General Rules:

- Why property rules?
  - Preserve peace/stability
- Relational: you own property in relation to others
- Bundle of sticks theory: you can keep some rights for yourself, and give some to others
  - E.g., a landlord maintains right of ownership, but gives right to live there...
- Property Rights:
  - Alienation
  - Possession
  - Abandonment
  - Inclusion
  - Exclusion
  - Transfer
- Legal Theories:
  - Formalism: looking at the traditional laws. It's good because it is. There are legal categories out there external to humans. Formalists believe that because law and doctrine are external, they are a constraint upon the capacity of judges to make law and legislate from the bench, and to decide cases the way they'd like them to come out. In this view, the law is determinate; it determines the way cases will come out. To the extent that they locate "law" they locate them either in God, or the natural order of things, etc. Natural law. In charge from the enlightenment until the 20th c.
  - Instrumentalism: viewing law as an instrument of social policy; we need to choose the best rules to determine social policy. No such thing as an unchanging natural order of things. Law is the creation of human beings living in society and working through its institutions. Comes from people doing jobs, figuring out the law. Law is a product of the human mind and nothing more. Doesn't speak to objective external truths. They make law, don't find law. Make law by deciding cases.
    - Legal realism is a type of instrumentalism
- Locke:
  - Property "was imposed by e law of nature and bond all men fast long before mere human conventions had been thought of."
  - Man has a right to "the labor of his body and the work of his hands."
  - Whatever he has taken out of the state of nature, and mixed with his labor, it becomes his.
    - Manure example. I heaps manure in the street intending to carry it off the next day, during the night the Δ carries it off. Because of Locke's labor theory, because "he'd changed its original condition and greatly enhanced its value by his labor" the manure belongs to the Δ.
      - Rule: you are allowed to leave property for a reasonable amount of time to procure the means to take it away, when such means are necessary for its removal.

First Possession
"Qui prior es tempore potior est jure!"- Who is first in time is stronger in right
I. First in time:
   A. Pros: clear, fair, disruptive to change, creates and maintains order
   B. Cons: not first in time, but first in time with a sword, unequal distribution, not the most productive (could technically sit on land once you got there), rewards speed or luck

II. Acquisition of Property by Discovery/Conquest
   A. Discovery - the sighting or finding of hitherto unknown or uncharted territory. It is frequently accompanied by a landig and thisbolic taking of possession
   Conquest - taking of possession of enemy territory through force, followed by formal anexation of the defeated territory by the conqueror.
     1. not of much relevance today-illegal under IL
     2. Grotius-the riches of the earth were initially held in common but because avarice eventually lead to scarcity, the institution of private property became necessary to preserve peace
     3. When land is captured, in general, the people are assimilated peacefully into the new state and its customs-land laws in general stay the same. (otherwise big upset)
       a) Indians were either unwilling to assimilate peacefully because of the differences in culture, or they were
b) unable because they were too “savage”
c) had very different land laws

B. Johnson v McIntosh (1823)

1. Native Americans gave property to Johnson, McIntosh purchased land from US gov’t. Gov’t held majority of property rights to the land, Indians only had right to occupancy. They did not maintain right of first possession b/c they did not improve the land, but lived as part of the land. Plus, they weren’t Christians. Therefore, Indians did not have the right of alienation, and could not sell the land to Johnson. All they could sell was their right of occupancy. Marshall had to rule this way in order to maintain the order of the United States.

2. Rule: first in time rules, as long as title is perfected with
   a) occupying land
   b) improving land

3. Locke and Johnson: the Indians did nothing to improve the land, no mixing labor, so it is not technically theirs.

II. Acquisition of Property by Capture

A. To catch an animal ferae naturae, you have to have capture. By capturing you get occupancy and possession.

B. Pierson v Post (1805)

1. Post is chasing the fox in the wilderness with his hounds of imperial stature. When the fox was cornered, Pierson jumped out and killed and took the fox. Holding for Pierson, who actually deprived the fox of its natural liberties and took occupancy of it.

2. Rule (formalist): to get ownership of an animal, it must be “subject to the control of the pursuer,” not just started and being chased. alternative would bring too many lawsuits. Need mortal wounding, and unabandoned pursuit. (Barbyrac)

3. Dissent: says that custom should triumph. Ask the hunters! If a hunter pursues a beast all day he should not get deprived his trophy. Don’t ask Justinian, ask the hunters!
   a) a good law would get rid of pesky foxes and reward hunters
   b) if the pursuer has a reasonable prospect of taking what he has the intention of taking, it can be said to be his possession. It can be acquired without bodily touch or manucaption

4. The Ancients’ Views:
   a) Justinian- pursuit alone vests no property or right in the huntsman, even pursuit accompanied with wounding, unless the animal be actually taken.
   b) Puffendorf- occupancy of beasts ferae naturae is the actual corporal possession of them
   c) Barbyrac- actual bodily seizure is not necessary to constitute possession of wild animals; need moral wounding of beasts. By one not abandoning his pursuit, may be deemed in possession of him, since the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. (ambiguous)

4. First in time?
   a) for Thompson (majority) it is first in time to actual possession
   b) for Livingston (dissent) it is first in time to have a reasonable chance of capture

C. Ghen v Rich

1. Ghen shoots a whale, it floats away. Custom is for the finder to give it back to the shooter and the finder to get paid a “finder’s fee” Ellis finds the whale and instead, auctions it off to Rich. Ghen sues for the whale.

2. ruled for Ghen, rather than Rich b/c
   a) wanted to help the whaling industry
   b) first in time to killing, not necessarily holding
   c) Swift v Gifford says: Custom is used when:
      i. custom is of limited application (won’t disrupt general law)
      ii. longstanding custom (we know it works)
      iii. custom must embrace the entire industry within scope of application
   f) people can rely on custom, if the court upholds it, there will be no surprises

3. problems with custom
   a) easy to fake
   b) how do you determine custom?
   c) biased by who you ask
   d) could be bad custom, be detrimental to societal goals.

D. Keeble v Hickeringill
1. Hickeringill fires shots near Keeble’s duck decoy in attempt to scare away the ducks, to damn him in his vivery.

Keeble sues.

2. Ruling for Keeble because
   a) interfering with Keeble’s business and livelihood
      - interfering with industry is tortius
   b) competition is ok, but only fair competition. (the school eg)
      - no unlawful competition
   c) constructive possession-Keeble owns the ducks while they are on his land.
   d) Keeble owns the ducks rationi soli

3. fair unfair competition: based on what is best for society: better schools by more schools, but if you kill the kids, not good for society.

E. Rules for Animal Capture:
   1. Pursuit + Mortal Wounding = possession (Pierson)
   2. Actual physical possession = possession
   3. Possession rationi soli or Constructive possession, while they are on your land
   4. Could be exception for custom!
   5. *A person has constructive possession of animals on their land but if the land is not owned, possession belongs to whoever pursues and mortally wounds or establishes physical possession of animal; however, custom may be followed in exception to the general rule*

III. Acquisition of Property by Creation
   A. any expenditure of mental or physical effort as a result of which there is created an entity, whether tangible or intangible, vests in the person who brought the entity into being, a proprietary right to the commercial exploitation of that entity, which right is separate and independent from the ownership of that entity.
   B. if you create something, you are first in time, then it is yours
      1. derives from John Locke
      2. you own the fruits of your labor
   C. Pros:
      1. incentive to create
      2. consistant with first in time
      3. moral arguments-you put in time and money, you should get it.
      4. fair
      5. in accordance with Locke
   D. Cons:
      1. imitation =>Competition
      2. moral obligation to distribute your invention? Medicine etc.
      3. unfair economic distribution
      4. practical concern-once its out there, how do you prevent people from getting it?

