Owners of property possess a bundle of entitlements

- Use the property, exclude others, transfer title, immunity from having property taken or damaged, lease and rent

**Adverse Possession**

How to gain title by adverse possession-clear and convincing evidence

- Hold the land adversely or hostilely (non-permissive)
  - Where a person mistakes the boundary, it will not defeat their claim. (Brown v. Gobble)
  - The possessor objectively acted as if he owned the land without legal permission (Nome 2000 v Fagerstrom)
  - Presumed non-permissive
  - If permissive, can only become adverse if permission revoked
  - If allowed to make improvements, true owner may be estopped from denying continued permission to use

- Actual possession
  - Enjoyment, cultivation, residence, or improvements
  - Be used as an average owner of similar property would use it (Nome 2000 v. Fagerstrom)

- Open and notorious
  - Need use consistent with ownership such that a reasonably diligent owner would see that a hostile flag was being flown over his property (Nome 2000 v. Fagerstrom)

- Continuous
- Exclusive (depends on the J)
  - Only used by the occupant, and no others could use it or claim ownership

- For the relevant statutory period (usually 5-40 yrs)
  - Tacking-succeeding periods of possession by different owners can be added together-must be in privity
  - May be lowered if possessor has color of title-written conveyance is somehow defective

Rationales for adverse possession

- Police your own rights, efficient use of the land, settled expectations, resolve land disputes, unjust enrichment, system for clear title

**Prescriptive Easements**
Exact dimensions of the easement do not need to be shown. Slight deviations do not defeat the easement. (Community Feed Store, Inc. v. Northeastern Culvert Corp.)

Requirements- Open and notorious, adverse or hostile, continuous, actual use for the statutory period.-normally not exclusivity
- Maybe preponderance of the evidence for prescriptive easements
- Only the same kind and amount of use before

Usually presumptively nonpermissive
- unless it was a community custom to allow use

No negative prescriptive easements
Public may acquire prescriptive easements, but public access to private land is presumed permissive unless there is evidence to the contrary

**Unjust Enrichment versus Forced Sales**
Structure Built on one person’s land by another
- Most courts hold landowners become the owner of the structure if it is mistakenly built on his land. Unjust Enrichment?
- Some cts hold innocent trespassers who improve property in good faith believing it to be their own has a right to compensation for the improvements or the owner can sell the land for its value without the improvements. (Somerville v. Jacobs), betterment statutes
  - Bad faith-no compensation and can be ordered to remove

**Boundary Settlement**
Cts may uphold oral agreements when
- The boundary is uncertain, the parties can prove the existence of an agreement, and the parties honor the agreed line
Cts may recognize longstanding acquiescence btw neighbors
Estoppel
- Owner erroneously represents the boundary is located on a certain line, and the other party makes improvements in reliance on the representations
- If owner knows of his neighbor’s improvements, but remains silent

**Public Policy Limits on the right to exclude**
At common law, absolute right to exclude except when people are in danger
The more an owner has opened up her property to the public, the more likely it is that the courts will find public rights of access to the property.
Properties opened to the general public cannot discriminate
Title to real property cannot include dominion over the destiny of persons the owner permits to come onto the property (State v. Shack)
  • Does not open the employer’s premises to the general public if the employer himself has not done so

2 ways to exclude people from your land
  • civil trespass-unprivileged intentional intrusion on property possessed by another
    o may occur when access to land is granted through fraud (Desnick v. ABC), but consent can still be effective.
      ▪ Depends on scope of consent
  • Criminal trespass-enters or remains in a place as to which notice against a trespass is given
  • Trespass to computer systems-more likely to be trespass to chattels

Privilege
  • Consent of the owner
  • Necessary to prevent a more serious harm
  • Entry otherwise encouraged by public policy

**Right of Reasonable Access to Property Open to the Public**
Majority has granted amusement places the absolute right to exclude.
  • As long as consistent with civil rights laws
  • Exception- (Uston v. Resorts International Hotel, Inc).
    o Cannot unreasonably exclude people, only those who disrupt operations or threaten security

Duty on Innkeepers and common carriers (bare minimum) to serve members of the public w/o discrimination.
  • reasonable access. Uston expand to all businesses open to public

**Public Accommodations Statute and Anti-Discrimination Policy**
Civil rights act of 1964.
  • Prohibition against discrimination or segregation in places of accommodation
  • Equal enjoyment of any place of public accommodation without discrimination on race, color, religion, or national origin.
  • Is a public accommodation if its operations affect commerce or discrimination is supported by state action in:
Provider of lodging (with exceptions)
Sells food for consumption on premises
Entertainment venue
Anywhere that has/is located in/or holds itself as serving patrons of those establishments

