acts – encourages grantees to record their deed by providing incentives for timely recording and possible adverse consequences for failure to record
   a. Types of recording acts
      i. Race statutes – purchaser who records title first prevails
         Ex. O→A, then O→B, if B records first then B has superior claim
            a. uncommon b/c could produce inequitable results
      ii. Notice statutes – subsequent purchaser prevails over earlier purchaser only if they didn’t have notice of previous conveyance
         a. actual notice – purchaser is aware of previous conveyance
         b. constructive notice – purchaser could have found out about previous conveyance by checking land records
            c. half the states use this
      iii. Race Notice statutes – subsequent purchaser will prevail over previous purchaser only if didn’t have notice and recorded first
         a. half the states use this
         b. if prior deed not validly executed, previous purchaser will not prevail over subsequent even if recorded first (Leasing Ent. v. Livingston – grantor conveyed land to family member then took out lien on land. D, debtor tried to foreclose and ct. held D had superior title b/c prior conveyance was not validly executed (only signed by one witness where law required two signatures))
         c. does not apply to involuntary transfers
            i. validly recorded deed will not defeat claim of adverse possession, implied easement, or dower right
      d. Shelter rule – where subsequent purchaser validly records w/out notice, further conveyances w/ notice by subsequent purchaser are protected against previous conveyance.
         Ex. O→A, O→B w/out notice and records first (valid in all jurisdictions), B→C, with notice of O→A. Result – C prevails b/c otherwise B who is blameless would be unfairly restricted to alienate
      e. Wild deeds – a recorded deed that is not legally recorded b/c a previous conveyance connected to the chain of title has not been recorded (see examples)

V. Fraudulent Transfer
   A. Forged Deeds – forged or wild deed cann gain priority over legitimate deed through operation of marketable title act (see Marshal v. Hollywood above)
      1. recording deed gives rise to a rebuttable presumption that deed is valid
   B. Deeds Fraudulently Acquired
      1. Fraud in the factum – fraud as to what it is you are signing
      2. Fraud in the inducement – fraud to get somebody to sign something
      3. Deed acquired through fraud creates a void title which fraudulent party has not power to convey
         a. Exception where void title may be validly conveyed:
i. conveyed to bona fide purchaser in value who purchased in good faith and 
ii. BFPV purchased for valuable consideration (love and affection doesn’t count) 
ii. defrauded pty was negligent in signing over deed (Hauck v. Crawford – where pty had fraudulently acquired deed by misrepresenting what grantor was signing then conveyed property to 3rd pty bona fide purchaser in value, ct. held must be a finding of fact to determine whether grantor was negligent in signing deed)

C. Implied warranty of habitability – new homes come w/ warranty that homes are livable

1. Housing not new after closing – only able to recover for defects in housing through fraud claims

VI. Anti-discrimination Statutes – civil rights statutes may limit the ability of the seller to discriminate on basis of race or other immutable characteristics (Jones v. Alfred H. Mayer – ct. held refusal to sell home based on buyer being black was in violation of Fair Housing Act and buyer was entitled to injunctive and other relief)

**SHARED INTEREST REAL/PERSO**

**REAL PROPERTY**

I. Concurren**

**C. Types of co-tenants:**

1. Joint Tenancies

   a. Distinguishing Characteristics

      i. right of survivorship – when 1 joint tenant dies, his share passes automatically to surviving joint tenants

      ii. joint tenants interest is alienable – transferable during lifetime

      iii. not divisible or descendible – b/c share automatically passes to other tenant at death

   b. How to create

      i. 4 unities (TTIP)

         a. time – same time

         b. title – same instrument

         c. identical/equal interests

         d. possession – equal rights to possession

   ii. grantor must clearly express right of survivorship

   iii. law disfavors b/c it allows joint tenants to avoid probate (wills)

   iv. can use a “strawman” to create joint tenancy - owner of free simple absolute transfers title to “strawman” who transfers back to original owner and X as joint tenants w/ right of survivorship (meets all 4 unities)

   c. How to sever

      i. joint tenant can sell or transfer interest during lifetime w/out other’s knowledge

         a. one joint tenants sale severs joint tenancy as to seller’s interest b/c disrupts 4 unities
i. buyer becomes a tenant in common
ii. joint tenancy b/t non-transferring joint tenants remains in place
iii. partition b/t parties
   a. voluntary agreement – allowable peaceful way to end relationship
   b. partition in kind – judicial action for physical division of estate if in best interests of all (works best if estate is large rural tract)
   c. forced sale – judicial action if in best interests of all where land sold and proceeds are divided proportionately (works best where estate is home)