C. INS v AP
   1. AP published news on the west coast, INS read it, and telegraphed the news stolen from AP over to its east coast newspapers, saving time and money and competing with AP in this way. Rule for AP because
   2. Property rights are relational
      a) no one “owns” the news, but you can own it in relation to business competitors
         i. not rights against the public, but rights as against each other.
      b) hinges on unfair competition
      c) the value of news is its being fresh
      d) business parties required to conduct business to not unfairly injure a competitor.
      e.) because news is the material out of which both parties are seeking to make profits, it must be regarded as quasi property
      f) unauthorized interference with the normal operation of legit business, at the point of profit making, in order to divert profit from those who have earned it to those who have not! –misappropriates and sells the goods of its competitors as its own.
      g) don’t want to kill the industry
      h) can’t copyright an idea, but can copyright your expression of it.
   3. Society will be better off with the competition, except if it undermines business.
D. Cheney Brothers v Doris Silk Corp
A. Cheney Brothers creates lots of silk patterns every year. Some fail, some win. Doris Silk Co. copied one of the popular designs. Cheney sued
a) impossible to copyright or patent all of the designs, because of the speed at which they go in and out.
 b) no “common law patent system,” that would conflict with congress
 c) court can’t interpose at all here, not a court area.

E. Right to include/exclude
1. A balance between what is most efficient for society, and an individual’s property rights.
2. Jacque v Steenberg Homes Inc.
a. Jacque told Steenberg homes that they could not drive across their land, even though it was snowy and the road was dangerous. Steenberg drove their motor home across the land anyway.
 b. J has the right to exclude
 c. Legal right is hollow if the legal system won’t enforce it
 d. society has an interest in punishing and deterring intentional trespassers

3. State v Shack
a. landlord trying to exclude aid worker and legal aid worker from his land where he has migrant workers living.
 b. right to exclude v right to access
 c. involves human rights of the people living on the land
 d. Rule: a person has the right to exclusive enjoyment of his own land for any purpose which does not invade the rights of another person

IV. Acquisition of Property by Find
- a finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner (generally), and is entitled to keep abandoned property.
A. Lost property
1. Goals
   - we want the lost property back to the last owner
   - we want to promote finding, and reward finders
   - we want to promote honesty, and make sure people act correctly
   - we want to protect land owners
2. replevin-return of property
   Trover-return of property’s value
3. Armory v Delamirie
   a) boy finds a jewel, takes it to a jeweler for pricing. Jeweler won’t give back. jeweler has to give it back to the boy
   b) Finder has right against all except the true owner
      a) first in time
      b)finding is socially useful
      c)finders find things that are lost-increase society’s wealth
      d) help get things back to the true owner
      e) clear rule is better than no rule!
4. Finding is bailment- rightful/lawful possession of a chattel by someone who is not the true owner. Ie valet parking, car lending, dry cleaning
   a) Bailee-person that possesses the good
   b) Bailor-the owner who is giving
5. Winkfield doctrine-
   a) meant to protect the innocent purchaser of found goods.
   b) owner cannot sue present possessor who innocently purchases found goods from finder. Owner must find the finder.
   c) minority rule
   d) usually the buyer of found goods is screwed, has to effectively pay twice
   e) if 30 years have gone by before the boy sues, then the jeweler has made it his, too bad!
6. Hannah v Peel
   a) finder v owner of Locus in quo
   b) Peel owns house, never occupied it. Soldier quartered in a house found a broach there hidden.
   c) house owner has constructive possession of the house but not of the things in the house
   d) Hannah won because
      i. Peel had never occupied the home
      ii. Hannah acted in good faith, Court rewards honesty!!
      iii. they wanted to reward the finder
      iv. Peel had no knowledge of the brooch until finder

7. Bridges v Hawkeworth
   a) finder v owner of LIQ (shop-public place)
   b) object found on floor of shop
   c) determined to have been lost, and in a public place,
   d) therefore goes to finder

8. Southstaffordshire Water v Shoreman
   a) finder v agent (LOQ/principle)
   b) when you go onto a property for a purpose, you do not get what you find, because finding was not your
      purpose!
   c) finder found 2 rings in the mud
   d) possessor of land carries with it all things attached to or under the land.
   e) agency-when you find something acting as an agent of another, you find it not for yourself, but for that
      other.

9. Elwes v Briggs
   a) landlord/lessor v tenant/lessee
   b) land owners get what is on their land/under their land
   c) old ship found under ground.

B. Mislaid Property
   1. McAvoy v Medina
      a) wallet left on the table of a barbershop. Finder left with the shopowner with the intention of coming
      back, asked him to wait for owner. Court says that we rule for the shopkeeper,
      b) mislaid=owner deliberately set something down and forgot it.
      c) if our intention is to return it to the owner, leave it in the shop.
      d) but this encourages finders not to tell!
      e) assumes intention of owner is to come back

C. Abandoned Property
   1. property which is found under specific circumstances,
   2. we infer from the circumstances that it wasn’t lost or mislaid. (ie, finding something in a trashcan)
   3. To abandon property, you must:
      a) Must relinquish possession
      b) Must have a state of mind that you intend to terminate your ownership of the chattel.
   4. These rules are based on dubious assumptions of the owners state of mind

V. Adverse Possession
   A. acquisition of title based upon hostile possession of a piece of property for a long period of time.
   B. Why?
      1. quiet all titles
      2. so we can assume that if you possess something, its yours
      3. correct errors in surveylance
      4. make sure land stays productive
   C. Five elements must be satisfied:
      1. Actual possession
• Must actually be on the land
• Best way to show this is to fence it.
• Put up a fence
  2. Open and Notorious possession (notoriety requirement) (notice)
• Must be visible and clear that you possess it.
• True owner must have notice that you are adversely possessing his property.
• Doesn’t have to be actual notice, constructive notice is fine.
• A true owner is charged with seeing what a reasonable person would see upon inspection. (you don’t have to outright tell them)
• Actual knowledge or being put on constructive notice
• Put up an “I’m here” sign by your fence
  3. Must be exclusive
• Can’t be a hippie commune.
• Has to be a specific person taking it. Like me and my family.
• Put up a no entry sign
  4. Must be continuous and peaceable
• Must be on the same piece of land continually for 10 years. No interruption by eviction, being sued, moving to different land
• Unbroken continuity of legal possession
  5. Hostile and under claim of right
• Come in, boot the person off, stay there for 10 years.
• Hostile means hostile to the legal claims of the actual owner
• This is the one that’s about “adverse”
• Your legal possession with respect to that of the owner is adverse

=NACHOE (nachoe property)

VI. Acquisition of Property by Gift

D. Van Valkenburg v Lutz

  1. need to show that you have improved the land (to show actual)

3 requirements for a gift:

1) Donative Intent (can be oral)
2) Delivery- transfer of the property being given
  • Manual delivery
    o Always sufficient
    o Physical handing over of a gift.
    o Where manual is possible, it always counts
    o Its clear evidence to witnesses and to the donee.
    o Its clear to the donor that the donor is parting with something “the wrench of delivery” we want the donor to go through this emotional process
    o Gives the donee evidence that it was actually meant as a gift
If a gift is capable of manual delivery, a watch, money, a figurine etc, it must be manually delivered! Such as in Groen v Groen.
  • Constructive Delivery
    o For instance, if you give a car by handing over the keys
    o Give the contents of the safe deposit box by giving the key
  • Symbolic Delivery
    o Handing over something symbolic of the object
    o Text example a note saying “I give you my piano”

3) Acceptance
  • As a formal matter, donee must accept.
  • The law will presume acceptance in the case of a valuable gift.
To A for life then to the children of A (C), but if A dies without children, then to B

A life estate
C vested remainder in fee simple, subject to open
A’s unborn kids have a contingent remainder
B has a

I. Possessory Estates
A. Estates: a person’s proprietary interest in land, real property
B. tenure: from feudalism, holding land.
   1. Land was held in feudal tenure in a pyramid scheme. (serfs=>king)
   2. Freehold Tenure-the form of tenure from done by freemen.
      developed into our modern notions of ownership of land.
C. Fee Simple-complete, absolute, perpetual ownership. Whole bundle of sticks.
   1. O conveys blackacre to A in fee simple.
   2. or O conveys blackacre to A and his heirs.