- Provisions do not apply to private clubs

To bring Civil rights act of 1964 claim, need to show
- 1.) discrimination,
- 2.) based on race, color, religion, national origin,
- 3.) public accommodation, not private club
- 4.) Affect commerce or supported by state action.
- State statutes may go further in protecting individual rights

Place of public accommodation
- May not be limited to those enumerated in the statute
- Commonly at fixed places, but not required (Dale v. BSA, NJ). May be a member organization lacking a fixed geographical status.
- Public accommodation vs Private club
  - Broad solicitation, close relationship w/ govt or other public accommodations, similar to the enumerated or other public accommodations, recreational nature
  - To be a club, must be truly selective (not a protected group), and limited # of people who can join Self-proclaiming to be a club does not make you one.

State public accommodations law expanding Civil Rights act may violate the first amendment protection of freedom of association. (BSA v Dale, U.S.)
- Expressive association-associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.
- Forced inclusion infringes the groups freedom of expressive association if it affects in a significant way the groups ability to advocate their viewpoints

Civil Rights act of 1866
- Equal benefit of the laws in all states, make and enforce Ks and protection against impairment
• Same right to inherit, purchase, lease, sell, hold, and convey real and personal property
• Only for race, and only for states

Common carriers, engaged in interstate commerce as regulated by the interstate commerce act are prohibited from all forms of unreasonable discrimination, not just those enumerated in civil rights act of 1964.

Sources of statutory interpretation
• Language of the statute-determinative if unambiguous
• Legislative history
• Court interpretations of the same or similar statutes
• Historical context
• Canons of statutory interpretation-various methods of interpretation
• Commentary on the statute
• Purpose and intent

**Free Speech Rights of Access to Property**
Prohibiting free speech in a large shopping center does not violate the first amendment. (Lloyd Corp. Ltd. V. Tanner, powell for the majority)
• 1st and 14th amendments protect against state action, not against an owner of private property used nondiscriminatorily for private purposes only
• Where the private owner exercises nearly all functions of a municipality, the public has the right to free speech on private property (Marsh v. Alabama)
  o No publicly held streets and sidewalks where first amendment rights could be exercised if not allowed there
  o Amalgamated Food Employees Union v Logan Valley Plaza extended Marsh to a shopping center situation but only where the 1st amendment right was related to the operations of the shopping center.
    ▪ Hudgens v. NLRB- overruled Logan Valley, saying first amendment only guarantees against abridgment by government and does not give individuals the right to speak on private property
• Marshall’s dissent in Lloyd
The more a private property owner opens up his property to the public, the more his rights become circumscribed by the statutory and constitutional rights of those who use it.

The balance must be struck between private property rights and freedom to speak, and the freedom to speak is given a preferred place on the hierarchy of values, so the balance can only be struck in favor of speech.

State constitutions may extend the guarantee of free speech to some private property (New Jersey Coalition against war in the middle east v. JMB realty Corp.) (also, State v. Schmid, passing out leaflets on a private university campus)

- the more an owner opens his property to the public, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it
- Expressional interests are very strong, and leafleting does not interfere with the normal use of the property. if it did they could have time, place, and manner regulations
- Property does not lose its private character merely because the public is generally invited to use it for designated purposes. (United food and commercial workers union v. Crystal mall associates)
- choosing what opinions can be expressed on their own lands may be itself a protected form of free speech
- The right of access is neither guaranteed by the first amendment nor prohibited by the 14th amendment. (Prune Yard Shopping Center v. Robbins)-State chooses
- National Labor Relations Act allows labor organizations to picket on the property of their employer, or their leased property

**Nuisance: Rules Governing relations among neighbors in the absence of agreement**

Nuisance: -substantial and unreasonable interference with the use or enjoyment of land

- Involves substantial harm the owner should not have to bear for the good of society
- If multiple people contributing to a nuisance, L depends on material participation (Page County Appliance center v. Honeywell, Inc.)
• Nuisance per se-possible if criminal activity is involved
• \( \pi \) is unusually sensitive—would probably not be substantial and unreasonable to a normal owner, so not a nuisance
• May be permitted if \( \pi \) “comes to the nuisance”

Public Nuisance—Substantial and Unreasonable interference with a right common to the general public.
• Usually individuals would have to prove special damages different from the public in order to bring a claim. Otherwise Public official

If possessor of land knows or should know of a nuisance by a third party and fails to provide reasonable care to prevent the nuisance, he is L.