2. Tenancies in Common - 2 or more own w/ no right of survivorship
   a. How created
      i. unity of interest and possession
   b. Distinguishing Characteristics
      i. each co-tenant owns an individual part and each has a right to possess the whole
      ii. each interest is descendible, divisible, and alienable (no survivorship rights)
   c. presumption favors tenancy in common where couple not married

3. Tenancies by Entirety – protected marital interest w/ right of survivorship
   a. How to create
      i. only in husband in wife who share right of survivorship
      ii. arises presumptively in any conveyance made to husband & wife unless clearly stated otherwise
      iii. requires same unities as joint tenancy but w/ marriage
   b. Dist. characteristics
      i. highly protected (can’t touch this)
         a. creditors of only one spouse can’t tough tenancy
         b. neither tenant acting alone can defeat the right of survivorship by a unilateral conveyance to a 3rd pty
      ii. neither pty can alienate the other pty’s rights w/out consent
         (Robinson v. Trousdale Cnty pg. 362 – where husband conveyed title to city, ct. held wife entitled to proportionate share of money paid for the property)

4. Condos
   a. property considered “condo” where there is a fee simple interest in property & pro rata interest inn common areas
   b. condo owners own condo in fee simple are tenants in common w/ co-owners as to common areas
   c. owners liable for damages proportionate to percentage of common area which they own (Dutcher v. Ownes pg. 358 – where condo owner suffered damage from fire due to condo homeowners ass’n’s neg’l in maintaining lighting fixture in common area, ct. held could recover proportionate share from all condo owners for damage)

5. Time shares
a. those w/ right to property viewed as tenants in common

B. Rights and duties of co-tenants

1. Possession
   a. each co-tenant has equal right of possession
   b. adverse possession by one co-tenant requires more than mere “ouster” of other

   • WHAT IS DEF. OF OUSTER (McKnight v. Basilides pg. 352)
     – ct. held tenant in common had not acquired property through adverse possession and was liable to other co-tenants for accounting during period of exclusive possession
       i. refusal of demand to share possession
       ii. notice of hostile claim of ownership
       iii. attempt to convey ownership of entire estate

2. Profits
   a. own efforts
      i. each co-tenant entitled to profits from own use of property
      ii. non duty to pay rent unless co-tenant has ousted others
   b. third pty rents
      i. all cotenants entitled to proportionate share of rents

3. Expenses
   a. taxes, insurance, and mortgage
      i. each co-tenant must pay proportionate share (Giles v. Sheridan)
         – where aunt purchased property for niece and husband, ct. held they were joint tenants and husband had to pay proportionate share of mortgage
      ii. co-tenant in possession must first pay, then seek reimbursement
   b. necessary repairs
      i. each co-tenant must pay proportionate share
   c. improvements
      i. no right to contribution from co-tenants
      ii. co-tenant who improves property entitled to increased value attributable to improvements(not what paid for improvements)

4. Remedies
   a. accounting
      i. co-tenant who rents to 3rd pty must share profits
      ii. can deduct for cost of taxes, insurance, mortgage and repairs
   b. partition
      i. in kind – dividing use of estate equally among tenants
      ii. by final sale – ct. orders property sold and divides money proportionately among co-tenants
   c. settlement upon final sale
      i. costs – co-tenant reimbursed for costs of taxes, insurance, mortgage and repairs
      ii. improvements – co-tenant who improves entitled to increased value attributable to improvements

E. Other marital Property – marital property divided equally among spouses
1. Definition of marital property – all property and earnings acquired by either spouse during a marriage, tangible or intangible
   a. Spouses entitled to increase in value of separate property which results from an expenditure of funds which are marital property
2. Educational degrees not viewed as marital property (Hoak v. Hoak pg. 366 – where wife supported husband during med school and couple subsequently divorced, ct. held educational degree not subject to equitable distribution)
   a. Property that is speculative, such as educational degrees are not subject to equitable distribution by spouse is entitled to reimbursement and alimony
   b. Minority of jurisdictions hold degree is marital property
3. Many jurisdictions moving towards “community property” view of marital property
   a. Definition – all earnings and property acquired through those earnings during a marriage are jointly owned by both spouses in undivided shares of equal value