Inheriting Fee Simple
-if A dies intestate (w/o a will,) it goes to A’s heirs
-no heirs until you die!
-issue take first in equal shares (per stirpes)
- Ancestors (mother and father, grandparents) take next
   - lineal consanguinity (issue and ancestors)
-then sibings, aunts, uncles, cousins (collateral consanguinity)
-if no heirs, (and no will) the property will escheat back to the state

D. Fee Tail
   1. Midieval system of keeping land in the family forever.
   2. a series of life estates. No one can will out of it.
   3. To A and his heirs, then to B and his heirs, then to C and his heirs
   4. Abolished by TJ.

E. Life Estate
   1. To A for life
   2. Creating a life estate always creates a future interest at the same time.
   3. if confusion btw life estate and fee simple, law presumes fee simple.
   4. Life estate pur autre vie: life estate measured by the life of another
   5. To A for life, then to B for life, then to C
a) A=life estate, B=remainder in life estate, C=remainder in fee simple

6. White v. Brown
a) holographic (handwritten) will, confusion between a life estate and a fee simple that cannot be sold.
b) Court says 1) favor fee simple.
c) 2) read language of wills in context of surrounding circumstances.
d) look for intent of testator
e) 3) avoid restraints on alienation/partial intestancy

7. Baker v Weedon
a) Weedon wants to leave home to Anna, and the remainder to his grandkids.
b) Anna wants to sell the land: cant sell alone, needs permission of remainderrmen
c) Court says cannot waste value of land, life estaters have to maintain value for remainderrmen
d) sale is a drastic remedy

Law of Waste:
-seeks to balance the diverging interests when parties share interests in the land
-one tenant cannot use the property in a way that unreasonably interferes with the use of another party.
-court weighs the interests of the parties vs the stakes. (80% stake v 20% stake)
-types of waste
- Affirmative/Voluntary waste affirmative acts by a tenant to substantially reduce the value of the property
- demolishing buildings, strip mining the property, sapping up all of its value
- Permissive Waste- Negligence. Failure to keep up the property. Ie the house gets run down and collapses.
Life tenant is generally obligated only to engage in acts stopping permissive waste to the extent that it costs the tenant up to the value that the tenant is getting from the land.
-do substantial changes = waste? (ie building a shopping mall and knocking down the house)
-English rule- there are sometimes a cause of action if the grantor intended the exact property (like the house) to be conveyed, then there could be liability in waste. For the loss of the emotional value of the family homestead
-American rule- no case for waste, because there was no economic loss.

F. Defeasible Estates
1. any estate can be made defeasible; most common is fee simple defeasible.
2. Fee simple defeasible may last forever, or may come to an end upon the happening of a future event.
3. Fee Simple Determinable
a) will end automatically when a stated even happens
b) to the school so long as the premises are used for school purposes
c) once the given event happens, it will revert back to O.
d) must include durational terms! “until, as long as, during”
e) mere motive words don’t count “to the school to be used for school purposes”
f) ALWAYS accompanied by future interest, a possibility of reverter
g) statute of limitations begins when event happens, mesne profits begin to accrue
4. Fee simple subject to condition Subsequent
a) may be cut short or divested upon the occurrence of an event.
b) does not necessarily have to be divested
c) To the school, but if not used for school purposes, O can reenter and retake.
d) created by the conveyance of a fee simple, followed by language stating that the fee simple may be divested if a specified event happens.
e) “.but if, provided, however, on the condition that”
f) creates the future interest of right of entry or power of termination

g) statute of limitations begins when O says “get off”
h) how do you exercise a right of reentry?
   i. actual entry (law doesn’t prefer)
i. file a law suit (precludes adverse possession)
   iii. otherwise give notice. Write a letter, wave and scream, etc.
i) when you evict someone, and they don’t leave, you can accumulate mesne profits which are calculated on market value
   i. on FSSCS, mesne profits begin as soon as you activate right of reentry
j) courts prefer FSSCS, b/c forfeiture is an option, not automatic
5. *Marenholz v County Board of School Trustees*
   a) was it FSD, or FSSCS? “used for school, otherwise to revert to grantor”
   b) neither a poss. of reverter, or a right of reentry can be transferred inter vivos under IL law, they can only be inherited
   c) it was FSD, because only was limiting time, and it did not say “may reenter”

6. *MountanBrow Lodge No. 82 v Toscono*
   a) was it FSD or void deed b/c of restraint on alienation?
   b) court likes charitable donations, so we’ll say its an FSD.
   c) court calls it a FSSCS, but per Richards, its wrong.
   d) we don’t like restraints on alienation! b/c
   - makes the land unmarketable to all buyers.
   - creates disincentives to improve it
   - doesn’t benefit other parcels of land
   - can’t get into the hands of the person who will make the most productive use of it.

5) *Fee Simple Subject to Executory Limitation*
   A. When grantor phrases a conveyance in the same way as an FSD or an FSSCS, but instead of retaining a possibility of reverter or a right of reentry, he gives the future interest to a 3rd party, B. To A as long as this is used for gardening, then to B
   i. A has fee simple subject to executory limitation, B has executory interest
   C. To A, but if A becomes a lawyer, then to B,
   i. A has fee simple subject to executory limitation, B has executory interest
   D. RAP is applicable here!
   E. All executory interests become possessory upon breach!

II. Future Interests
   A. Confer rights to property at a future time
   B. not a mere expectancy, an actual presently existing property interest
   C. *Interests retained by the transferor:*
   1. *Reversion-
      a) Interest retained by the grantor when he transfers to somebody else something less than the full fee simple, but not a defeasible fee.
      b) Its not a reversion when the grantor specifies that someone other than the grantor gets the residual interest
      c) The grantor need not create a reversion specifically in the document. When the grantor gives away something less than he has, the law will imply one.
      d) *Reversions are always vested.
      e) leftover turkey at thanksgiving. Does not follow a Defeasible fee!!
      f) freely alienable!

2. *Possibility of Reverter-
   a) The residue that remains retained by the grantor after the creation of a fee simple determinable, and only in this case.
   b) If no fee simple determinable, you cant have a possibility of reverter. The interest that follows a fee simple determinable. ONLY! 
   c) Doesn’t follow a life estate, doesn’t follow anything else, just a defeasable fee.

2. *Right of entry (power of termination)*
   a) When an owner transfers an estate subject to condition subsequent and retains the power to cut short or terminate the estate
   b) O has the right to reenter and retake the premises

D. Interests created in a transferee
1. -Vested Remainder
   a) given to an ascertained person
   b) not subject to a condition precedent other than the termination of the preceding interest
   c) To A for life, then to B and her heirs.
      i. vested remainder: ascertained person (B) with no condition precedent other than the end of the
         preceding interest. (A) B doesn’t have to turn 21 or graduate college or marry Bob etc
   d) law prefers vested remainders to contingent remainders.
   e) vested remainders are not subject to RAP!

   • Indefeasibly vested
     o certain to vest in A or their heirs regardless what happens

   • Vested subject to open/subject to partial divestment
     o gift shared by a class/group of people,
     o we’re not sure if the class is going to grow.
     o To A for life, then to B and any children A might have later. Remainder is vested in B subject to open.
       We know it is vested, B will get it when she dies, but in the mean time, it could get less and less as A
       has more kids. Partial divestment by C, the second child, of B, the first child.

   • Vested subject to complete divestment/executory limitation
     o subject to a condition subsequent that upon occurrence will completely divest the remainderman
     o anything that uses a condition subsequent “, but” “except if”
     o always followed by an executory interest!
     o To A for life, and then to B, but if B marries, then to C

2. Contingent remainder
   a) either given to an unascertained/unborn person, or
   b) given with a condition precedent
   c) To A for life, and then to B if B finishes highschool.
   d) *Rule*
      i. if the first future interest created is a contingent remainder in fee simple, the second future
         interest in a transferee will also be a contingent remainder. (To A for life and then to B if B
         reaches 21, and if B does not reach 21, then to C) If the first future interest created is a vested
         remainder in fee simple, the second future interest in a transferee will be a divesting executory
         interest. (To A for life and then to B, unless B starts to garden, then to Dr. Evil.”