Light and Air
• Property owners usually have an absolute right to develop their property without L for interference with light and air (Fountainbleau hotel Corp v. Forty-Five twenty-five, Inc.)
  o Exceptions—spite and express agreements

Remedies
• Dismissal
• Damages—cost of restoration/diminution in MV
  o damages if beneficial for society as a whole but the harm is greater than anyone should be forced to bear for good of society
• Injunction/purchased injunction

Gravity of the harm v Utility of the conduct

4 ways to resolve land disputes
• \( \Delta \)’s privilege; freedom to act despite the harm
  o \( \pi \) has no right to stop the \( \Delta \) unless they work it out
  o common enemy-water
  o no easement for light and air
  o free use of groundwater
  o if \( \Delta \) is prior user
• \( \pi \)’s security: SL or absolute security
  o veto rights
  o \( \pi \) entitled to damages or injunction
  o if \( \pi \) has prior user rights
  o natural flow doctrine
• Reasonableness test—it depends
o Δ can engage in the activity if its conduct and the harm caused by it are reasonable
o Factors
  ▪ Extent of harm vs total benefit (including externalities)
    □ Difficult for nonmonetary costs and benefits
  ▪ People should not bear a disproportionate share of the burdens necessary to promote the social welfare
  ▪ Some values more fundamental than others
  ▪ Alternative means to mitigate or avoid harm
  ▪ Δ’s motive
  ▪ first established
o reasonable use-water
o N-lateral support for structure
o Nuisance doctrine
o Malice doctrine for spite fences
- Prior use, prior appropriation or prescription
  o Right to commit harmful act if it was established first
    ▪ Prior appropriation
  o Granted after continued for a substantial period of time
    ▪ Prescription or adverse possession

**Water Rights**
A landowner’s right to expel diffuse surface water is subject to the reasonable use rule (Armstrong v. francis Corp)
- Common enemy rule-possessor has the privilege to rid his lands of water at will-law in about 17 states
  o Usually modified to include L for N for expelling more water or with greater force
- Civil law rule, natural flow rule-person who alters the quantity, flow, or direction surface waters is subject to L to for the invasion of another’s interest.
- Reasonable use doctrine is a little of both (majority)
  o Whether Δ’s conduct caused an unreasonable interference
  o Social benefit, social cost, ability to mitigate, harm, motive

**Support Easements**
Easement-limited right to use someone’s property/negative-prevent use

**Lateral Support**
• strictly Liable for the lateral support of neighboring land in its natural condition (Noone v. Price), not strictly L for buildings or structures the land cannot support
  o Cannot remove necessary support
  o Must keep retaining wall in good repair to avoid loss of LS
• Damages imposed for harm to land and building if harm to the building was caused by removal of the lateral support for the land in its natural state
• L only for N if the landowner provides enough support for land in its natural state, and weight of the building causes it to subside
• Must be reasonable in withdrawing lateral support

Subjacent support
• English rule-absolute right to withdraw groundwater unless malicious
• If the landowner’s manner of withdrawing ground water from his land is N, willfully wasteful, or malicious, he is L for the consequences of subsidence in land (Friendswood Development Co. v. Smith-Southwest Industries, Inc.)
• Some impose L only for N undermining of subjacent support and others say absolute D to provide subjacent support
• N standard-unreasonable risk of harm caused
• Nuisance standard-Harm and benefit of Δ’s activity
• Always absolute right not to have subjacent support undermined by mineral estate

Servitudes - creates a right or an obligation that runs with the land or an interest in land.
If permission is informal or revocable, it is a license.
• No writing required, and many are implied
If permanent, it is a servitude called an easement.
• Affirmative Easement-right to do something on another’s land
• Negative-owner promises to refrain from doing something

Creation of restrictive servitudes
• Negative easements, restrictive covenants, equitable servitudes
• Covenants-restrictive or affirmative
  o Contractual agreements by which owners agree to restrict use of their land the benefit of their LL or neighboring owners
  o Remedy in damages
• Equitable servitudes-Remedy is injunction

3 ways to create easements
• prescription-must meet the requirements for prescriptive easement
• estoppel- created when licensor consents or tacitly approves to investments made by the licensee(Holbrook v. Taylor)
• express agreement

Limits on negative easements
• Traditionally, only LS for one’s building, access to light and air, prevent interference with flow of artificial stream
• More difficult to observe than affirmative easements
• Many more now available via conservation statutes
• Can use covenant form for other new land use restrictions