II. Present Estates/Future Interests
   A. The estate concept – recognizes that interest in land goes beyond present possession to parties that may have a future interest in the land
   B. Types of estates
      1. Fee simple absolute – highest form of estate
         a. Fee – potentially infinite duration of ownership
         b. Simple – no restrictions on inheritability of property
         c. Absolute – no event will automatically divest owner of his interest
      2. Present estates – owner of fee simple absolute alienates portion of estate but either retains a future interest or transfers future interest to a 3rd party
         a. Life estate – transfer possession of estate to one party and future interest to another
            i. Called freehold estate b/c have right of seisin (legal ownership)
            ii. May be limited by life of grantee or 3rd party
               a. Where language is vague – assumed is for life of grantee
         b. Estate for years – grantor alienates property for a period of time but retains possessor right in future (possession, not legal ownership)
            i. Periodic tenancy – estate for fixed period of time which continues for period equal to that time unless landlord or tenant gives notice
            ii. Tenancy at will – landlord or tenant can terminate at any time
            iii. Tenancy at sufferance – estate holdover remains on land after expiration of the estate
      3. Future interests
         a. Types of future interest
            i. Reversion – grantor retains future interest in property
            ii. Remainder – grantor conveys property to a pty, but future interest in the parcel is conveyed to a different pty
   Estates that can be terminated by holder of future interests
B. Duties of life tenants

1. life tenants entitled to all ordinary uses and enjoyment so property except:
   a. subject to doctrine of WASTE
      i. affirmative/voluntary – actual overt conduct that causes decrease in value
      ii. permissive – neglect, land allowed to fall into disrepair/failure to protect land
      iii. ameliorative – must not engage in acts that will enhance property’s value unless all future interest holder are known and consent (Brokaw v. Fairchild pg. 375 – ct. held life tenant could not convert house to apartments even where increased value b/c against future interest holder’s wishes)

C. The law of remainders

1. Contingent remainders
   a. unsatisfied condition precedent for holder of remainder to take possession (something has to happen for remaindermen to take possession)
   b. not yet possible to ascertain identity of remaindermen
   c. strong presumption that remainders are vested rather than contingent

2. Vesting of remainders – becomes vested when:
   a. there are no more condition precedents and
   b. the holder of the remainder can be ascertained
   c. unless there is a vested remainder in fee simple absolute, original grantor retains reversion

3. Destruction of Contingent remainders
   a. destructionability rule – if contingent remainders not vested b/f destruction of previous estate, remainders are destroyed
      i. only followed in minority of states
   b. modern rule – if contingent remainder not vested b/f destruction of previous estate, right of present possession reverts to holder of reversion (usually original grantor or grantor’s estate) but interest but interest is divested if condition precedent is later fulfilled
      i. becomes executory interest (Abo Petro v. Amstutz – where life estate was conveyed w/ contingent remainders in heirs and absolute title later conveyed to holder of life estate, then holder conveyed title to P, ct. held would not follow destructionability rule and contingent remainders remained vested. P did not get anything more than life estate w/ remainder in heirs of grantor)
   c. merger rule – when present estate and reversion are transferred to common owner, the parts merge back into estate in fee simple absolute
      i. minority ct.’s allow destruction of contingent remainder by merger
   d. rule in Shelly’s case – if grantor convey’s life estate to pty w/ remainder in pty’s heirs, the remainder interest went to that pty. not their
heirs. Therefore pty took title in fee simple absolute and could freely convey it as they chose.
   i. abolished in most jurisdictions
e. doctrine of worthier title – if grantor convey’s land w/ remainder in grantor’s heir but grantee dies while grantor still alive, property is transferred back to original grantor in fee simple absolute and grantor may alienate it freely
   i. modern interpretation is that if evidence show’s grantor intended to create a remainder that would vest in its heir upon the death of the grantee, heir retain a remainder interest.