3. Executory Interest
   a) the product of a divestment! They must follow vested interests.
   b) Dr. Evil: It’s time to say “bye bye garden.” “Bye bye Mr. B.”
   c) always freely alienable and indestructable
   c) Shifting
      i. a future interest that divests from a third party
      ii. A gives to B, but if C should become a judge, then to C
      iii. B has a fee simple subject to executory limitation
      iv. C has an executory limitation
   d) Springing
      i. a future interest that divests from the grantor
      ii. A gives blackacre to the first person in the class to become a judge

D. Rule Against Perpetuities
   1. A struggle btw landowners wanting to keep land in family, and judges who didn’t want them to
      a) compromise between landed class and judges
      b) said landowners could reasonably assess the capabilities of people who are alive, but not those in
         the future, so he can’t keep

E. The Trust
VII. Co-Ownership

- Where two or more people share an interest in a piece of land at the same time:

A. Tenants in Common
   1. Separate but undivided
   2. descendable, alienable, heritable
   3. basic form of coownership
   4. presumed in ambiguous cases
   5. no magic words are necessary to create it
      a) old common law, words were needed b/c JT were favored
   6. separate but undivided interests in a piece of property
   7. freely alienable: give it to heirs in a will, if not, it will descend automatically by statute of descent
   8. each tenant in common has the right to possess an undifferentiated share of the whole
      a) not divided like duct tape down the bed.
      b) everyone owns the car, they just own ½ of it. (for instance)
      c) interests can be split into any percentage. (can have 60/40 interest) unequal shares ok!
   9. If Blackacre is given to A and B, A and B are Tenants in Common.
   10. If A gives his interest to C, then C and B are Tenants in Common.
   11. No survivorship!

B. Joint Tenants
   1. just like a TC but with 3 differences
      a)2 diff. of form, 1 diff of substance.
      b) Substance Difference:
         1. Right of Survivorship
            - if A and B are Joint Tenants in blackacre, and A dies, B through operation of the right of survivorship, owns all of blackacre. A’s interests are extinguished at death.
            - this right principally distinguishes it from TC
         c) Procedural Diff:
            1. in order to create a JT, the four unitities must be satisfied
            - Time-each interest must be created at the same time.
            - Title-each interest must be created by the same instrument. Same legal document must create the interests.
            - Interest-each tenants interest must be equal, identical, and undivided. If there are two joint interests, each must have a half. If there are 3, each must have 1/3, etc.
               If A conveys 1/3 to B and 2/3 to C, B and C must take as tenants in common b/c of unequal interest.
               Modern courts overlook this to a greater extent.
               Rebuttable presumption of equal shares these days
            - Possession-each tenant must have the right to possession in of the whole.
               3. Joint tenancies are not preferred. Therefore must have MAGIC WORDS!
               - To A and B, as joint tenants with right of survivorship and not tenants in common. That will get the job done. (or to a and b as joint tenants with right of survivorship, or to a and b as joint tenants and not as tenants in common)
               - To A and B jointly will not.
      2. No interest passes on the joint tenant’s death
      3. popular, esp. between husband and wife, b/c it avoids probate.
      4. Decedent’s interest disappears at death
      5. Cannot pass interest by will!
      6. Severance of Joint Tenancies:
         a) JT will only last as long as the 4 unitities are preserved!
                        b) any JT can sever by transferring his share to someone else
         c) A and B are JT, if B gives interest to C, then A and C are now tenants in common
         d) A and B and C are JT, if B gives interest to D, then A and C are JT, and A/C are JT and D is Tenant in common
         e) Riddle v Harmon
            i. Mrs Riddle and Mr. Riddle had JT. She wanted to terminate so she could dispose of her estate by will. She made a writing granting herself ½ interest. is this legal?
            ii. yes. At common law you have to use a strawman, but now, in some states, a JT can unilaterally sever the JT without using intermediary
f) Mortgage
   a) **Harms v Sprague**
      b) Harms and his brother are in joint tenants with right of survivorship.
      c) one brother had a mortgage and died. Did it go to the other brother, or go away?
      d) court found that the mortgage was a lien,
         i. lien: the right to take collateral if a loan is defaulted on
         - a quasi property interest. the right to take my house if I don’t pay
   e) 2 rules: title rule or lien rule
      i. Title rule: Mortgage is a property interest, therefore it will sever the JT and make it TC.
         - getting a mortgage gives away an interest in the property
         - mortgagor retains a right to buy back property “equity of redemption”
         - mortagor (homeowner) mortaggee (bank)
         - I have a mortgage, bank has a lien.
      ii. Lien rule, mortgage is a lien, not property. If one JT gets a mortgage, doesn’t matter,
         still a JT. If I am a JT, and I have a mortgage, and I die, the mortgage goes with me.
      iii. which rule, depends on the jurisdiction
      iv. Lien theory threatens the availability of mortgages to joint tenants

C. Tenants by the Entirety
   1. Exists in about half of the states
   2. can be created only btw a husband and a wife, by definition.
   3. has 5 unities: time, title, interest, possession, plus the unity of marriage
      a) not just a joint tenancy where they happen to be married,
   4. Central feature is that neither the husband nor the wife can sever their tenancy by conveying to a third party.
      a) Both spouses have to consent to a transfer of the property in order to convey it. b) Similarly both parties
         must consent to a severance of a tenancy, in order to sever it.
      c) creditors of just one party cannot come after it.
   5. comes with a right of survivorship
   6. in normal married couples, this is a good thing. When husb dies, the wife gets the house.
   7. presumption of tenancy by entirety when granting to H and W
   8. both have to agree for any mortgage, loan, etc.

D. Partitioning
   1. Partition in Kind- if in the best interests of all. Sale proceeds divided up proportionally. Works best when blackacre is a piece of land, doesn’t lend itself to division.
   2. Partition by forced sale- judicial action. A physical divvying up, if in the best interests of all. Works best when Blackacre is building, home, which doesn’t lend itself to division
      a) In tenancy in common and (joint tenancy in some jurisdictions), the sales proceeds will go in relative proportions, percentage wise.
      b) two requirement for partition by sale
         i. impracticability of partition in kind, because of the physical state of the land.
         ii. interests of the owners as a whole will be promoted by a sale, (everyone will be better off)
   3. voluntary partition-voluntary peaceful means
   4. applicable for Joint Tenancy and Tenancy in Common.
   5. in Tenancy by the entirety, only divorce can partition.
   6. **Delfino v Vealencis**
      a) Delfino and Vealencis are tenants in common. Vealencis lived on it, and owned a garbage truck lot.
         Delfino wanted to kick Vealencis off and develop it all, wanted to partition by sale, Vealencis wanted to partition the lot in kind, so that they can keep their house.
      b) court says favor partition in kind, but to allow sale in emergencies or when division cannot be well made otherwise.
      c) Court must consider all parties’ interests, and not just the economic gain of one party.
      d) Take into account that Vealencis had actual possession of the land and made her living off the land, and had for a substantial period of time.
e) don’t take zoning/public bodies into account

7. Spiller v Macareth
a) Spiller puts furniture in the house and puts locks on the doors to protect furniture
b) Mac demanded half the building or rent
c) in absence of an agreement to pay rent, a cotenant is not liable, unless there is an ouster.
d) Ouster:
   i) beginning of the running of the statute of litiations for adverse possession
      - must assert complete ownership
      - treat the land as if it was owned in fee simple for the statutory period
      - general denying of the cotenancy relationship
   ii) liability of an occupying cotenant for rent to other cotenants
      - does not need absolute claim of ownership
      - possessing cotenant refuses other cotenants demands for use and --- enjoyment of land
      - aka, denying possession, not ownership

e) non liability for mere occupancy
f) no ouster here, no evidence that he was trying to exclude

8. fiduciary duties
a) generally cotenants are not fiduciaries with respect to each other, each one is in chargd of his own interests.
b) in relationships, such as familial, they may be imposed and required to ace as a fiduciary with respect to the other. (in the best interests)
c) will arise in two other ways:
   i. where one cotenant buys in concurrently owned property at a mortgage foreclosure or tax sale, and then asserts a superior title against cotenants, the courts will compel the buyer to hold the superior title for the benefit of all the cotenants provided they reimburse him.
   ii. where cotenants are kindred, courts will treat the cotenant in possession as a fiduciary who can claim adverse possession only where his claim of sole ownership is so unequivocal and notorious as to put his cotenants on actual notice of a hostile claim

9. Schwartzbach v Sampson
a) Schwartzbach and her husband were joint tenants. Her husband rented his share of the lease to Sampson, who put up a boxing ring. Mrs. Schwartzbach tried to sue to terminate the lease, saying that he could not make a lease without her consent
b) A joint tenant can lease out all of his interests that he has, without permission, as long as it does not exclude joint tenant b. The leasee will have all of the interests that the tenant in common had. The other joint tenant cannot inhibit any interests of the other joint tenant. The leasee cannot keep the first joint tenant out of any part of the property
c) if the leasee tries to keep the other joint tenant off the premises, the joint tenant can charge rent.
d) Joint tenant B can compel the joint tenant A to account for rent paid by third parties.
e) Neither a joint tenant nor a tenant in common can do any act to the prejudice of their cotenants. Therefore, cannot sell the cotenant’s interest w/o consent.