No affirmative easements on one’s own land-again, use covenants

Running with the land
• Easements by implication, necessity, estoppel, run with the land if intended to do so and reasonably necessary for the enjoyment of the dominant estate
• Writing-only need original writing containing the easement signed by the grantor
• Intent-clearly stated or implied by the type of easement granted
  o Does the benefit/burden run with the land
  o Burden must be yes for some kind of easement
  o Benefit runs with the land, it is appurtenant
• Notice-Actual, Inquiry, or Constructive
• Requirements for the benefit to run with the land-primary criteris is intent of the grantor
  o Appurtenant- intended to benefit whoever owns a particular parcel of land, appurtenant to the dominant estate
    ▪ Even if subdivided, unless otherwise stated
  o In gross-benefit does not run with the land, is not attached to a particular parcel, only enforceable by the beneficiary
    ▪ Generally transferable if commercial and exclusive as to the owner, not for personal
    ▪ Would be useful separate from ownership
    ▪ Cannot exceed the scope of the original easement
Kind of use contemplated, unreasonable burden not contemplated, apportionability (exclusive)
  - Easement is not in gross if there is anything that made it seem appurtenant (Green v. Lupo)

Servient owner can impose reasonable restrictions on an easement to avoid a greater burden on the servient estate than originally contemplated (Green v. Lupo).
  - the owner may maintain, improve, or repair an easement to an extent reasonable to promote the purposes for which it was created, but the owner may not cause an undue burden (Cox v. Glenbrook Co.)-cannot widen or create undue burden

Traditionally, servient owner needs permission from the easement holder to relocate the easement, but some cases say can move if reasonable

Modifying and terminating easements
  - Agreement in writing
  - Terms of the original agreement
  - Merger-Holder of the easement becomes owner of servient estate
  - Abandonment-intent by the easement holder
  - Adverse possession by owner of servient estate or third party
  - Frustration of purpose

Covenants
Covenants-damages
  - Writing
    - Usually part of lease or deed
    - Intended to run with the land (buden and benefit)
    - “intended to run with the land” “heirs and assigns”
    - generally intended to run with the land if T&C the land
      - otherwise could just turn around and sell
  - Notice to the owner of the burdened estate
    - Actual, inquiry, or constructive
  - Touch and Concern the land (dominant and servient estates)
    - Benefit current and future owners of the dominant estate
    - Servient estate-relates to the use
    - Dominant-improves enjoyment or increases market value
    - Usually not enforced in gross-no dominant estate to benefit
  - Privity of estate between the covenanting parties and successors


- **Horizontal**-burdened for the benefit of another
  - Mutual privity-simultaneous interest in the same parcel
  - Instantaneous privity-created at the moment of sale
  - Does not include agreements not part of a simultaneous conveyance of a property right or made at conveyance
- **Vertical**-run with successive owners
  - Grantor must not retain any future interest in the land
  - LL/tenant is excluded, but can still get injunction

**Equitable servitudes**-injunction
- Same requirements except no privity required

**Reasonableness of noncompetition covenants** (Davidson Bros., v. D Katz)
- Intention-viable purpose not violating statutes or public policy
- Impact on consideration when covenant was executed
- Clear and express
- Writing, recording, actual notice
- Reasonable concerning the area and time
- Unreasonable restraint on trade or secures a monopoly
- Interferes with public purposes
- Changed circumstances now make it unreasonable

**Modification and termination of covenants**
- Changed conditions-focuses on benefit to dominant estate
  - Covenants will not be enforced if conditions have changed so drastically inside the neighborhood restricted by the covenants that enforcement will be of no substantial benefit to the dominant estates. (El Di, Inc. v. Town of Bethany Beach).
    - Defeat the purpose of the covenant or make it valueless
    - May apply if conditions outside the area have changed
- Relative hardship
  - Covenant will not be enforced if hardship to servient owner will be greater by a considerable magnitude than the benefit to the owner of the dominant estate
- **Other equitable defenses**
  - Acquiesce- tolerated previous violations by servient owner
  - Unclean hands-violated the covenant himself
  - Abandonment-has tolerated violations by other owners
Estoppel- servient owner relies to her detriment on oral representations made by dominant owner

Laches-unexcused delay in enforcing covenant prompted investment on reliance of failure to object to violation

 Marketable title acts-terminate of not recorded

Language of the instrument

Merger of burdened and benefited estates

Agree in writing to release

Prescription

Many states have enacted statutes to remove covenants over time

A court may allow a covenant to be broken even if it still serves a purpose, but the public as a whole would be better off, but still must pay damages to the owner of the dominant estate

Regulations of covenants and homeowner’s associations

Homeowner’s associations, common interest community associations, condo associations, cooperatives, community land trusts, limited equity coops

Enforced by owners of dominant estates benefiting from restrictions

General standard is reasonableness

- Even if the language of the covenant allows changes, the changes are subject to reasonableness, so as not to destroy the general scheme or plan of development (Appel v. Presley Companies)
- In evaluating reasonableness, it is important to balance the rule’s objective against the interest infringed upon. (O’Buck v. Cottonwood Village Condo Association)
- Condos have a unique character that for the good of the majority, can restrict rights residents would otherwise have (Neuman v. Grandview at Emerald Hills, Inc)
  - reasonably restrict right to peaceably assemble
- Issues may arise about the ability to engage in exclusionary conduct and infringing on liberty interests of owners