D. Transfers of future interests
   1. Life estates and estates for years are freely transferable
      a. Pur autre vie – when life estate is transferred
         i. new estate does not last longer than life of pty it was originally subject to (Rutherford v. Keith pg. 392 NEED SUMMARY)
   2. Gen’l rule that restraints on transferring future interest impose by private pts are unenforceable

E. Rule against Perpetuities – designed to limit the ability of property owners to control the identity of their successors in future generations
   1. Common law rule – invldates future interests unless:
      a. they must vest, if at all
      b. not later than 21 yrs. after
      c. the death of life in being at creation of interest
   2. Future interests subject to RAP
      a. executory interests
      b. contingent remainders
      c. vested remainder subject to open
   3. Future interest exempt from RAP
      a. future interests of grantor
         i. possibilities of reverter
         ii. rights of entry
         iii. reversion
      b. vested remainders of 3rd pts
      c. future interests of charities
         i. if present estate also held by charity
   4. Definitions
      a. creation of interest
         i. inter vivos transfer – created moment of conveyance
         ii. will – created moment testator dies
      b. vesting – happens moment condition occurs
      c. life in being
         i. alive at time of creation of interest
         ii. pty to transfer unless otherwise specified
      d. class – group of person described in such a way as to form a distinct body of recipients
i. open class v. closed class – a class remains open as long as any of its members have not become vested.

ii. RAP and class interests – if future interests of any member of a class are void then the interests of all the class are void

F. Modern Modifications of RAP
1. Wait and see approach – future interest no invalidated unless it actually fails to vest w/in perpetuities period
2. Uniform Statutory Rule against Perpetuities
   a. future interest not invalidated unless it actually fails to vest w/in 90 yrs of creation
   b. transactions for value are exempted [WHAT DOES THIS MEAN???]
3. Equitable reformation
4. Statutory cut-offs for reversions and rights of entry (ex. MA: 30 yrs. from date of creation)

III. Trusts
A. Def. – takes present ownership and divides it into separate legal and equitable ownership interest. Legal title is held by a trustee while equitable title is vested in trust beneficiary
   1. Neither pty is sole owner of assets in trust
   2. If trustee dies and no provision is made for such event, ct. appoints a replacement trustee
   3. A pty can est. a trust and make themselves the trustee but they must choose b/t being either the present or future beneficiary, can’t be both

B. Advantages of trust
   1. group of indiv (beneficiaries) can derive economic benefit of land ownership w/out having to worry about exercising control over the land
   2. guarantees a smoother transition b/t generations (Deiss v. Deiss pg. 399 – ct. held trust did not violate RAP b/c instead of creating life estate followed by series of remainders it created a number of simultaneous interests that are already vested just enjoyment of estate is postponed until condition of mortgage being paid off has occurred)
   3. ease with which land can be sold if course of action is deemed appropriate
      a. can sell land and replace the land in trust w/ proceeds from sale
         i. can be done w/out approval of trustees (easier than other joint tenancies)
   4. Deed of trust can be used to secure creditor’s interest in a mortgage and ptys can conduct foreclosure proceedings w/out having to initiate formal proceeding w/ the court.

C. Disadvantages of trust
   1. Unless document creating trust reserves right of revocation, the settler can’t change its mind and revoke the trust.

IV. Landlord/Tenant
A. Property Interests – tenant interest created from estate for years (see above)
   1. Tenant – present possessor estate
   2. Landlord – reversion in either:
      a. fee simple, life estate or
b. leasehold (when sublease or assignee)

B. Types of tenancies (leaseholds)

1. Tenancy for years
   a. definite term, fixed in advance
   b. created by an express agreement
      i. if more than one yr must be in writing (statute of frauds)
   c. automatically terminates at end of term unless renewed

2. Periodic Tenancy
   a. indefinite duration; fixed length of recurring period
      i. ex. month to month, week to week
   b. created by express agreement or implication
   c. terminated by notice in advance
      i. at lease equal to length of period unless otherwise agreement
      ii. if tenancy is year to year or greater, 6 mo. notice required

3. Tenancy at will
   a. permissive possession w/out any agreement regarding term of tenancy
   b. terminable at any time by either pty
      i. jurisdictions split on notice requirement

4. Tenancy at sufferance
   a. wrongful holdover after termination of prior tenancy
   b. distinguished from trespass
   c. terminable by landlord upon giving notice