E. Duties of cotenants:
1. Rents/Profits
a) cotenant who collects from third parties rents and other payments arising from the land must account to cotenants for the amounts received.
b) this is based on actual receipts, not fair market value

2. Carrying costs
a) taxes, mortgages, payments
b) cotenant paying carrying costs has a right to contribution from the other cotenant, at least up to the amount of the value of their share in the property

3. Repairs and Improvements
a) repairs don’t get contributed to
b) cotenant who does repair gets credit during partition or accounting action
c) improvements, no right to contribution
d) in selling/partitioning, the improver receives the added value of his improvements
A.

Constructive Eviction
When the landlord substantially interferes with the tenants use and enjoyment of property. Comes as a result of Act or omission or abuse by landlord.

Habitability
Applies to only private leases
Unwaivable
Implied in all residential leases
Don’t have to leave, can sue without leaving
T need not abandon to use breach as defense for habitability

VIII. Land Use Controls: Law of Nuisance
A. The earliest form of controlling conflicting land uses
B. *sic unere tuo ut alienum non laedas*—one should use one’s own property in such a way as not to injure the property of another.
C. nuisance—a tort field, invading the interest in the use and enjoyment of land
C. Two types of nuisance
   1. nuisance per se—always a nuisance no matter what, ie waste dumping, nuclear testing
   2. nuisance per accidens—only a nuisance b/c of time/location. A pig in the parlor.
D. Nuisance is either private or public
   1. private nuisance—doesn’t affect the community at large, but affects a particular piece of land
   2. public nuisance—affects rights held by the public, polluting municipality lake. Most pub. Nuisances are also private.
      a) normally suit is brought by public officials
      b) private citizen who has been specially injured can also bring.
      c) recently, private citizen who represents the class can also bring.
E. At what point does something become a nuisance?
   1. giving moral offense?
   2. bringing trashy clientele, drugs, sex, and trash?
F. Morgan v High Penn Oil
   1. private nuisance of an oil company omitting noxious fumes, making the property owners and their tenants sick.
   2. Oil company is not nuisance per se, not illegal, only b/c its next to the trailer park. Nuisance per accidens
   3. intentional nuisance—when the person whose conduct is in question acts for the purpose of causing nuisance, or knows that it is resulting from his conduct. When the conduct is unreasonable
      a) liable no matter how he tries to avoid the injury.
      b) fault is not an issue!
   4. Court finds that High Penn Oil is committing intentional nuisance by unreasonably causing noxious gasses to escape on to plaintiff’s land.
   5. no evidence that High Penn intended to stop emitting the gasses
   6. Court finds injunctive relief necessary
G. Restatement of Torts:
   1. liability will arise if the interference is substantial and
      a) either intentional and unreasonable, or
b) unintentional result of negligent, reckless, or abnormally dangerous activity.

H. three points of view on unreasonableness:

1. Majority rule: If there is substantial harm some courts ignore balancing test. If the injury is severe enough that it is over the threshold that someone should have to endure w/o compensation, then it is a nuisance.
   a) to allow a socially useful utility to deprive others of the full use of their land = taking w/o compensation
   b) Jost threshold invasion test

2. Restatement rule: if the gravity of the harm outweighs the social utility of the actor’s conduct. (Restatement of torts)

3. All courts take 6 factors into account when deciding nuisance:
   1. whether the activity is customary or suited to the area. Is the water treatment plant in the middle of farm land, or down by the docks with other factories?
   2. Does the activity create observable effects that most people would find unreasonable or disagreeable, independently of whether it actually harms the plaintiff? Smelly or noisy?
   3. whether the activity is carried out by methods that produce more disturbance than other available methods. Are they harvesting catfish with hand grenades or a fishing net? Eg. Keeble could have gotten ducks by maybe using his decoy instead of firing a gun. Eg. Morgan case…normally oil refineries do not produce noxious fumes that make people sick.
   4. is the activity of little value to the defendant? Water treatment plant is valuable. If someone is blowing up catfish for fun, its different.
   5. whether the activity has value to society. Water treatment is valuable to society, so is oil refining.
   6. was the defendant’s activity being engaged in when the plaintiff moved to the land? “coming to the nuisance”

4. easier to be considered a nuisance under Majority than under Restatement rule!

I. Intentional torts result in liability no matter the amount of harm or reasonableness. Like trespass.
   1. unless \( \Delta \) can show physical invasion, \( \Pi \) can get off if his conduct was reasonableness, or causing little harm
   2. system treats polluting water differently than polluting gasses. Reasonable?
   3. one court found poison gasses as a trespass b/ pieces of matter were invisible
   4. trespass: interference with exclusive right of possession. If sludge of waste pours onto your land, you can sue both.

J. when injury is unintentional, look at two factors:
   1. was conduct below standard of care commonly required? Or
   2. was the risk of harm so great that the conduct ought not be tolerated? Like storing plutonium

K. Nuisance law protects normal uses, not abnormally sensitive ones. (amusement park next to a drive in theater ok)

L. ugliness doesn’t make a nuisance, unless done in spite

M. Gun club next to a day care:
   1. gun club makes kids cry, but day care is supersensitive plaintiff.
   2. which was there first? Did one come to the nuisance?
   3. quiet neighbors can infringe on loud as much as vice versa.
   4. for whom would moving be easier? Who should pay?

N. Estancias Dallas Corp v Schutz
   1. plaintiff built loud air conditioning on their roof. Schultzes sue for enjoinder.
   2. balance equities: injury which may result to public and \( \Delta \) by granting injunction, and injury sustained by \( \Pi \) if denied.
   3. Coase theorem: use will end up in the hands of the one which is most valuable.

IX. Private Land Use Controls: The Law of Servitudes
A. Rooted in Conract rather than Tort
B. arise out of private agreements rather than public
C. purpose is usually to increase total value of all the parcels involved
D. usually one parcel is burdened for the benefit of another
E. All servitudes fall into 5 types to require B to pay money for the upkeep of specified facilities
   1. A is given the right to enter upon B’s lnd
   2. A is given the right to enter upon B’s land and remove something attached to the land
   3. A is given the right to enforce a restriction on the use of B’s land
   4. A is given the right to require B to perform some act on B’s land
   5. A is given the right
F. largely products of the 19th c. once people started to fence land, with the industrial revolution