Present Estates and Future Interests

Can be created by sale, lease, or trust

Devising (leaving real property) or Bequeathing (personal property)
Problem of the dead hand-past owners seeking to control property
  • Increase alienability bc present owners are more willing to part
  • Decrease alienability and freedom of future owners
Hierarchy-restraints could concentrate ownership
Trust-property arrangement in which trustor or settlor conveys property to trustee for the benefit of the beneficiary
  • Trustee holds legal title, and beneficiary holds equitable title
  • Trustee can sell the property and reinvest if in the best interest of the beneficiary unless settlor did not intend property to be sold
  • Can be created in any of the established estates
  • Income of the trust assets is paid to the beneficiaries and the principal assets are turned over to the beneficiaries if and when the trust terminates, unless the settlor instructs otherwise

Estate System
*Fee Simple Absolute*-ownership w/ no future interest
  • Created by: O to A, O to A and heirs, O to A in fee simple
*Defeasible Fees*-present interests that terminate at the happening of a specified event, other than the death of the current owner
  • *Fee simple Determinable*-automatic transfer to grantor (or heirs) if condition is violated
    o Future Interest: Possibility of reverter
    o O to A for __, or not for ___
  • *Fee simple subject to condition subsequent*-grantor (or heirs) can choose to retake the property if the condition is violated
    o Future interest: right of re-entry
    o O to A, but if ____ , O shall have a right of re-entry
  • *Fee simple subject to executory limitation*- future interest belongs to someone other than the grantor (or heirs)
    o Future Interest: executory interest (usually not alienable)
    o O to A, but if _____, then to B
Future interests are generally alienable, devisable, and inheritable
  • SOL for adverse possession starts immediately for fee simple determinable.
• For FSSTCS, starts when possession demanded, but modern approach is to treat the same for SOL, or apply Doctrine of Laches to prevent right of entry holder from waiting too long

_Life Estates_

• O to A for Life
• Future interest in grantor: reversion
• Future interest in third party: remainder
• Life Estate owner can transfer the rights she had during her lifetime
  o Can create life estate per autre vie-for the life of another
• Remainders-contingent and vested
  o Contingent-take effect only on occurrence of event not certain to happen or got to a person not ascertained at conveyance
    ▪ Generally not alienable
    ▪ Traditionally destroyed if did not vest before preceding life estate ended or by merger of remainder and reversion.-modern law says indestructible
  o Vested remainder –any remainder not a contingent remainder
    ▪ Absolutely vested-not subject to change
    ▪ Vested remainder subject to open-O to A for life and then to children of B. If he has any children, because more children may come
    ▪ Vested remainder subject to divestment-may be destroyed by an event that happens after conveyance

_Fee Tail_-Estate whose purpose is to keep property in a family dynasty
• O to A and the heirs of his body (normally treated as fee simple, or fee tail with the ability to convert to fee simple through conveyance or life estate in present owner with fee simple in her issue)

Doctrine of worthier title-O to A for life, remainder in O’s heirs is generally construed as remainder in O.
Shelly’s case-Converts remainders in grantee’s heirs intro remainder in grantee. Turn O to A for A’s life and then to A’s heirs, into fee simple for A
• Abolished in most states.
• Get around by ;O to A for hundred years if A lives so long, then to A’s heirs
Cy Pres Doctrine—settlor has charitable intent, particular charitable intent becomes impractical, trust income may be authorized to be used for another charity.

Regulation of future interests

- Presumption against forfeitures—burden on grantors to make it clear
  - Presumption against finding a future interest
  - Just saying it is to be used for a particular purpose will be interpreted as a covenant rather than a future interest
  - Subject to condition subsequent preferred over determinable
  - Fee simple preferred over a life estate
  - Courts may try to find future interest if donated for a charitable purpose
- Must be in the form of one of the established estates
- Rule against perpetuities
  - Must vest within 21 years after death of someone alive at the creation of the interest
- Wont enforce Those that unreasonable restrict alienability
- Future interests wont be enforced if
- Against public policy or ridiculous

**Leaseholds**

Most rules the same for commercial and residential, but some differences

**Term of years-specified period of time**

- Future interest is remainder or reversion if in third party
- Death does not terminate. Can only evict if T breaks material term

**Periodic tenancy—renew automatically unless ended by one of the parties**

- Notice required, many states a month
- Death does not terminate, only requisite notice

**Tenancy at will—same as periodic but can end w/o notice**

- Many states have abolished by requiring notice
- Death terminates. LL absolute right to evict