C. L/T relationship

1. Covenants of landlord – correspond to present/future covenants conveyed in deed
   a. Seisen (landlord owns estate)
   b. Right to lease (similar to right to covey)
   c. No 3rd pty w/ legal right of possession (similar to cov. against encumbrances)
   d. Landlord won’t prevent tenant from taking possession
   e. Others
      i. quiet enjoyment
      ii. habitability

2. Landlord duties
   a. duty to put tenants in possession
      i. legal possession – implied covenant that no 3rd pty has legal right of possession paramount to that of tenant (English & American rule)
      ii. actual possession – implied covenant that no 3rd pty will have actual possession at inception of tenancy (only American rule and URLTA) (Andrian v. Rabinowitz pg. 416 – ct. held tenant not liable to pay rent where holdover tenant would not vacate)
         a. American rule – rightful tenant has cuase of action against wrongful holdover tenant for damages but no cause of action against landlord or right to break lease
b. URLTA (statute) – landlord and tenant can bring action against holdover tenant
b. implied cov. of quiet enjoyment (see below under eviction)
c. implied warranty of habitability (see below under quiet enjoyment)
d. no duty of intended use (Anderson Drive-in v. Kirkpatrick pg. 412 – ct. held landlord not liable that land could not be used for reason purchased when lessee had opportunity to get information himself)
e. no duty of landlord to prevent crime except where (Walls pg. 444 – where tenant sexually assaulted in parking lot of apt. complex ct. held est. the following standards as well as such conduct does not fall under IWH):
i. special relationship such as common carrier (L/T relationship alone does not qualify)
ii. known physical defects in premises provides an opportunity for criminal conduct
iii. there is an overriding foreseeability that criminal attacks will occur
iv. voluntary assumption of risk (gratuitously providing security services, etc.)
v. primary rationale – not resp. for actions of 3rd ptys.

3. Tenant duties
   a. duty to repair
      i. responsible for keeping premises in reasonable good repair
      ii. must not commit waste, (voluntary, permissive, ameliorative)
         a. when a tenant removes a fixture, commits voluntary waste
            i. fixture is a one moveable chattel that by its fixture to reality objectively shows intention to permanently improve reality (ex. furnace, lighting)
         b. tenant can’t remove a fixture, no matter that she installed it
            i. fixtures pass w/ ownership of the land
      c. how to determine if item a fixture
         i. prty’s express agreement controls
         ii. in absence of agreement, tenant may remove her installation if removal doesn’t cause substantial harm to premises
   b. duty to pay rent
      i. options when tenant breaches and retains possession
         a. evict and sue for rent owed
         b. continue relationship and sue for rent owed
         c. landlord can’t engage is self help (change locks, remove tenant or possessions)
      ii. options when tenant breaches but vacates (see abandonment)
         iii. if landlord evicts tenant may recover under cov. of quiet enjoyment or breach of K

D. Sublease v. Assignment
   1. Presumptive right to assign or sublease in every lease K
a. ct.s strictly construe language of lease so if no restriction is mentioned then presumption that right to assign/sublease is included

a. Restrictions:
   i. complete restraint on alienation is disfavored by courts
   ii. landlord must consent
      a. landlord can refuse consent w/out offering a reason

2. Sublease – when only a portion of leasehold interest transferred
   a. tenant retains reversion
   b. sublessee not in privity of estate w/ landlord
   c. sublessee liable directly to sublessor, not landlord
   d. sublease created where:
      i. tenant reserves right of re-entry
      ii. transfer contained agreement to surrender possession to original tenant at end of sublessee’s term
      iii. sub-tenant had to pay a different rent than original tenant
      iv. transfer made on different terms/conditions than original lease

3. Assignment – when leasehold interests transferred in whole
   a. complete transfer of all interests in lease
   b. assignee in privity of estate w/ landlord (Jaber v. Miller – where tenant of a building transferred lease to D and building later destroyed, ct. held that D not liable to tenant for promissory notes b/c language of transfer was an assignment, therefore assignee owes no duties to assignor but rather landlord of building)
   c. assignee liable to landlord to breach of lease