G. 2 Categories of Servitudes

1. Easements
   a) Interests in land, therefore within Statute of Frauds
   b) not technically estates in land, but ARE legal interests in land
      i. can have easements for life, defeasible easements, or easements in fee simple
   c) Creation of Easements
      i. requires a written agreement, signed by the party to be bound thereby
      ii. usual exceptions of fraud, past performance, estoppel
      iii. Prescription (adverse possession)
         ▪ Need to show possession: Openly, peaceably, continuously, and hostily, with the knowledge and acquiescence of the owner. NACHOE
         ▪ Hostility/Adversity: talk in terms of adverse rather than hostile use in terms of easements.
            • Means essentially the same thing, but here you use the easement in the absence of permission, liscense, or any indicia that you are somehow subordinate to the rights of the landowner.
            • Easement hostility rather than estate hostility. In an easement, O still owns the land, but you have the right to use the land. It doesn’t give fee simple, just the right to use. O can’t stop me from using his land in this way.
            • Hostility is to the claims of the owner to deny the use of the easement, but not hostility to the ownership of the estate
         ▪ Exclusivity: must be some sort of exclusivity. Text suggests that you can have a shared use, but the claim has to be different (?)
         ▪ How do you stop a prescripted easement? Stop the use. Put up a gate. You can liscense it, by stopping the hostility, but that doesn’t stop the use. Seek an injunction joining trespass
   iv. Express provision in deed or will
   v. Implication
      ▪ Don’t have to comply with the statute of frauds
      ▪ All, all, all implied easements arise from the division of one tract of land
      ▪ Necessity
         • If, at a time a grantor divides a tract of land and conveys part of it to another, and the only means of ingress and egress is over the remaining land, than an easement will be implied for B’s benefit across the remaining land
         • Terminates when necessity terminates
         • Requires strict necessity in general, but courts differ on scale.
         • Common owner divides his property in such a way that one of the resulting parcels is left without access to a public roadway. An easement for right of way between the landlocked parcel and the public road across the owner’s remaining parcel is then implied,
            o Either b/c the parties must have had intended this result
            o Or b/c economically efficient and socially beneficial to reate an easement for aess.
         • Permitted only for Right of way!
         • Permitted only over property owned y the persn who also owened the landlocked parcel and who divided the property to create the problem.
         • Easement created the moment the parcel is landlocked, therefore burdening the last parcel split off by the common owner
         • In the West, don’t need common owner, just show of reasonable necessity and landlocked land.

Othen v Rosier
   i. Hill broke off chunks of parcel, gave one to Othen which became landlocked. Othen used a road through Rosier’s land. Rosier put up a levee which made the road impassable at times. Othen sued to enjoin Rosier from blocking his way out. Othen said he had an easement by necessity.
ii. court found no easement by necessity b/c no indication that Rosier’s parcel was the one that landlocked Othen. At the time of the conveyance, Hil owned other land that was contiguous to othen and the roadway.

iii. he could have argued that he had a liscense, or estoppel, or prior use easement.

iv. court held no prescriptive easement, b/c he had permission. (evidenced by gate), not continuous, he left for year.

• Quasi Easement (prior use)
  • Easement implied based on prior existing use
  • When a grantor divides up a tract of land, and prior to the devision, one option of the property has been used in an easement like fashion
  • Must be appurtenant!
  • Where do parties to a conveyance intend to create an easement without explicitly saying so?
  • Must be:
    o **Common owner**-prior to division, quasi servient and quasi dominant estates must be owned by the same person
    o **Reasonable necessity**: prior use must be reasonably necessary for the use and enjoyment of the quasi-dominant estate. If it would be costly or difficult to use the dominant estate without the easement, or if the price paid reflects the existence of easement.
    o **Continuous use**: The prior use must be continuous, not sporadic
    o **Intended continuation**: the parties must intend at time of division, to continue the prior use
    o **Existing use**: prior use must be existing at time of division
    o **Apparent**: prior use must be apparent, (not necessarily visible)

Van Sandt v Royster

i. Bailey owned 3 plots of land; constructed a sewer that runs across each. She then sold the two other lots, with no exceptions or reservations in the deed. Van Sandt got his basement full of sewage, and realized that a sewer drain went across his property. He tried to enjoin the other properties from using the sewer pipe, b/c they didn’t have an easement.

ii. Court found that an appurtenant easement did exist, by prior usage.

iii. Bailey created a quasi easement when she used one part of her land for the benefit of another part.

iv. Old rule says grantor must state easements in grant, cannot reclaim things granted

v. court says pay attention to circumstances, not just language of grant

vi. court says “easement by reservation, implied from prior use” was created

vii. because: apparent with constructive knowledge, and

viii. reservation-when I sell you a lot and reserve an easement for myself

grant-when I sell you a lot with an easement for you maintained on my land.

Jurisdictions differ on whether it is more difficult to prove an implied easement when a reservation is involved than when a grant is involved.

ix. Normally, court won’t charge a bonefied purchaser who took without notice and acted reasonably, with notice of a lien on the property.

x. Courts use words like notice, apparent, and necessary to reach holdings that they feel are just in the particular situations

vi. Estoppel
  • Substantial reliance
  • Past permission
  • grounds that it would be unfair to deny the licensee the benefits of any improvements he has made.

vii. Emminant Domain

d) easements

i. Easements Appurtant
- appurtenant when in its creation the easement is attached to a piece of land and benefits the owner of the piece of land in his use or enjoyment of the land.
- gives the right to whomever owns a parcel of land that the easement benefits
- benefits the easement owner in the use of land belonging to that owner
- law construes in favor of easements appurtenant
- usually transferable, but they can be made personal to the owner and non-transferable
- require both a dominant tenement and a servient tenement
  - dominant tenement-easement attaches to and benefits dominant tenement
  - servient tenement- plot of land which is burdened by the easement.
- Appurtenant cannot be detached or severed from the dominant tenement without the consent of both the dominant and servient tenants.
- Can’t be separated without the permission of the servient tenant. It stays attached to the land when sold.
- If you want to split things up, so that you’re selling less than land + easement, then you need consent from both servient and dominant tenants

ii. Easements in Gross
- gives the right to some person without regard to ownership of land
- benefits the easement owner personally rather than in connection with use of land
- freely alienable in general. Recreational easements in gross may not be though.
  - old rule: no assigning
  - Modern trend: whatever intentions of parties are
- do not attach to the a parcel of land owned by an easement owner
- If W grants me a right to pick her apples, its to me; I don’t have to own an adjacent plot of land.
- has a servient tenement, but no dominant tenement. (but has a dominant tenent)
- Gross can be alienated by the dominant tenant without the servient tenant’s permission. --If I have a right to pick apples on W’s land, I can sell that right

iii. Affirmative Easement
- granted by a servient owner, gives a neighbor the right to enter or perform an act on the servient land

iv. Negative Easement
- easements forbidding one landowner from doing something on his land that might harm a neighbor.
- takes a right that the servient tenant previously had.
- A agrees not to put up a building on his lot that will restrict B’s view
- don’t have negative easements by prescription, prior use, or necesshglity usually.
- Negative easements are restricted to four types (LASS)
  - b/c it keeps land unencumbered and there was no public record
  - prescriptive negative easements precluded development
  - conceptual: couldn’t decide whether to make it an easement or grant
    - Light
    - Air
    - Support
    - Streamwater
    - And sometimes View
    - And sometimes conservation

Willard v First Church of Christ, Scientist
i. McGuigan gives easement to church for parking, then sells land w/easement to Peterson, who sells w/easement to Willard. Willard wishes to quiet title, saying use the common law rule b/c we relied on it. Court says no, b/c old common law rule doesn’t take grantor’s intent into account, Willard had constructive knowledge of the easement, no reliance. Use equity to balance competing interests
ii. can you create an easement in a third party?
iii. common law says you cannot create easement in a third parties, and no exceptions, but this conflicts with modern idea of not wanting to frustrate the grantor’s intent
iv. also inequitable b/c the price was reduced b/c of the easement on it
  - exception-I will sell you all of this property except my right to walk across it.
v. current law says yes easements in third parties, but no to exceptions
vi. majority of jurisdictions say NO you can’t reserve in a stranger to the conveyance!

vii. McGuigan could have deeded to church, who would deed to Willard reserving an easement.

b) Profits
   i. within statute of frauds
   ii. right to enter onto someone’s land and take something from it. Ie timber, fish
   iii. Also called usufructuary privilege
   iv. Every profit has an implied easement

c) [Licenses]
   i. oral or written permission given by occupant of land allowing the licensee to do some act that would otherwise be a trespass
   ii. revocable, with two exceptions:
      1. except when coupled with an interest, incidental to ownership of a chattel on the licensor’s land
         -O grants to A the right to take timber from Blackacre. A as an interest, and an irrevocable license to enter the land and take it.
      2. except when the rules of estoppel apply
   iii. license that cannot be revoked is treated as an easement
   iv. defense to trespassing

Holbrook v Taylor
   i. Taylor wants an easement to use Holbrook road. Holbrook gives Taylor permission to use the road to build his house. The house burns down. He builds another house. Then, Holbrook blocks it off and says buy the use for $500. Taylor sues for an easement under prescription and estoppel
   ii. Court says no prescription b/c he had permission to use the land. It was neither adverse, continuous, or uninterrupted.
   iii. Court says YES under estoppel. He had improved the land by constructing a house using the road, with Holbrook’s Acquiescence, and also maintained the road.
   iv. estoppel rests upon substantial reliance and permission.
   v. Taylor has an irrevocable license by estoppel, working like an easement.
   vi. Taylor has a right to use the road/land in a reasonable way
   vii. Taylor does NOT have the right to make substantial changes to the way the road is used. T can use the road for maintenance and upkeep of his $25,000 house, no more. If it burns down, the investment is gone = no rebuilding. No large additions.