**Tenancy at sufferance—wrongfully stays after lease has ended**

- T at sufferance or holdover T.
- Ct proceeding usually required to evict
- If LL accepts rent checks, new tenancy may have been agreed to according to payment schedule
Leases of less than a year may be enforceable despite statute of frauds

Self Help v. Judicial Process/summary process/forced entry and detainer
- Self Help can be used to evict a trespasser or licensee, but must use eviction proceedings to evict a tenant.
  - Maybe allowed to use self-help for commercial tenants
- Common law may require employers to follow certain procedures to exclude an ex-employee from the property (Vasquez v. Glassboro Service Association, Inc.)
  - Reasonable time to find alternate housing
- If LL transferred exclusive possession of a defined space, it is generally a lease
- Summary procedure provides quicker judicial process
  - T may raise defenses

LL’s main rights
- Receive agreed rent
- Tenant’s D not to commit waste
- Reversion

If tenant Fails to pay rent
- Sue for back rent and evict
- Eviction based on violation of implied or express terms
- T moves out early, can sue for difference btw old rent for remaining lease term and what he was able to charge new T

LL’s remedies when tenant breaches and refuses to leave
- Possession and backrent
- Holdover T and renewal of tenancy
  - T continues to pay rent, LL can accept new tenancy
- Sue for possession
  - Accepting rent may create new tenancy, unless made clear

LL’s remedies when T breaches and leaves
- LL’s D to mitigate
  - Accept Surrender
    - back rent + agreed renal price – fair market rent + advertising, search costs, and lost rent in the meantime
    - If LL re-lets, and new T fails, can only go after original T if did not accept surrender. LL should make it clear
o Re-let on T’s account
  ▪ Difference btw old rental price and reasonable rent received from new lessee

o Wait and sue for the rent at the end of the lease term
  ▪ Reduced by an amount that could have been mitigated has LL acted reasonably to find new tenant
    □ He must treat the apartment as if it was any of his vacant apartments, and he must prove he used reasonable diligence. (Riverview Realty v. Perosio)
  ▪ If mitigated, can still get unpaid rent while vacant, cost of finding new T, and difference in rent

LL has D to deliver actually possession.
  • LL has the D to get rid of holdovers
    o T can sue for damages sustained as a result and/or withhold rent
  • Minority still hold LL only has to deliver right to possession
    o New T’s responsibility to invoke proceedings

T’s right to leave and transfer the lease v. LL’s right to control the occupancy
  • Transfer of LL’s reversions-T and new LL have same rights
  • T’s right to assign or sublet
    o Cases can be silent, allow it only w/ consent, or prohibit it
    o Cases that are silent as to leasing or assignment
      ▪ T can transfer
      ▪ Assignment-all interests conveyes
        □ New T directly responsible to LL
      ▪ Sublet-T retains some future interest
        □ Not real covenants
        □ LL cannot sue sub for damages unless there is an express promise to pay LL directly
        □ Probably can be enforced as equitable servitude
          • Can always sue original T for rent
          • LL can evict T, thereby ending sub-T
          • Probably cannot use injunction to enforce covenant to pay rent (too close to damages)
        □ Original T has right to reimbursement from sub
Assignment or subletting only with LL’s consent
  - Saying there is no subletting without the LL’s consent usually implies a reasonableness standard in the context of commercial leases (Kendall v. Ernest Pestana, Inc.)
    - Must have a commercially reasonable objection unless explicitly says the absolute right to arbitrarily refuse consent
  - Trend is toward adopting implied reasonableness terms in commercial leases, but not so much for residential leases (Slavin v. Rent Control Board of Brookline)

T’s Right to Habitable Premises
- Implied terms may not be waivable
- Covenant of quiet enjoyment
  - A LL may breach the covenant of quiet enjoyment if he created a situation where a T is going to cause extreme annoyance to another T and he has the ability to stop it but does not (Blackett v. Olanoff)
- T may deny breach, raise defenses or raise counterclaim, or sue
  - Damages-
    - reduced value of the leasehold caused by the breach of the implied warranty
    - rent abatement
    - Always if LL’s N causes physical harm
  - Injunctive relief-fix the apartment
- Actual Eviction-obligation to pay ceases.
  - T may be able to sue LL for trespass or injunction
  - Partial actual-may move out with no obligation to pay
    - If stays, maybe don’t have to pay or abatement
- Constructive eviction
  - Substantially interferes with T’s quiet enjoyment
  - Allows T to stop rent payments and move out
  - If stays, it is evidence it was habitable
  - Constructive Eviction can be used as a defense to nonpayment as long as at least the portion claimed was vacated (Minjak Co. v. Randolph)
• Implied warranty of habitability
  o General health, safety, community standards of suitability for occupancy
  o Many say the implied warranty has not been violated until LL has been notified and a reasonable opportunity to fix it
  o Makes summary process more complicated when raised in defense
  o Ordinarily withhold or abate rent
    ▪ Look to applicable statutes
    ▪ Reduce rent by % reflecting seriousness of violation
  o Repair and deduct/injunction
  o Don’t have to leave like constructive eviction
  o PD may be available for breach of implied warranty of habitability when LL’s actions are intentional or malicious (minjak v. Randolph)
  o Usually no implied warranties for commercial leases-maybe implied warranty of suitability for intended purpose