4. Formalism v. Intent of pts

B. Abandonment
1. Tenant still has duty to pay rent unless land accepts tenant’s surrender
2. What constitutes acceptance?
   a. reletting alone insufficient if landlord has duty to mitigate damages (Reid v. Mutual of Omaha pg. 427 – where tenant breached and landlord remodeled and re-rented them new tenant breached ct. held original tenant liable for rent for period where space was vacant)
   b. remodeling or renovating maybe (but not always) sufficient
3. Duty to mitigate
   a. traditional rule – no duty to mitigate
      i. may constitute unwanted acceptance
      ii. lease is complete conveyance such that landlord has not possessory interest
      iii. unfair to require landlord to act
      iv. duty to mitigate encourage abandonment which invites vandalism
   b. modern rule – yes duty to mitigate
      i. reletting promotes economic efficiency
      ii. punitive contract damages are disfavored
      iii. mitigation of damages favored in contracts and torts
   c. extend to duty and costs
i. good faith effort to advertise/show property meets the duty
ii. breaching tenant bears cost for putting another tenant in possess.
iii. breaching tenant responsible for any period of time landlord
can’t rent, costs of renting to 3rd pty, and any difference in rents

C. Constructive Eviction – breach of covenant of quiet enjoyment

1. How it is breached:
   a. acts or omissions by landlord that
   b. so substantially interferes w/ tenant’s possession or use and
      enjoyment of the premises
   c. as to physically dispossess tenant or justify tenants abandonment
      i. landlord gen’l not responsible for bothersome conduct of others
      except duty not to permit nuisance on premises
   d. tenant must give notice to landlord (actual or constructive)

2. Types
   a. total – tenant must vacate premises to recover (Petro. v. Swords pg. 432 – where D refused to pay rent b/c claimed breach of quiet
      enjoyment, ct. held although there was evidence of breach of quiet
      enjoyment there had been no breach b/c tenant never vacated premises)
   b. partial – tenant must vacate affected portion of premises
   c. equitable – tenant may remain in possession equitable relief (usually
      an abatement in rent) for breach
      i. URLTA – if landlord fails to provide essential services tenant
         may either:
         a. recover damages based on diminution in value or
         b. procure reasonable substitute housing at landlord’s exp.

3. Implied warranty of habitability – part of quiet enjoyment
   a. applies to residential leases (and sale of new homes) only
   b. duty to keep premises in condition fit for human habitation
      i. can’t be contracted around
   c. breached by landlord’s failure to remedy or repair substandard
      conditions that materially affect tenant’s health or safety
   d. elements
      i. existence of condition materially affecting health or safety
      ii. tenant did not cause condition
      iii. landlord has actual or constructive notice of condition
      iv. landlord fails to remedy or repair condition w/in reasonable
         time after notice
      v. tenants suffer injuries proximately caused by condition
   e. remedies for breach
      i. termination of tenancy
      ii. repair and deduct
      iii. rent withholding (Javins pg. 438 – ct. held tenant’s duty to pay
         rent tied to landlord’s duty to keep premises in line w/ housing
         code. housing code violations is a breach of K and tenant able to
         use regular K remedies)
a. payment of rent into court or escrow is best way b/c simply withholding rent runs risk of eviction if ct. finds no breach

iv. suit for damages and injunctive relief
   a. damages = K rent – actual value

v. housing code remedies – usually enforceable by criminal penalties.

d. there is an argument that not being able to contract around IWH (“as is” housing) decreases the quantity of housing available thereby increasing cost of housing which has adverse effect on low income tenants – the same class of tenants IWH is meant to protect

E. Statutory intervention in L/T relationship – statute more than case law has been instrumental in reshaping relationship in recent yrs

   1. Urban housing code – requires the maintenance of housing in good condition, the provision of necessary facilities, and limits occupancy by requiring a minimum amount of space for each occupant
      a. requires subjective interpretation of requirements by inspectors/ct.s
      b. retaliatory eviction – protected activities carved out by statute
         (Edwards v. Habib pg. 451 – where tenant reported housing code violations to gov’t, landlord evicted tenant, ct. held such retaliatory evictions are not legal)
            i. tenants complaint to landlord/housing authority about housing code violations or conditions
            ii. tenants asserting their rights under lease
            ii. if landlord responds negatively there is a rebuttable presumption of retaliation
               a. prohibited actions:
                  i. eviction
                  ii. refusing to renew lease
                  iii. increasing rent
                  iv. decreasing privileges under the lease
            iii. most statutes provide a retaliation period (usually 6months)
               a. in most jurisdictions if reason for eviction is non-payment of rent, retaliation does not apply
               c. comprehensive housing code enforcement is a popular alternative to relying on tenants to report code violations but only best in areas where there is some decline but code enforcement will prevent further decay.
                  i. doesn’t work in good areas b/c no need for enforcement
                  ii. doesn’t work in back areas b/c landlords don’t have resources for repair or tenants money for increased rent for up to code housing