Shepard v Purine
   i. in relationships between close friends and neighbors, an oral license is just as valid, binding, and irrevocable as a deeded right of way.

Henry v Dalton
   i. despite improvements made in the land, oral licenses are still revocable.
   ii. want to give security to titles, doesn’t burden the land with easily misunderstood oral restrictions. Put it in writing!

VanSandt v Royster
2. Covenants
   -bargains among neighbors to minimize harmful impact that arise from conflicting resource uses.
   -contract right enforceable not only against the promisor landowner, but against his successors in title as well.
   -run with the land but are not interests in land.
   Benefited land-like dominant tenement
   Burdened land-like servient tenement
   -privity of estate required for the burden of a covenant to run at law to successor landowners
   -Restatement 3d tries to do away with distinctions btw Real Covenants and Equitable Servitudes
a) Real Covenants
   i. promise respecting the use of land that runs with the land at law
   ii. must take into account whether the burdens and benefits run.
   iii. can be affirmative or negative
   iv. not enforceable against an assignee who has no notice
   v. remedies are ALWAYS money damages
   v. 4 Requirements for covenant to run with the land: WITHN
i. 1. Must be a **writing**. – To protect against fraud.

2. **Intent**-parties must intend that it run with the land. Best way to do this is through magic words such as “successor in interest”, “run with the land” or “assigns/heirs”. Otherwise, look at the context in which it was made to find intent

3. Must **touch and concern** the land. Covenant must increase the value/usefulness of the land of the “dominant tenant” and decrease value for the “subservient tenant” (don’t really use these terms for this) must be in relation to the land, not A and B as people.

4. **Horizontal and Vertical Privity of Estate**! – must be some form of successive relationship to the land, from one of the covenanting parties.

5. *Successor in interest must have Notice of the covenant.*

vi. **Two types of privity of estate**

1. **Horizontal Privity:** privity of estate between the original covenanting parties

   - Old law says: horizontal privity of estate is required for the burden of a covenant to run, per Restatement 1. horizontal privity if not required for benefit to run.
   - New law (most states) says: no, horizontal privity is inherited by successors in interest (743) Restatement 3d says horizontal privity is not required for a covenant to run
to create horizontal privity which will be inheritable by successors in interest, the burden needs to be included in the deed at transfer of land.

2. **Vertical Privity:** privity of estate between one of the covenanting parties and a successor in interest

   - Traditional law requires vertical privity for both the burden and the benefit to run.
   - For burden, covenant is enforceable only against someone who has succeeded to the same estate as that of the original promisor ie fee simple
   - Does not transfer to an adverse possessor, because by law, it’s a new title.
   - For benefit, the promise is enforceable by a person who succeeds to the original promisee’s estate, or to a lesser interest carve out.

*Restatement 3d law*: attempts to negate differences between covenants and equitable servitudes; calls them all “covenants running with the land.” Says court should decide remedy. Wants to unify servitudes Discards this rule of privity. It distinguishes btw negative promises and affirmative ones.

   Negative promises are treated like easements: all owners and possessors of burdened land are bound, and all owners/possessors of benefited land are entitled, regardless of the extent of the interest/manner of obtaining interest

   Affirmative promises distinguished btw lessees, life tenants, adverse possessors, and benefits and burdens.

   *Lessees*-benefits to render services to the property run, also those that the lessee may enjoy without diminishing the benefit’s value to the lessor and materially increasing the burden of performance on the person obligated to perform

   Burdens only run if they can reasonably be performed by a person in possession than by the holder of the reversion

   *Life tenants*-benefits and burdens run to life tenants

   Liability for performance limited to life estate

   *Adverse possessors*-when they have not yet gained title, they are liable to burdens, but usually do not receive benefits unless the covenant was to render services to the property, or that the benefit is one that can be enjoyed by the person in possession without diminishing the benefit’s value to the owner of the property and without materially increasing the burden of performance on the party obligated to performance on the party obligated to perform the covenant.

   - All appurtenant benefits and burdens burdening the land when adverse possession began run to adverse possessors who have acquired title.

**Modern Law:**

- Vertical privity required for both burden and benefit.
- Horizontal privity is required for burdens.
b) Equitable Servitudes
   i. covenant enforceable at equity against the assignees of the burdened land
   ii. doesn’t matter if it runs with the land or not.
   iii. 4 requirements (1st 3 same as Real Covenants)
       1. must be a writing
       2. must be an intent to run with the land binding successive interests
       3. must touch and concern the land.
       4. must have notice! It replaces privity of estate, which has no relevance here. Must have notice of
          land use restriction in deed, or in some other writing. Theory is that if someone takes land in
          notice of a restriction, its inequitable to be able to avoid that restriction.
   iv. privity is not required, therefore a way to get around that element of covenants.
   v. Damages will be equitable/enjunctive
   vi. actual interest in the land (as opposed to real covenants, but like easements)

v. Tulk V Moxhay
   - Tulk sold to Elms with covenant not to build. Elms sold to Moxhay with no covenant, however,
     Moxhay had notice of the prior deed. Moxhay wants to build, Tulk sues to enjoin.
   - Court holds that because Moxhay had notice of the covenant, privity is not necessary
     English rule- to have privity of estate, has to be in a landlord tenant relationship! B/c this was in
     England, no privity, therefore no enforcement by law.
     American rule- lots of different ways to have privity of estate. If this was in America, it’d run.

H. Limits of Covenants
1. Shelley v Kramer
   a) private agreement between neighborhood landowners that the land was only to be sold to Caucasians. Shelly,
      Afam, bought the land from a willing seller. Neighborhood sued to restrain Shelley from taking possession.
   b) Court says that private agreements will not be interfered with. However, when they try to get the state involved,
      by bringing suit. The state cannot be a tool in violating the constitution. It violates the 14th amendment if the state
      gets involved in any capacity.
   c) these are now handled by the Fair Housing Act.
   d) This case is sui generis, b/c it would have wide, severe implications if any enforcement of a contract was state
      involvement.
2. Marsh v Alabama
   a) corporation began a community, with stores, houses, everything. All services usually provided by gov’t were
      provided by the company. It kicked out the Jehovah’s witnesses, and was sued for non constitutionality
   b) Court says when private company assumes all of the functions of the government, it assumes the responsibilities
      of the constitution