Zoning: Governmental land use and planning
Police Power—authority to enforce regulations to promote health, welfare, and safety
Zoning enabling acts delegate powers to municipalities
• Use Zoning-kinds of use
• Area Zoning—the physical structures
• Usually can allow things not zoned for, but not restrict things not zoned for

Comprehensive plan and zoning ordinance
• Requires Municipal gov’t to establish comprehensive plan
• Local governing body has power to adopt zoning ordinance or bylaw
• Aided by planning commission, aided by planning department
• Landowners may submit rezoning petitions for council approval

Zoning Board of adjustment—administer the zoning law

Variances and special exemptions
• Variance—permit to develop a parcel in a way that otherwise violates the zoning ordinance—granted in cases of special hardship
• Special exemptions—permits to develop in ways that are conditionally authorized by the zoning ordinance
• Owners can appeal to cts, ZBA, or municipality

For an ordinance to be declared unconstitutional, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general details. (Village of Euclid v Amber Realty Co., holding a 75% reduction in the MV of land was not unconstitutional.)

• An ordinance can be unreasonable as it applies to a particular parcel if the public purposes underlying a law do not justify its imposition (Nectow v. City of Cambridge).

Limits to Zoning Laws designed to protect preexisting property rights

• Prior noncomforming uses
  o continuance must be of substantially the same kind of use as that to which the premises were devoted the time of passage of the zoning ordinance (Town of Belleville v. Parillo’s, Inc)

• Variances-3 tests
  o Majority- No variance shall be authorized unless strict application of the ordinance would produce undue hardship (Cochran v. Fairfax County Board of Zoning Appeals)
    ▪ No economically viable use
    ▪ Somehow unique from surrounding property
      □ such as topographical conditions
  o Practical difficulties-significant economic injuries
  o Unusual circumstances if there will be a significant public benefit, variance will be granted w/o substantial detriment to the public good, and will not substantially impair the intent and purpose of the ordinance
  o Generally granted for lot and building restrictions, not use
    ▪ Think should be done by city council, not zoning boards
    ▪ Often granted if not dramatic and noone objects, but likely to be overturned if it gets that far

• Vested rights

**Zoning and The Constitution**
Every exercise of the police power affects property rights in some way, but there is no need for compensation if w/in the sphere of the police powers
Eminent Domain—May take or condemn private property, pay just compensation, and transfer the property to use designated to further the public welfare.

Takings clause—5th amendment and to the states by way of the 14th
- Taking
- For public purpose
- Without just compensation

**Regulatory Taking**—state action has disproportionately negative effect on some owners may be suspect to a taking just like an outright seizure

Courts engage in ad hoc factual inquiries
- (Penn Central Transportation Co. v New York City)
  - Character of the Gov’t action
    - A taking can more readily be found if interference with property can be characterized as a physical invasion than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
    - Protect public welfare or remove nuisance
    - Preventing harm or requiring a benefit
  - Protection of reasonable, investment-backed expectations
    - More likely a taking if substantial investment on reasonable reliance
    - Less likely if realizing an expected future benefit
    - Arguably does not have reasonable investment-backed expectations if law was already passed
  - Economic impact on the particular owner
    - Relevant property is as a whole-denominator problem
    - Complete deprivation of any economically viable use is likely to be a taking, unless it denies rights that never exists.
    - Impacting some more than others is not a taking
      - No owner guaranteed most beneficial use of land
    - Greater diminution, more likely a taking
    - Requiring owner to leave 50% of coal beneath the surface undisturbed was not a taking bc still has
significant economic value (Keystone Biuminous Coal Association v. DeBenedictus)

Per se categorical takings-only two

- Any permanent physical occupation of private property authorized by the government (Loretto v. Teleprompter CATV Corp.)
  - Destroys right to use, possess, exclude, and dispose
  - Requiring a public place to allow reasonable exercise of free speech is not a taking (Prunyard Shopping Center v. Robbins)
    - The physical invasion is not permanent
- Completely deprive an owner of all economically viable use unless background principles of nuisance and property law independently restrict the owner’s intended use of the property (Lucas v. South Carolina Coastal Council)
  - Identify background principles of nuisance and property law that prohibit the uses he now intends
  - Not Simply harm preventing v benefit conferring
  - Could try to argue diminished 10 percent of the land 100 percent rather than 100 percent of the land 10 percent-denominator problem (Palazzo v. Rhode Island)
    - Palazzon and Tahoe suggest taken as a whole, over space and time
  - Temporary deprivation of all economic use cannot be a per se taking (Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency)