   2. Rent Control
      a. Def. – ordinances which allow for periodic increases, either a fixed statutory amount or a discretionary amount determined by a local agency that is based on or on increases in cost of living index or landlord costs
         i. some also prohibit eviction except for just cause and regulate the demolition or conversion of rent controlled units
b. exists only in CA and some Eastern states
   i. rent controls for apartments are less common today but still common w/ mobile homes

c. constitutionality – rent control has been challenged as a taking where it limits landlords ability to evict but ct.’s have held it is not a taking (Yee – where rent control of mobile home park entitled tenants to reside indefinitely at rent control prices but enabled them to sell freely at any price they choose, the S. Ct. held it was not a taking b/c transferring wealth to mobile home owners and regulating use of land is not a gov’t imposed physical occupation of the premises)
   i. other ct.’s have held not regulatory taking either b/c it was reasonably related to gov’t interests and benefits society

d. Alternatives to rent control – federal subsidy programs
   i. Public housing – “projects” originally meant to be temporary housing NEED MORE INFORMATION
   ii. Project based Sectoin 8
      a. units are constructed and owned by private owners
      b. subsidized to varying degrees by gov’t
         i. provided units are available to low income tenants
      c. subsidies tied to units
      d. rent usually established at portion of household income
   iii. Tenant based Section 8 voucher
      a. gov’t gives an individual who qualifies a voucher which they can use on the open market to make up difference in rent
   iv. Modern trend is away from project based and towards tenant based subsidies
   v. subsidies are not entitlements and may be revoked or denied

e. no real answer as to whether rent control or subsidies is better

V. Servitudes – the right to use land of another for a particular purpose
   A. Easements – most permanent of the servitudes
      1. Affirmative or Negative
         a. Affirmative – entitles holder of dominant tenement to access servient tenement for a particular purpose
         b. Negative – restricts owner of property from doing something but gives holder of easement no right of entry
            i. can only be created expressly
            ii. traditionally disfavored
            iii. now accepted in some contexts
               a. light, air, lateral support, artificial streams (Peterson v. Friedman pg. 530 – ct. extended neg. easement on light and air to easement of view where neighbor’s television antenna were obstructing view)
               b. conservation easements – when landowner relinquishes right to use a particular parcel in some specified way that would detract from, diminish or extinguish its natural qualities
enacted by UCEA
b/c no dominant tenement, it is the one negative
easement held in gross
historic preservation easements
similar to restrictive covenants (see above)
always appurtenant

2. Appurtenant or In Gross
a. Appurtenant – created for the use of owner of adjacent land
   i. must be created for use of dominant estate
   a. has to involved two parcels of property
   b. must benefit one parcel, not just a person
   ii. “run w/ the land KEY
   a. benefit runs to future owner of dominant tenement
   b. burden runs to future owner of servient tenement
   iii. easement will run if:
   a. ptys intended easement to run w/ land
      i. language of deed or other conveyance
      ii. surrounding circumstances
   b. reduced to writing
   c. owner of servient estate has notice of easement
      i. actual, constructive, or inquiry notice
iv. Cushman Corp. v. Barnes pg. 468 – ct. looked to language of
deed to determine easement created in gross holding that were
prior easement conveyed it is conveyed through later transfers
unless an express exception is made. further easement was
divisible where did not increase burden on servient tenement and
could not be terminated through lack of use. however, easement
was limited in size to size of road at time of conveyance)

b. In Gross – confers benefit not related to land to easement holder
   i. not linked to ownership of a particular estate (no dominant
tenement)
   ii. Miller v. Luthern Camp Ass’n. pg. 475 – ct. held where
   brother assigned portion of rights to fish and bathe in lake to
   brother, grantee could not convey the easement in gross to 3rd pty
   w/out consent of his brother)