I. Common Interest Communities
1. obligation binds the owners of individual lots or units to contribute to the support of common property or other facilities,
   whether or not the owner uses them or agrees to join the association.
2. Condos: each unit owned in fee simple by the owner, common areas owned by tenancy in common.
3. horizontal and vertical privity is met, as are touch and concern req.
4. Rules of common interest comm.. and homeowners assns can adversely affect individuals
5. By what standards should the common interest communities rules and regulations be judged?
6. Nahrstedt v Lakeside Village Condominium
   a) Nahore moved into the Lakeside Condos with her 3 cats, having constructive notice that cats were not allowed.
      She was fined, and sued the condos, saying they could not enforce this b/c it was an unreasonable restriction.
   b) She said it was unreasonable b/c the burden to her far outweighed the benefit; her cats did not cause any trouble
      and no one knew they were there.
   c) Court concluded that the restriction was reasonable b/c it did not violate public policy, it wasn’t wholly arbitrary,
      and it did not create a burden that outweighs a benefit. B/c it was recorded and she had constructive notice, it was
      reasonable.
   d) gave her the burden of proving that it was unreasonable to the whole community, not just to the individual.
e) Horizontal privity: developer sold to whomever first bought the unit, Vertical privity: someone sold to someone who sold to Nahore.
f) Deed restrictive covenants acceptable unless reasonable. Natore has the burden to prove that its unreasonable.
g) Very narrow view: has to be unreasonable to the whole community, not to one individual.
h) balance the burden on the community v the benefit to the community.
i) court doesn’t want to find things unreasonable, b/c
   i. wants to protect the right of the common interest community to live how they want.
   ii. wants to protect planned, stable environments, written deeds. (social fabric)
   iii. wants to avoid lawsuits, b/c fees pass to residents.

j) Dissent
   i. No social fabric interruption – these are cats in the home, don't have any effect on the outside area, or on the neighbors.
   ii. Not a mundane issue like the color of a door, pets are a quality of life issue.
   iii. Conceptual objection – "a man's home is his castle", home ownership is central to the American Dream and American society. Basic right of humanity to do as we please in our own homes.

7. What standard for judging the power of CIC and Homeowners’ Associations Boards?
   i. reasonableness standard-board must prove they acted reasonably.
   ii. business judgment standard-tenant must prove a breach of board’s fiduciary duty. Protects the boards business decisions from indiscriminate attack.
   iii. board members possess expertise relevant to their own particular community.
   iv. board members should be given deference.
   v. many see homeowners’ assn’s as consentual regimes, which people may choose voluntarily but
   vi. if there aren’t a lot of options, homeowners are coerced into accepting obligations they don’t want.
   vii. once inside, they are coerced by the power of the association to make rules.
   viii. fear exclusiveness, regimentation and loss of personal autonomy.
   ix. loss of community, loss of diversity, loss of care for neighbors, just like me syndrome.
   x. gated communities safer, people get to take care of things the way they want, like mini cities.

X. Legislative Land Use Controls: The Law of Zoning
   A. The use of governmental power to regulate land use through rules/regulations.
   B. Objectives:
      1. theory designed to prevent harmful effects being visited on neighbors, rather than to fix them.
      2. increase property values.
      3. channel development into patterns that may serve larger social goals.
      4. orderly development, community health, welfare, and safety.
   C. History
      1. Began with Garden cities idea in 1899.
      2. Americans liked to protect separation of uses, single-family home, low rise development, and medium density population.
      3. Wright’s broadacre city, decentralized, lots of land.
      4. City Beautiful movement, Radiant city with all skyscrapers.
      5. Zoning was attacked for unconstitutionality, saying that it “effecting taking w/o compensation” or worked deprivation soft property w/o due process of law.
   6. Village of Euclid v Ambler Realty Co.
      a) district court said unconstitutional b/c its segregating based on income.
      b) Euclid zoned by area, height, and use.
      c) court said that minimizing land use conflicts to prevent nuisances was legit exerise of police power-not unreasonable or arbitrary.
      d) defendant claimed his property was devaluing b/c he couldn’t sell it to industry anymore, just to residential. Claims breach of 14th amendment, depriving of property w/o due process.
      e) like nuisance law, consider whether a particular type of building would be a problem in locality.
      f) it is reasonable to regulate building to avoid nuisance, and if a harmless building is excluded, it doesn’t invalidate it.
      g) arguments against: depriving of substantive due process, and takings without compensation.
      h) court says compare to nuisance law which is already formulated. Its like nuisance.
         i. industries are nuisances, but what about duplexes?
7. Only the state has the power to zone, but it is delegated to cities and counties.
8. Zoning is now presumptively valid.
9. Euclidean Zoning graded from highest (single family) to lowest (nasty industry). They are cumulative.
10. Courts struck down govt’s controls for freedom and economic liberty, using due process as excuse.
11. Zoning is exercise of police power to protect health, safety, welfare, and morals.
12. Hallmarks of Euclidean Zoning (are these really benefits?)
   a) separation of uses
   b) protection of the single family home
   c) low rise development
   d) medium density population
13. Rests on late 19th century values, trying to preserve status quo. Suburban values.

D. The Non-Conforming Use
1. Non-conforming use is a use that was lawful prior to the zoning.
   a) cannot be simply zoned away, as that would constitute either taking w/o compensation, or unreasonable exercise of power. A few ways to get rid of them:
   b) originally, NCUs were bought out by the town, or maintenance was forbidden
   b) Amortization period-forced phase out. Be out in 1 year.
      i. majority says this is valid rule if the period is reasonable
      ii. weigh benefit to the community v burden to the business
      iii. minority rule says its invalid per se, its uncompensated/confiscatory no matter the length of period.
2. PA Northwestern Distributors, Inc. v Zoning Hearing Board
   a) zoning ordinance adopted regulating porn shops, shortly after a legal porn shop opened up.
   b) court held amortization is per se confiscatory, while dissent said it was ok if a reasonable time.
      i. reasonable time measured by nature of use, amount invested in it, number of improvements, public detriment caused by it, character of surrounding neighborhood, and amount of time needed to amortize the investment.
3. Right to own non-conforming use runs with the land, owner to owner
   a) some jurisdictions provide that the uses may expand to meet natural changes
   b) some jurisdictions allow for one non-conforming use to trade for another non-conforming use, usually only if it does not increase the violation.
4. Destruction or abandonment terminates nonconforming use

E. Limits on Zoning
1. States possess police power: power to act to achieve the people’s vision of public welfare
2. Traditional view: beauty is subjective and courts can’t regulate it, however, courts justify it using property values.
   a) if enough community members share the same view of beauty, it is objective enough
3. Architectural Review Boards
   a) conditions approval of a building permit on conformity and likelihood that the proposed structure will not cause substantial depreciation of the neighboring property values.
3. Zoning has expanded away from original ideas in Euclid, not just about nuisance and safety anymore
   a) aesthetic regulation
   b) Stoyanoff ex rel. v Berkeley
      i. Stoyanoff wants to build a house that is modern and ugly in a fancy neighborhood.
      ii. Architectural board forbid it; rules said they could say no on grounds of ugliness/nonconformity
      iii. it was detrimental to stability of value, and general happiness of community
      iv. Stoyanoff says its unconstitutional and vague
      v. statute gave right to zone for health, safety, and welfare, also taking into account value of buildings and character of district, promoting general welfare
      vi. this term is flexible. Court says not based on aesthetics, but based on property values
      vii. court says architectural review is for the general welfare, and this was reasonably related to preserving land values and the prevailing aesthetic sense of the community, emphasizing adverse affects on property values. Aesthetic is ok if its tied to something objective.
   c) courts up in the air as to the constitutionality of architectural review boards
      i. ugly doesn’t mean nuisance
      ii. courts can regulate anything they want if they call it for public health and safety
      iii. democratic problem when courts can regulate beauty
   c) City of Ladue v Gilleo
i. Gilleo put a sign in her yard saying no to war. Police told her it was illegal to put up a sign in this town. She sued for violation of her first amendment rights.

ii. Ladue changed ordinance, saying signs for churches, schools, or for sale signs are ok

iii. say signs would create ugliness and clutter, tarnish natural beauty, impair property values, may cause safety/traffic hazards to motorists and children.

iv. court says yes, it violates first amendment-it fails to leave open enough alternative means of communication

v. signs time honored means for the voiceless to have a voice.

d) gov’t controls cannot regulate content of speech, stores, etc, they are subject to strict scrutiny,

i. can regulate secondary effects on society, bringing around trash and loose women etc.

i. creation of red light district not content based, but time, place, and manner restriction aimed on quality of urban life

iii. laws regulating in a content-neutral fashion more ok. “no amplified speech in the park”

e) zoning laws regulating content-neutral speech are invalid if they are

i. broader than necessary to achieve the purpose which is not speech regulation

ii. so restrictive that they fail to leave open ample alternative channels of communication