The state does not exceed its constitutional powers by deciding on the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. (Miller v. Schoene)

Ultimate test of fairness and justice

- Bar gov’t from forcing some people alone to bear burdens that should be borne by public as a whole
  - No reciprocity of advantage if burden is unique (penn)

Facially unconstitutional-always a taking in every situation

As applied-effect on a particular parcel is unconstitutional

Ripeness-Agency regulating must make a final decision before a taking

- State cannot avoid taking by never giving a final ruling
Violation of civil right

Cannot treat an owner different that other similarly situated owners
- Taking and denial of equal protection under the law

Environmental protection laws
- Compensation may be required if prevent all development of land.

Kaiser Aetna v. U.S.-Right to exclude was destroyed when required to allow others access to navigable waters amounted to a taking
Pumpbelly v. Green Bay Co.-Canal company allowed to flood upstream was a per se taking
U.S. v Causby-Military aircraft flew so close to the ground to make the land uninhabitable was a taking
Nollan v. CA Coastal Comm’n-taking when required to grant right of way along the beach as condition for variance to expand house
No Taking despite physical invasion by stranger if for anti-discrimination
- Ant- discrimination laws and fair housing laws
Heart of Atlanta Motel, Inc. v U.S.-Civil rights act of 1964 was not a taking
LL’s rights to evict
- Statutes Usually unconstitutional not to allow LL to evict and live there herself, but usually upheld if just restricts conversion to other use
  - Block v. Hirsch-requiring LL to allow renter to stay was not a taking
  - Yee v City of Escondido-requiring LL to allow holdovers was not a taking
- Where owners are forced to accept the occupation of tenants not already in residence, there is a physical taking for which compensation is required
- May be an unconstitutional taking to not allow the owner to go out of business

Exactions and Linkage Requirements
Loretto, Penn, and Lucas were all arguing it was a taking. These argue whether or not the act was constitutional to begin with
Doctrine of unconstitutional Conditions (Dolan v City of Tigard)
- Government may not require a person to give up a constitutional right, here the right to receive just compensation when property is
taken for a public use, in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

**Essential Nexus (Nollan v. CA coastal Comm’n)**

- Subsumed by the rough proportionality test of Dolan
- Relationship btw legitimate purpose and permit condition

degree of exactions demanded by the city’s permit conditions must bear the required relationship to the projected impact of the proposed development.

- Rough proportionality
  - The requirement must be related in nature and extent to the impact of the proposed development

A government benefit that is not an established property right may not fall under the N & D tests

**Public Use**

May not take property for the sole purpose of taking the property from A to give to B, even w/ just compensation.

- May transfer from A to B if the transfer to B is only incidental to future use by the public.

Public purpose, not necessarily use by the public

- A blighted area may be redeveloped as a whole, even if some particular owners do not own blighted property (Berman v Parker)
  - The plan as a whole is what matters for public use, not to be taken on a piecemeal basis

- Extreme Concentration of land ownership was reduced by transferring title from lessors to lessees for just compensation
  - Hawaii Housing Authority v. Midkiff-eliminating the social and economic evils of a land oligopoly was a valid public use

- The purpose and not the mechanics are what matters in determining public use (Kelo v City of New London)

Economic development can be a public use/purpose (Kelo v City of New London)-no reasonable certainty or substantially advances requirement

- Nothing precludes a state from placing further restrictions on its takings power
- Still needs to be part of an integrated plan
Still need to make sure the taking is not just pretextual to granting property to private parties. (Kennedy, concurring in Kelo)-
- If some cases are particularly suspicious, a more stringent level of scrutiny may be required for private transfers
- All private property is now vulnerable to being taken and transferred to another owner as long as it is upgraded (O’connor, dissent in Kelo). Berman and Midkiff involved extraordinary precondemnation use inflicting affirmative harm on society. Public use is deleted from the fifth amendment
- Public use means govt may only take the property if it actually uses it or gives the public the legal right to use it (Thomas, dissent in Kelo)

State Constitutions
- Mostly similar to federal
- Some hold public use requirements more stringent
- Some say public benefits and characteristics of the intended use substantially predominate over the private nature of the use
  - Kennedy’s public use test approach
- Some use O’Connor’s view, saying the property itself must justify the taking
- Some have taken Thomas’s view-public ownership or public use
- Some have said the public purpose must not be achievable except though a taking of property and transfer to another