3. Creation
a. express easement – must be in writing
   i. deed
   a. for easement only (grant cable co. access to lay line)
   b. conveyance of land w/ grant or reservation of easement
b. prescriptive easement – analogous to adverse possession (MacDonald
   Prop. v. Bel-Air pg. 487 – where D golf course used part of P’s
   property as a rough for more than 50 yrs. and P knew about it but did not
   interfere, ct. held D had gained a prescriptive easement)
   i. actual use (can’t be symbolic or hypothetical
   ii. continuous or uninterrupted
iii. open and notorious or visible
iv. adverse (w/out servient owner’s permission)
v. for statutory period of time
c. implication – implied from prior use
   i. former unity of title
   ii. apparent and continuous use of “quasi-easement:
      iii. reasonable necessity for easement for quiet enjoyment of
          dominant estate (not as strict as easement by necessity)
d. necessity (Hellberg v. Coffin pg. 482 – where landlord leased
   property to P that was landlocked by river and surrounded by landlord’s
   property then gated off road that was only ingress and egress to rental
   property, ct. held tenant had easement of necessity to use road through
   landlord’s property)
   i. former unity of title
   ii. landlocked parcel has not other access to public road than
       through servient estate
   iii. no prior use is required (unlike easement by implication)

4. Scope of allowable uses determined by:
a. intent of grantor
   i. ct.s look to language, surrounding circumstances, and conduct of
      pty
   ii. if language unclear, easement assumed to be in gross
b. manner of use
   i. kind of use
   ii. quantity or intensity of use
c. overburdening
   i. reasonable use
d. divisibility, extensions, and relocation
   i. ct.s do not usually find mere division of a dominant estate to be
      an overburden of the servient estate, must show more to prove

5. Transferability
a. appurtenant – transfers automatically to subsequent owners
b. gross – traditionally not transferable
   i. exceptions
      a. commercial purposes
      b. intended to benefit person other than immediate grantee
      c. restatement of property – freely transferable
   ii. apportionment (transfer portion of right granted under easement)
      a. exclusivity test – can only apportion easement if holder of
         easement has exclusive rights against servient holder
      b. restatement – apportionable unless contrary to grantor’s
         intent or division unreasonably increase burden on servient
         estate

3. Termination
   a. release by easement owner (in writing)
   b. expiration by own terms
c. merger of servient and dominant estates
d. abandonment (Presault v. United States pg. 492 – where gov’t stopped using railroad tracks for a long time and tore up portions, ct. held the easement had been terminated by abandonment coupled w/ affirmative evidence of intent not to use)
  i. requires informative act of intent not to use anymore
  ii. may also be terminated by estoppel of servient owner acts to detriment on benefited pty’s assurance that will no longer use
e. frustration of purpose
  i. purpose is impossible to accomplish
  ii. easement no longer serves intended purpose
f. changed circumstances
  i. lack of necessity, prescription, condemnation of servient estate

B. Profits – entitles holder to enter servient land and take soil or substance of soil (St. Helen Shooting Club v. Mogle pg. 497 – ct. held property owner could alienate exclusive right to hunt/fish on land to another pty and that pty could then exercise that right against subsequent owners)
  1. subject to same rules of easements
  2. assumed to be in gross

C. Licenses – privilege to enter another’s land for some delineated purpose
  1. Creation
    a. may be created formally or informally
    ex. “dinner invitation”
    b. not subject to statute of frauds
    c. look to intent of pty’s to determine whether license or profit
  2. Generally viewed as revocable at will
    a. exceptions where irrevocable
      i. estoppel - licensee invests substantially in reasonable reliance on license (Holbrook v. Taylor pg. 508 – ct. held where pty granted coal co. permission to use road and coal co. invested substantially in reliance on permission pty was estopped from revoking license)
        a. estoppel lasts to the extend necessary for pty holding license to realize upon its expenditures
      ii. deemed to be a lease or covenant
      iii. common law or statutory duty not to revoke for discriminatory reasons
  3. Gen’l non transferable, even for commercial purposes (McCastle v. Scanlon pg. 502 – ct. held license to cut trees granted to P revocable where P transferred interests to 3rd pty)